IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANT DAI GLOBAL, LLC'S MOTION TO DISMISS
THE FIRST AMENDED COMPLAINT

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OTHER AUTHORITIES

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

The Amended Complaint's farfetched rewrite merely compounds the implausibility of Plaintiffs' claims. In their initial Complaint, Plaintiffs relied almost exclusively on a 2010 report of USAID's Office of Inspector General ("OIG"), which, they claimed, found that DAI had routed protection payments to the Taliban through local Afghan subcontractors and recouped the payments from USAID. As DAI's motion to dismiss explained, the actual report did nothing of the sort and, instead, found that DAI had responded to insurgent threats by cancelling subprojects (27 in one year alone), raising concerns to both USAID and OIG, and conducting due diligence that USAID found "appropriate to the complex environment and in accordance with contractual obligations." Dkt. 74-1, at 16, 25. Now, Plaintiffs claim that "certain OIG officials in Washington, D.C." whitewashed "evidence and findings" out of the final report, and that USAID's response was "influenced heavily by pressure from" unnamed "Washington, D.C. officials." Dkt. 82 ¶ 203.

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

DAI empathizes with Plaintiffs' losses, but their claims distort the Anti-Terrorism Act ("ATA"), 18 U.S.C. §§ 2331 *et seq.*, beyond recognition. Stripped of its contrary, group-pleaded, and conclusory allegations, the Amended Complaint fails to state a plausible claim against DAI. At the threshold, it challenges the U.S. Government's foreign policy choices and DAI's implementation of those choices—matters over which the Court lacks jurisdiction under Rule 12(b)(1). Even if the claims were justiciable, they fail to meet the elements of ATA liability and, thus, would require dismissal under Rule 12(b)(6). As shown by numerous decisions, including this Court's recent dismissal of similar claims filed by Plaintiffs' counsel in *Atchley v. AstraZeneca UK Ltd.*, No. CV 17-2136 (RJL), 2020 WL 4040345 (D.D.C. July 17, 2020), lawsuits seeking to use the ATA to hold companies liable for attacks removed from their alleged conduct are routinely dismissed at the pleading stage. Indeed, many Plaintiffs and their counsel claim, in a separate ATA action filed in this Court on the same day as this lawsuit, that it was ***the Government of Iran*** that caused Plaintiffs' injuries. The claims against DAI are akin to alleging that a "butterfly in China" was "the proximate cause of New York storms." *Atchley*, 2020 WL 4040345, at *8 (quotation omitted). DAI should be dismissed from this lawsuit.

FACTUAL BACKGROUND

A. DAI and the Stabilization of Afghanistan

DAI is an employee-owned international development company headquartered in Bethesda, Maryland, that partners with governments on economic, social, and humanitarian development projects. First Am. Compl. ("FAC") ¶¶ 21, 181–82. DAI's mission is "to make a lasting difference in the world by helping people improve their lives. . . , envision[ing] a world in which communities and societies become more prosperous, fairer and better governed, safer, healthier, and environmentally more sustainable." DAI, Who We Are: Mission & Values, https://www.dai.com/who-we-are/mission-and-values (last visited Sept. 9, 2020).

DAI works across the spectrum of international development. It provides post-disaster and post-conflict assistance to governments and community organizations to ensure short-term stability, support local ownership of initiatives, prevent violent extremism, and lay the foundation for long-term development in fragile, crisis-stricken states. DAI also provides technical advice, strategic guidance, and support to public institutions, elected bodies, and citizens to strengthen government performance. And DAI's economic growth work drives trade, technology, agriculture, business, and financial services to create jobs, reduce poverty, and enhance food security. DAI, Solutions, https://www.dai.com/our-work/the-solutions (last visited Sept. 9, 2020).

DAI has implemented development projects in Afghanistan since 1976, interrupted only by the decade of Taliban rule in the 1990s. Answering USAID's call following the 9/11 terror attacks on the United States and the U.S. invasion of Afghanistan, DAI has since 2002 implemented more than 30 short- and long-term development activities in Afghanistan for USAID and other clients, including the World Bank, the European Commission, and the United Nations. DAI's work is entirely development focused. Unlike other Defendants, DAI is not a private-security contractor or a telecommunications operator. FAC ¶ 3.

The Amended Complaint principally discusses the Local Governance and Community Development ("LGCD") project, in which USAID tasked DAI with implementing subprojects in four areas: "1) support to local public administration and governance; 2) community mobilization and development; 3) local stability initiatives; and 4) the provision of [local Afghan] specialists" to work with USAID staff. Task Order No. 2, Local Governance and Community Development (LGCD) Project in Southern and Eastern Regions of Afghanistan at 4 (Oct. 2, 2006) ("LGCD Task Order No. 2") (Ex. 1), *cited at* FAC ¶ 182(a). LGCD's primary focus was to "implement small-scale infrastructure and other projects that accelerate, extend, and complement government

efforts . . . . help[ing] Afghan communities . . . to take responsibility for and contribute to their own future." *Id.* at 7. This effort to win the hearts and minds of the Afghan people was focused on those living in "remote, unstable areas," where "generalized instability and lawlessness [make] it . . . easy for insurgent and criminal activity to take root and flourish." *See id.* at 7, 9. USAID expressly tasked DAI with engaging possible Taliban recruits, "former combatants," and "groups who support the Taliban." *Id.* at 9. DAI's mission—in furtherance of U.S. policy—was to strengthen local governments "to turn [their] communities away from the insurgency and towards the Government of the Islamic Republic of Afghanistan (GIRoA) . . . in unstable areas where GIRoA authority is contested and the populace has yet to decide 'en masse' whether or not to support the GIRoA." *Review of Security Costs Charged to USAID's Projects in Afghanistan* at 14 (Sept. 29, 2010) ("2010 USAID OIG Report" or "Report") (Ex. 2), *cited at* FAC ¶¶ 191–212.

Similarly, under the Afghanistan Stabilization Initiative ("ASI"), USAID and DAI worked together to "build confidence and trust between the [Afghan government] and communities through the identification and implementation of small community improvement projects in unstable areas of Afghanistan." Task Order No. 2, Contract DOT-I-00-08-00035-00 at 4 (June 25, 2009) ("ASI Task Order No. 2") (Ex. 3). The ASI provided support for "[s]mall livelihood and business activities . . . [that] have the full support of the community and will benefit the community as a whole." *Id.* at 5. By their very design, the LGCD and ASI projects sought to infuse communities with funds to make them *less* vulnerable to insurgents.

The LGCD and ASI contracts, like other contracts referenced in the Amended Complaint, were "cost plus fixed fee" agreements. Contract DFD-I OO-OS-002S0-00, Part II, § B.2 (Sept. 27, 2005) ("LGCD Master Agreement") (Ex. 4); ASI Task Order No. 2 § B.2; Task Order EDH-I-14-05-00004, § B.2 (July 15, 2010) ("RAISE Contract") (Ex. 5). As such, USAID was required

to reimburse DAI for costs incurred in performing each contract, including security costs. *See id.*

DAI's work has, at all times, been subject to extensive oversight by U.S. Government agencies and inspectors general. *See* FAC ¶¶ 213, 216; USAID, OIG Oversight: Afghanistan & Pakistan, https://oig.usaid.gov/afghanistan (last visited Sept. 9, 2020). DAI has engaged constructively with these oversight bodies to report concerns and resolve audit findings. *See* 2010 USAID OIG Report at 7-8. And USAID continues to partner with DAI on seven development projects in Afghanistan, consistent with the U.S. Government's policy that these "[i]nvestments in infrastructure and human capital are making the country less vulnerable to insurgents and illicit business." USAID, Afghanistan, https://www.usaid.gov/afghanistan (last visited Sept. 9, 2020); *see, e.g.*, Contract No. 72030618C00011, Afghanistan Value Chains – Livestock (June 9, 2018), *available at* https://www.usaid.gov/sites/default/files/documents/1871/72030618C00011_-_Afghanistan_Value_Chains-Livestock.pdf ("Afghanistan Value Chains Contract").

B. Plaintiffs' Allegations

Plaintiffs are U.S. service members and civilians who served in Afghanistan, and their families. They allege that they, or their family members, were injured or killed by attacks committed by different insurgent groups in Afghanistan between 2009 and 2017. FAC ¶¶ 1, 412. Most of the attacks were committed by the Taliban, others by the Haqqani Network or the Kabul Attack Network, while yet others are cursorily alleged to have been jointly committed by groups that included al-Qaeda. *Id.* ¶¶ 524–2569; *see infra* Argument, Part IV.A.1.

1. The Allegations Against Unnamed "Companies"

Plaintiffs' blunderbuss theory is that unnamed "companies" and "contractors" working in Afghanistan all followed a "standard practice" of paying protection money to the Taliban. The Amended Complaint devotes pages to allegations regarding these companies, stating that these allegations are intended to "lay the groundwork" for Defendant-specific allegations by

"describ[ing] the post-invasion Afghanistan contracting environment" and alleging that other unnamed "large Western contractors" made protection payments to the Taliban. FAC ¶¶ 53–96. As noted in Defendants' initial motions to dismiss, the Complaint did not connect these generic allegations to DAI or other Defendants. The Amended Complaint fares no better, simply replacing *en masse* the allegations concerning companies "like Defendants" with allegations concerning companies "including Defendants." *Compare, e.g.*, Compl. ¶¶ 61, 65, 72, *with* FAC ¶¶ 68, 72, 84.

Plaintiffs allege that post-invasion Afghanistan was prone to corruption, and that "Western contractors operating in Afghanistan knowingly structured their transactions to exploit that corrupt business environment." FAC ¶¶ 56–57. The contractors engaged subcontractors, which engaged sub-subcontractors (and so on), so the contractors could "launder[] money" and enable the "final subcontractor to make corrupt payments while the companies higher up in the chain denied involvement." *Id.* ¶ 57. This caused "[v]ast sums of money" to "disappear[]." *Id.* ¶ 59.

In addition to facilitating corruption, Plaintiffs allege that companies used this subcontractor structure "to funnel money to the Taliban." *Id.* ¶ 62. The Taliban used threats of violence against "international companies doing business in Afghanistan" to extract protection payments, which companies generally "routed . . . to the Taliban through their subcontractor[s]." *Id.* ¶¶ 63, 68. Plaintiffs allege that "the Taliban takes as much as 20 percent of development aid awarded to contractors." *Id.* ¶ 72 (internal quotation marks omitted). The unnamed companies acquiesced to maximize profits, because it was cheaper to make the payments than to "invest[] in legitimate security." *Id.* ¶ 64. The payments typically caused the Taliban not to attack the paying companies, but they "redirect[ed] the attacks to other targets," including Plaintiffs. *Id.* ¶ 8.

2. The Allegations Against DAI

The Amended Complaint mentions DAI in only 46 of its 2,617 paragraphs. *Id.* ¶¶ 14, 21, 90, 126, 134 n.175, 180–216, 231, 401, 403, 407, 2591. Plaintiffs identify nine DAI contracts with

USAID for projects in Afghanistan or the Federal Administered Tribal Areas ("FATA") of Pakistan. *See id.* ¶ 182. As to five contracts, Plaintiffs merely list the contract, *id.*, and make the conclusory assertion that DAI followed a "general policy" of making protection payments to the Taliban in connection with the contracts, *id.* ¶ 182. This is based on the same boilerplate alleged as to other Defendants, namely that this "policy applied to each of the contracts [Defendant] implemented in Afghanistan" and was "consistent with USAID implementers' standard operating practice on projects with comparable funding profiles, security risks, and geographical coverage." *Id.* ¶¶ 183–84; *see id.* ¶¶ 248–49, 381–82, 403–04. But, DAI is not alleged to have worked with other Defendants, nor the companies that purportedly followed this practice. Three other DAI contracts are mentioned in passing. *Id.* ¶ 187 (ASI), ¶ 188 (RAISE), ¶ 190 (FATA).

The only contract as to which Plaintiffs offer detailed allegations is the LGCD Contract, awarded on October 1, 2006 and concluded on April 30, 2011. FAC ¶ 182(a). The principal source of those allegations is the 2010 USAID OIG Report. *See id.* ¶¶ 191–211. Because the Report is quoted extensively and incorporated by reference, the Court need not accept the characterizations of it as true. *Stewart v. Nat'l Educ. Ass'n*, 471 F.3d 169, 173 (D.C. Cir. 2006). In fact, the Report squarely contradicts Plaintiffs' allegations. *See infra* Argument, Part I.B.2. As do other documents cited by Plaintiffs. *See infra id.*, Part I.B.4. As does the fact that USAID continues to work with DAI in Afghanistan. *See, e.g.*, Afghanistan Value Chains Contract.

After DAI's initial motion to dismiss detailed how the OIG Report contradicted Plaintiffs' claims, Dkt. 74-1 at 12–18, Plaintiffs amended their allegations to claim that the OIG Report was actually the product of a government cover-up. Under this new theory, OIG staffers purportedly found "overwhelming testimonial and documentary evidence that DAI was knowingly orchestrating protection payments," but after a review of the staffers' draft report by "OIG officials

in Washington, D.C.," the final Report was scrubbed of unspecified "evidence and findings." FAC ¶¶ 195, 203, 208. Plaintiffs make a similarly bare assertion that USAID's response to the Report, which found that DAI complied with its contractual obligations, *see* 2010 OIG Report at 12–17, was "influenced heavily by pressure from DAI and from Washington, D.C. officials." FAC ¶ 203.

STATUTORY FRAMEWORK

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

LEGAL STANDARD

This motion seeks dismissal under Rule 12(b)(1) and 12(b)(6). On a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), Plaintiffs bear the burden of establishing jurisdiction. *Kokkonen v. Guardian Life Ins.*, 511 U.S. 375, 377 (1994). Dismissal on the basis

that a plaintiff's claim implicates a political question or derivative sovereign immunity constitutes a dismissal for lack of subject matter jurisdiction. *See Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 215, 216 n.5 (1974); *Cunningham v. Gen. Dynamics Info. Tech., Inc.*, 888 F.3d 640, 650 (4th Cir.), *cert. denied*, 139 S. Ct. 417 (2018). Because DAI challenges the factual basis of the Court's jurisdiction to adjudicate Plaintiffs' allegations, the Court "must go beyond the pleadings and resolve any disputed issues of fact." *Lillard & Lillard v. Blue Cross & Blue Shield Ass'n*, 971 F. Supp. 2d 116, 118 (D.D.C. 2013) (internal quotation marks omitted).

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

SUMMARY OF ARGUMENT

Lawsuits seeking to use the ATA to hold companies liable for attacks far removed from their alleged conduct are routinely dismissed at the pleading stage, including in this Court's recent decision in *Atchley*, 2020 WL 4040345, which dismissed similar ATA claims filed by Plaintiffs' lead counsel. This case should be no exception. At the threshold, Plaintiffs fail to plausibly plead that DAI made protection payments or supported terror attacks, instead relying on group pleading, conclusory allegations, and assertions contradicted by referenced U.S. Government records.

Stripped of those allegations, the claims against DAI require the Court to second-guess the

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

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

The secondary liability claims, alleging that DAI substantially assisted attacks committed by the Taliban, fail for similar reasons. The ATA cabins such liability to circumstances in which an act of international terrorism is "committed, planned, or authorized" by a FTO, but the Taliban has never been so designated. Plaintiffs employ several pleading devices to try to circumvent this defect, but each fails as a matter of law and common sense. Finally, as in *Atchley* and other cases alleging secondary liability claims against private companies, Plaintiffs fail to plausibly allege facts to satisfy the elements of substantial assistance and knowledge.

ARGUMENT

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

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

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

Most of the Amended Complaint does not address DAI at all, instead making generic group pleading allegations against unnamed companies or Defendants generally. But DAI is not alleged to have worked with the unnamed companies or the other Defendants, which, as Plaintiffs allege, did different things, at different times, and in different parts of Afghanistan. *See, e.g.*, FAC ¶¶ 3, 147, 182, 230, 247. Plaintiffs' only attempt to connect the unnamed companies to DAI is the boilerplate assertion, repeated verbatim against other Defendants, that DAI followed the "standard practice" of unnamed companies. *Id.* ¶¶ 95, 184; *accord id.* ¶ 249 (making same allegation against LBG/BV Defendants), ¶ 382 (IRD Defendants), ¶ 404 (Chemonics). Plaintiffs plead similar boilerplate of a purported "industry playbook that was *almost* uniformly followed by American development companies operating in Taliban areas of Afghanistan," *id.* ¶ 183 (emphasis added), ¶ 218 (ECC), ¶ 248 (LBG/BV). There is no well-pleaded allegation that DAI associated with any unnamed "companies," or that DAI was aware of any "standard practice" or "playbook," let alone followed it. Rather, Plaintiffs' theory amounts to "guilt by region," i.e., that DAI worked in regions where purported Taliban protection payments were common. *See, e.g., id.* ¶ 190.

In sum, there is no basis to attribute other companies' alleged practices to DAI, nor to attribute purported activities or practices to "Defendants" as a group. Accordingly, such group-pleaded allegations are properly disregarded. *See Magluta v. Samples*, 256 F.3d 1282, 1284 (11th Cir. 2001) (per curiam) (allegations about "defendants" deficient where realities of time and place "make plain that all of the defendants could not have participated in every act complained of"); *Toumazou v. Turkish Republic of N. Cyprus*, 71 F. Supp. 3d 7, 21 (D.D.C. 2014) ("[A] plaintiff cannot satisfy the minimum pleading requirements . . . by 'lumping all the defendants together in each claim and providing no factual basis to distinguish their conduct.'" (quoting *Atuahene v. City of Hartford*, 10 Fed. App'x 33, 34 (2d Cir. 2001)).

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

1. There Are No Well-Pleaded Allegations Concerning Eight Contracts.

There are no well-pleaded facts concerning eight of the nine DAI contracts, let alone ones that satisfy the elements of an ATA claim. As to five (ASMED, IDEA-NEW, RAMP UP East, ACE-II, and RADP-East), Plaintiffs simply list them, FAC ¶ 182, and then rely on the conclusory boilerplate that DAI must have followed other companies' "standard operating practice" of making protection payments, *id.* ¶ 183. Plaintiffs' references to three other contracts are also deficient:

- The lone allegation as to the ASI Task Order is that an unnamed DAI field director allegedly said that DAI *refused* to make protection payments on LGCD and ASI projects, but hired locals affiliated with the Taliban. FAC ¶ 187. Plaintiffs conclusorily state that this "was not merely ordinary-course employment of the local community." *Id.* But USAID *required* DAI to engage "populations that are vulnerable to recruitment into militant groups . . . ; *former combatants*; and *groups who support the Taliban*." LGCD Task Order No. 2 at 9 (emphasis added); *see* 2010 USAID OIG Report at 3-4.[2]

- The sole allegation as to the RAISE Contract is that an unidentified consultant "was instructed" (Plaintiffs do not allege by whom) to remove unspecified statements "confirming" unspecified "access" payments from a "final report." *Id.* ¶ 188. Stripped of conclusory spin, Plaintiffs plead no facts to assess whether this states a plausible ATA claim, as opposed to, for example, matters like those discussed in the OIG Report.

- The sole paragraph concerning the FATA Contract quotes a 2012 report that "'[l]ocal sources report large and rising security payments made by [unnamed] contractors for USAID-funded projects in the FATA appearing in Haqqani coffers,'" and then conclusorily speculates that DAI must have "followed the same pattern." FAC ¶ 190 (quoting Gretchen Peters, *Haqqani Network Financing: The Evolution of an Industry* at 44 (July 2012) ("*Haqqani Network Financing*") (Ex. 6)).

Because there are no well-pleaded allegations as to these eight contracts, claims based on those contracts must be dismissed. *See RSM Prod. Corp. v. Freshfields Bruckhaus Deringer U.S.*

[2] Plaintiffs elsewhere allege that DAI paid an employee who was "a close relative of the local Taliban commander," FAC ¶ 183, without specifying a contract or details to assess the allegation, such as whether the employee was a "former combatant[]," part of a "group[] who support the Taliban" that USAID was trying to win over, or even Taliban-affiliated at all. LGCD Task Order No. 2 at 9. Plaintiffs also cite a contractual clause prohibiting transactions with "individuals and organizations associated with terrorism," FAC ¶ 185, but this clause must be interpreted in concert with USAID's specific provisions requiring DAI to engage individuals in these groups.

LLP, 682 F.3d 1043, 1052 (D.C. Cir. 2012) ("unsupported conclusory allegations are 'not entitled to be assumed true'") (quoting *Iqbal*, 556 U.S. at 681); *In re Elevator Antitrust Litig.*, 502 F.3d 47, 52 (2d Cir. 2007) (rejecting theory that "if it happened there, it could have happened here"); *Doe v. Von Eschenbach*, 2007 WL 1848013, at *2 (D.D.C. June 27, 2007) (same).

2. The OIG Report Contradicts Claims Regarding the LGCD Contract.

The thrust of Plaintiffs' claims regarding the final contract, LGCD, is that DAI knew or recklessly disregarded that its local Afghan subcontractors "had paid insurgents for protection in remote and insecure areas of Afghanistan" and "knowingly reimbursed [subcontractors] for payments to the Taliban." FAC ¶¶ 191, 206 (internal quotation marks omitted). Those claims are principally based on Plaintiffs' characterizations of the referenced 2010 USAID OIG Report, which Plaintiffs characterize as a "review of DAI's performance" that purportedly found "overwhelming testimonial and documentary evidence that DAI was knowingly orchestrating protection payments [by its subcontractors] to the Taliban." FAC ¶¶ 191, 195; *see generally id.* ¶¶ 191–211. The actual Report belies these allegations. Accordingly, the Court may disregard these allegations and instead consider the Report itself. *Kaempe*, 367 F.3d at 963.

The Report describes a review of security costs charged by Edinburgh International ("Edinburgh"), DAI's principal security subcontractor, "to determine whether there has been any indication that Edinburgh [] misused USAID funds to pay the Taliban or others in exchange for protection." 2010 USAID OIG Report at 2. This review covered three contracts referenced in the Amended Complaint (LGCD, ASMED, and IDEA-NEW) and was initiated after news reports that "U.S. Government funds paid to contractors for reconstruction projects were being siphoned off to Taliban insurgents in exchange for 'protection' to prevent attacks." *Id.*; FAC ¶ 182. Edinburgh was not named in these reports; rather, it was selected for review based on the extent of its work in Afghanistan. 2010 USAID OIG Report at 10. The OIG's review focused on the 2009 period

and entailed interviews of "43 key personnel from USAID, DAI, and Edinburgh," interviews of U.S. intelligence officials, and a review of Edinburgh's financial records. *Id.* at 10–11.

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

The OIG also did not identify *any* misconduct by DAI. Rather, the Report explains that during the interviews regarding Edinburgh, DAI personnel and others expressed "concerns that insurgents may have extorted protection payments" from local Afghan subcontractors working on LGCD activities. 2010 USAID OIG Report at 3. The OIG did not suggest, let alone find, that DAI made such payments. But it was this concern—that local subcontractors may have been extorted into making protection payments and attempted to recoup those costs from DAI—that Plaintiffs blatantly mischaracterize as "the OIG's specific findings . . . that protection money was likely paid" and that "DAI enabled its subcontractors to obtain U.S. government money and knowingly reimbursed them for payments to the Taliban." FAC ¶¶ 206, 212.

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

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

2010 USAID OIG Report at 3–4 (emphasis added). USAID had tasked DAI with "engaging populations that are vulnerable to recruitment into militant groups, such as . . . former combatants[] and groups who support the Taliban," and required those communities to guarantee security for development activities. LGCD Task Order No. 2 at 9; *see also id.* at 25 ("[I]n maximizing the benefits and sustainability of the Demobilization, Disarmament and Reintegration (DDR) program in Afghanistan, it is essential that attempts are made to give priority to employing local entities – particularly those former Soldiers (ex-combatants) who participated in the DDR program."). This created a risk that a subcontractor would be negotiating with local community leaders seeking to include current or former insurgents as guards to guarantee security, and also that insurgents would try to extort protection payments directly from a subcontractor. 2010 USAID OIG Report at 4.

The Report also contradicts Plaintiffs' allegations that DAI was complicit in, or "recklessly disregarded" the risk of, protection payments by subcontractors. FAC ¶ 208. Instead, the OIG found that during the period under review (2009), DAI responded to "Taliban insurgent threats and violence around the [LGCD] subproject construction sites" by ***suspending or cancelling*** "27 LGCD subprojects totaling about $1.4 million," 2010 USAID OIG Report at 4. The Report details one such incident, in which the Taliban sought payment from a subcontractor on a road construction project, and even set fire to a bulldozer. *See id.* The OIG found that DAI responded by informing USAID, suspending the project, and ultimately cancelling it. *Id.*

Plaintiffs selectively, and misleadingly, quote the Report to suggest that DAI was reckless because "most of the 'DAI personnel' OIG interviewed admitted that DAI could not 'provide reasonable assurance of preventing USAID funds from going to the Taliban or others in exchange for protection' of the LGCD project," and that DAI's CEO was forced to admit this. FAC ¶¶ 208 (quoting 2010 USAID OIG Report at 6), 212. As the full quote from the Report explains, however, the reason both DAI—*and USAID*—could not prove the negative was because LGCD activities were being conducted in areas that were too dangerous to monitor:

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

2010 USAID OIG Report at 6 (emphasis added). As one USAID official explained, the "high security risk" in these areas "prevented proper monitoring of subprojects and activities in the field," as U.S. officials and "DAI's international expatriate staff . . . could not go into these areas to monitor, and in many cases Afghan project staff could not enter these areas either." *Id.* at 5. Another USAID official added that "LGCD works in the most insecure areas" of Afghanistan. *Id.* These findings also foreclose Plaintiffs' attempt to spin an alleged statement by DAI's CEO (that DAI denied wrongdoing but could not possibly prevent all "LGCD project money from reaching the insurgency") as a purported lack of remorse or intent to implement reforms. FAC ¶ 200.

USAID's response to the Report also discusses the measures that DAI employed to safeguard against these inherent risks in USAID's LGCD program. *Id.* at 14–15. These included "risk and impact assessments of the security situation of current and proposed locations that are targeted for LGCD subprojects"; ongoing "due diligence on the part of DAI"; and "[m]ethods such as geographically defined 'targeting boards' . . . implemented by DAI down to the sub-district

level to allow for proper civilian implementation, monitoring, and evaluations regarding program activities." *Id.* at 14. DAI participated in weekly meetings with USAID to discuss the security dynamic and notified USAID of "every security incident affecting DAI projects, which then triggers a review of whether or not implementation should continue . . . and whether or not wider USAID programming is even possible for that district." *Id.* at 15.[3]

Ultimately, USAID concluded that DAI "conduct[s] risk and impact assessments as appropriate to the complex environment and in accordance with contractual obligations." *Id.* at 15. USAID also concluded that while LGCD activities "can become at-risk," those critical stabilization activities needed to continue, with DAI "continu[ing] to conduct appropriate and cost-effective risk and impact assessments and continu[ing] to be vigilant in proposing additional and cost-effective assessment means." *Id.* These findings contradict Plaintiffs' unsupported assertion that DAI "did not adequately implement [due diligence] measures." FAC ¶ 211.

It is telling that Plaintiffs felt compelled to omit or mischaracterize these and other portions of the Report. Plaintiffs even cite the Report to claim that "U.S. intelligence officials confirmed[] the Taliban's extraction of protection money from DAI's project 'fit[] the pattern' evident throughout Afghanistan," FAC ¶ 205 (citing 2010 USAID OIG Report at 4), when the Report's "fit the pattern" quote instead describes the project in which the Taliban ***attempted*** to extort money from DAI, destroying a bulldozer in the process, and DAI responded by ***cancelling*** the project. 2010 USAID OIG Report at 4.

In sum, the Report does not find, or even suggest, that DAI made protection payments or was complicit in payments made by subcontractors. Instead, the Report and USAID's response

[3] USAID reviewed and approved DAI's retention of subcontractors. *See* Contract DFD-I-OO-OS-002S0-00, Part II, § 1.1 ("LGCD Master Agmt.") (Ex. 5) (incorporating 48 C.F.R. § 52.244-2).

show that DAI responded to insurgent threats by cancelling projects, raising concerns, and conducting due diligence that USAID found "appropriate to the complex environment and in accordance with contractual obligations." *Id.* at 3–4, 15. Moreover, because the LGCD agreement required USAID to reimburse DAI for local security costs, *see* LGCD Master Agmt. § B.2, there was no motivation for DAI to avoid incurring "legitimate security" costs, FAC ¶ 64, as those costs had no impact on DAI's bottom line. This refutes Plaintiffs' theory of the case, i.e., that DAI reimbursed protection payments because doing so ultimately "saved [it] money." *Id.* ¶ 3.[4] And, Plaintiffs concede, USAID continued to work with DAI in Afghanistan for years after the Report. *See id.* ¶¶ 181–82; 2010 USAID OIG Report at 3, 15. Indeed, it does so to this day. *See, e.g.*, Afghanistan Value Chains Contract.

3. Plaintiffs' New Cover-Up Theory Makes the Claims More Implausible.

Plaintiffs' new attempt to undermine the OIG Report confirms how devastating it is to their claims. Plaintiffs now allege that the OIG Report was purportedly purged of "overwhelming" evidence that DAI knowingly made and facilitated protection payments by "certain [unnamed] OIG officials in Washington, D.C.," and that USAID's response was influenced by "pressure from DAI and from [unnamed] Washington, D.C. officials." FAC ¶¶ 195, 203, 208.

The implausibility of these new allegations cannot be overstated. *Ashcroft*, 556 U.S. at 678. As the Report states, it was created "in accordance with the general standards" for OIG and government auditors, including that of auditor independence, and included only those findings for which OIG had a "reasonable [evidentiary] basis." 2010 USAID OIG Report at 10. In Plaintiffs' telling, however, numerous USAID and OIG officials independently acted to cover up evidence

[4] That Plaintiffs cannot decide whether to allege that DAI "inflated" its charges in order to hide protection payments, FAC ¶¶ 94, 216, or "artificially deflated" them in order to win contracts, *id.* ¶ 66, illustrates the implausibility of their claims.

of protection payments by DAI, and instead to issue an official OIG report and agency response that found the opposite. Moreover, while Plaintiffs offer allegations of the OIG's investigative process, they tellingly fail to provide any well-pleaded facts concerning the supposed cover-up. FAC ¶¶ 191–211. Instead, the "overwhelming" evidence appears to be (1) generic "standard practice" findings regarding subcontractors; and (2) DAI's stated concerns. *Id.* ¶¶ 195–97. Both are addressed in the Report, which found no wrongdoing by DAI. 2010 USAID OIG Report at 3 ("DAI officials expressed concerns that insurgents may have extorted protection payments from DAI subcontractors implementing stabilization and community development activities."). These implausible new allegations cannot be credited under *Twombly*.

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

The remaining allegations are similarly deficient. For example, Plaintiffs allege purported "indications" of "especially large" protection payments, FAC ¶ 183, but they are not well-pleaded and do not state a plausible claim against DAI. Without providing any factual support or connection to a specific contract, Plaintiffs generally allege that these unidentified payments were made in seven provinces, covering roughly a quarter of the country, at some point between "at least 2007 and 2016." *Id.* The LGCD Contract ended in April 2011. *Id.* ¶ 182(a).

Plaintiffs also allege that non-management employees in DAI's Kabul offices speculated that DAI was paying the Taliban to work in unstable regions of Afghanistan, *id.*, after observing "one DAI operative who would periodically pick up bags of cash, along with a special encrypted laptop, for transport out to the provinces to make 'security payments.'" *Id.* ¶ 189.[5] This does not render it plausible "that this operative was transporting protection money to the Taliban," *id.*,

[5] Plaintiffs' cookie-cutter allegations of "prevailing understanding[s]" and "hushed tones" (FAC ¶ 183) are substantially identical to those made against other Defendants. *See id.* ¶¶ 248, 381.

where both the OIG Report and DAI's contracts make clear that DAI worked with local security subcontractors in remote areas of Afghanistan that lacked access to the banking system, *see* 2010 USAID OIG Report at 3; RAISE Contract § C2 (discussing efforts to rebuild banking system).

Plaintiffs also resort to guilt-by-association allegations in attempting to connect DAI to USPI, an alleged "criminal-run subcontractor." FAC ¶ 186. Plaintiffs tacitly acknowledge that these allegations lack grounding by glossing over any details, implying that DAI hired unspecified "personnel" who had previously worked with USPI, as opposed to USPI itself. *Id.* Plaintiffs also fail to connect whomever DAI allegedly hired to any particular contract, nor allege that DAI was aware of any alleged misconduct when it retained them. The Court should not credit such allegations, which are many steps removed from alleging a plausible ATA claim against DAI.

Plaintiffs' allegation that DAI received unspecified "permission letters" from the Taliban is similarly lacking in detail and is itself based on the conclusory allegation that such letters were "issued only to contractors that had made the necessary protection payments." FAC ¶ 183.

Finally, Plaintiffs conclusorily allege that protection payments were facilitated by "fraud" or "deficient internal controls." *Id.* ¶¶ 183, 213–216. Plaintiffs do not connect these allegations to a protection payment, nor do the documents cited in support of these allegations. *Compare* 2010 USAID OIG Report at 6–8 (discussing fraud issue), *with id.* at 3–6 (discussing protection payment issue); *see* USAID OIG Afghanistan & Pakistan Oversight Rep., at 66 (Jan.–Mar. 2012) (Ex. 7). The referenced documents reflect instead that DAI was itself defrauded by rogue employees in schemes unrelated to the Taliban, and that DAI took appropriate corrective measures when it became aware of the incidents, including reporting them to USAID. *Id.* Plaintiffs' conclusory speculation about these matters is a textbook example of allegations that are "merely consistent with" misconduct, but do not cross the line into plausibility. *Twombly*, 550 U.S. at 557.

Ultimately, missing receipts, misdirected payments, and employee embezzlement are indicia of a variety of behaviors that do not support an ATA claim—*e.g.*, accounting issues, or a rogue employee's attempt to conceal his theft. Characterizing such matters as evidence of "deficient internal controls" does not give rise to a plausible inference that DAI knowingly or intentionally made protection payments to the Taliban to support attacks on American citizens.

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

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

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

The political question doctrine "excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch." *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986); *see also Harbury v. Hayden*, 522 F.3d 413, 418-21

(D.C. Cir. 2008); *Schneider v. Kissinger*, 412 F.3d 190, 193 (D.C. Cir. 2005). In *Baker v. Carr*, the Supreme Court explained that a claim presents a political question if any of six factors is present: "[1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly fit for non-judicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question." 369 U.S. 186, 217 (1962); *Schneider*, 412 F.3d at 194 ("To find a political question, we need only conclude that one factor is present, not all."). The claims here implicate the first, third, and fourth factors, because they question USAID's policy of providing financial support to vulnerable Afghan communities despite the inherent "risk" that by "its very design and approach," this could cause funds to fall into insurgent hands. 2010 USAID OIG Report at 3, 11.

The Supreme Court has cautioned that "[m]atters relating to the conduct of foreign relations . . . are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." *Regan v. Wald*, 468 U.S. 222, 242 (1984) (internal quotation omitted). DAI's performance of its contracts was in furtherance of the foreign assistance program authorized by Congress in the Afghanistan Freedom Support Act of 2002 (P.L. 107-327). *See generally* Cong. Research Serv., R40699, *Afghanistan: U.S. Foreign Assistance* (Aug. 12, 2010), *available at* https://fas.org/sgp/crs/row/R40699.pdf (describing USAID's programs in Afghanistan). As DAI's contracts make plain, these programs are the essence of foreign policy decisions that "are constitutionally committed to the political branches." *El-Shifa Pharm. Indus.*

Co. v. United States, 607 F.3d 836, 842 (D.C. Cir. 2010) (en banc) (first *Baker* factor).

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

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

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

To that end, USAID mandated that "one important responsibility of [local Afghan] communities is to guarantee security during the implementation phase of development activities." *Id.* at 7. As the OIG later recognized, this reliance "on local communities that likely include Taliban insurgents or supporters to provide security" may have "contributed to the risk that USAID funds might fall into the hands of insurgents." 2010 USAID OIG Report at 3. Even so, USAID concluded that the need to press forward with these stabilization initiatives outweighed these "inherent risks," *id.* at 13–14, and that DAI's due diligence measures were "appropriate to the complex environment and in accordance with [its] contractual obligations," *id.* at 15.[6]

A finding that DAI's performance instead violated the ATA would express a "lack of the respect due" to the political branches, given that the U.S. Government was well aware that DAI's

[6] Similarly, USAID recognized that the 2008 FATA Development Program, aimed at improving conditions in the FATA, must be "performed in an environment characterized by profound constraints," most notably the instability caused by extremist groups. Task Order No. DFD-I-05-05-00220-00, FATA Capacity Building Development Program at 7 (Dec. 20, 2007) (Ex. 8); FAC ¶ 182(c). USAID determined that DAI's work with local stakeholders must proceed because the "urgency to improve the standard of living and economic opportunities cannot wait." *Id.* at 8, 15.

activities risked funds falling into the hands of the Taliban due to the very nature of the programs that USAID tasked DAI with implementing. *Baker*, 369 U.S. at 217 (fourth factor). USAID also was intimately involved with DAI in assessing the potential risks in pursuing the political branches' objectives, and determining whether and how to carry them out. 2010 USAID OIG Report at 13–15; ASI Task Order No. 2 at 3 (USAID tasked DAI with implementing "[p]rogramming [that] will quickly follow military operations that clear areas of insurgents," until those areas had been held securely by Coalition forces long enough to begin the "build" phase).

Similarly, even if Plaintiffs' implausible cover-up theory were credited, the "evidence" that was allegedly covered up *was known to the OIG and USAID* when the OIG Report was issued in September 2010. *See* FAC ¶ 199. Thus, regardless of whether this "evidence" was found to be lacking or left out for other reasons, it obviously did not change the U.S. Government's official position that DAI was in compliance with its contractual obligations and that DAI would "continue to implement [those obligations] in unstable areas where [Afghan government] authority is contested," despite the inherent risks noted in the report. 2010 USAID OIG Report at 14. Plaintiffs' claims would require the Court to re-evaluate USAID's determinations that the need to press forward with these stabilization initiatives outweighed their risks. *Schneider*, 412 F.3d at 197 (third factor implicated because court "would be forced to pass judgment on the policy-based decision of the executive" to achieve a foreign policy objective).

Plaintiffs' sources make this clear. For instance, Plaintiffs repeatedly cite an interview with a former DEA officer who identified the U.S. government as "one of the biggest funding sources for the insurgency":

> Unfortunately, I have to say that one of the things we discovered was that we were one of the biggest funding sources for the insurgency. ***"We" being the U.S. government and [the International Security Assistance Force]***, through development

> projects. This was mostly because of a particular dynamic: in the beginning, the only metric anybody was using to measure development was how fast they could spend money, not what impact that spending had on the insurgency. So there were a lot of projects being done in areas where we didn't control the terrain.

Interview with Kirk Meyer, Combating Terrorism Archive Project at 93–94 (Apr. 2, 2014) ("*Meyer Interview*") (Ex. 9) (cited at FAC ¶¶ 58, 75, 106 n.112) (emphasis added). Tellingly, Plaintiffs omit the emphasized language, *see* FAC ¶ 75, and elsewhere suggest that the interview implicates "Defendants," when it does not mention any Defendant, *see id.* ¶ 104. And, the policy choices criticized by the former DEA officer—the government's fast infusion of funds into unstable communities most vulnerable to Taliban influence—are precisely the kinds of activities *mandated* by USAID's contracts with DAI. *See, e.g.*, ASI Task Order No. 2 at 3 (community grant-making to occur "in non-permissive areas, sometimes immediately after kinetic ('clearing') activities and/or in 'hold' stages of counterinsurgency").

Plaintiffs' insistence that they "disclaim any theory of liability premised on any USAID program's 'design and approach'" rings hollow. *See* FAC ¶ 207. Plaintiffs challenge the alleged hiring of individuals affiliated with the Taliban and conclusorily state that this was not "merely ordinary-course employment of the local community," *id.* ¶ 187, but that is exactly what USAID required of DAI. LGCD Task Order No. 2 at 9 (emphasis added). Plaintiffs similarly challenge DAI's assertion to OIG that it could not guarantee that project funds would not reach the Taliban, an assertion that was entirely correct and shared by USAID, given that DAI was contractually required to fund communities in remote areas vulnerable to Taliban influence. *See* FAC ¶¶ 200, 212; LGCD Task Order No. 2 at 9; ASI Task Order No. 2 at 3 (program would create "a market-based, licit economy" through the "implementation of small community projects in unstable areas of Afghanistan"). There are no well-pleaded allegations that fall outside the "design and approach"

of the challenged USAID programs; thus, the political questions raised by Plaintiffs' challenge are "inextricable from the case." *Baker*, 369 U.S. at 217.

While Plaintiffs may weigh the risks differently in hindsight, "[t]o determine whether drastic measures should be taken in matters of foreign policy and national security is not the stuff of adjudication, but of policymaking." *Schneider*, 412 F.3d at 197. These judgments were committed to the Executive and Legislative Branches, where they remain under debate today. *See, e.g.*, USAID, Measuring Impacts of Stabilization Initiatives (MISTI), https://www.usaid.gov/afghanistan/fact-sheets/measuring-impacts-stabilization-initiatives-misti (last visited Sept. 9, 2020). Thus, these are policy decisions that remain committed to those branches under the political question doctrine. *See Bancoult v. McNamara*, 445 F.3d 427, 438 (D.C. Cir. 2006).

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

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

For over 70 years, federal courts have found that, where the Government enjoys sovereign immunity, contractors working on behalf of the Government and within the scope of their delegated authority are entitled to derivative sovereign immunity. *See Yearsley v. W.A. Ross Constr. Co.*, 309 U.S. 19, 20–21 (1940). As the Fourth Circuit has recognized, "Imposing liability on private agents of the government would directly impede the significant governmental interest in the completion of its work. . . . 'particularly in light of the government's unquestioned need to

delegate government functions.'" *Butters v. Vance Int'l, Inc.*, 225 F.3d 462, 466 (4th Cir. 2000) (citations omitted). In other words, if a contractor is performing "the act[s] of the government," it rightly has the immunity of the government as well. *Yearsley*, 309 U.S. at 20-21. In this regard, courts do not delve into how the contractor performed the contract, so long as the contractor was acting within the scope of authority "delegate[d] . . . down the chain of command" to the contractor. *Butters*, 225 F.3d at 466. *See also Yearsley*, 309 U.S. at 20-21; *Westfall v. Erwin*, 484 U.S. 292, 295–98, 296 n.3 (1988) (officials exercising discretion within their official duties are immune from tort liability if the benefits of the immunity outweigh the costs); *In re Series 7 Broker Qual. Exam Scoring Litig.*, 510 F. Supp. 2d 35, 45 (D.D.C. 2007), *aff'd*, 548 F.3d 110 (D.C. Cir. 2008) (extension of *Westfall* immunity to private contractors).

DAI is entitled to derivative sovereign immunity here. Plaintiffs' claims against DAI (stripped of their contrary, conclusory and group-pleaded allegations) amount to a challenge to DAI's performance of its obligations: i.e., that DAI engaged Afghan subcontractors to implement project activities, conducted development activities "in insecure areas," and "relie[d] on local communities that likely include[d] Taliban insurgents or supporters to provide security during the implementation phase." 2010 USAID OIG Report at 3; *see also, e.g.*, ASI Task Order No. 2 at 3. As the OIG found, however, this was the "very design and approach" of USAID's LGCD project that contributed to the risk of protection payments by subcontractors. 2010 USAID OIG Report at 3. In short, USAID explicitly tasked DAI with infusing local communities with funds *despite* the risk of insurgent diversion. Derivative sovereign immunity precludes claims based on DAI's performance of those obligations. *Butters*, 225 F.3d at 466. *See also Cunningham*, 888 F.3d at 646–49 (granting immunity when contractor followed contract scope of work); *Westfall*, 484 U.S. at 295–98, 296 n.3; *In re Series 7 Broker Qual. Exam Scoring Litig.*, 510 F. Supp. 2d at 45.

Finally, Plaintiffs' new government cover-up theory (FAC ¶¶ 195, 203, 208) also implicates derivative sovereign immunity, insofar as Plaintiffs allege that USAID was purportedly aware of "overwhelming" evidence of protection payments, *id.*, yet nonetheless issued an official report finding that DAI had "performed as the Government directed." *Cunningham*, 888 F.3d at 646 (internal quotation marks omitted); *see* 2010 USAID OIG Report at 14-15 (finding that DAI acted "in accordance with [its] contractual obligations").

III. THE PRIMARY LIABILITY CLAIMS SHOULD BE DISMISSED.

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

Counts One, Three, and Four allege primary liability—i.e., that DAI itself committed "act[s] of international terrorism." (Count Two is not alleged against DAI.) Because 18 U.S.C. § 2333(a) requires a plaintiff's injuries to arise "by reason of" a terrorist act, a plaintiff must establish proximate causation, i.e., that "the alleged [ATA] violation led directly to the plaintiff's injuries." *Rothstein v. UBS AG*, 708 F.3d 82, 91-92 (2d Cir. 2013); *Atchley*, 2020 WL 4040345, at *8; *accord Owens v. BNP Paribas*, 897 F.3d 266, 273 n.8 (D.C. Cir. 2018) (requiring "some direct relation between the injury asserted and the injurious conduct alleged" (internal quotation marks omitted)). This is a rigorous requirement. *See Owens*, 897 F.3d at 273–76. "Courts routinely dismiss ATA claims when the plaintiffs fail to allege a direct link between the defendants and the individual perpetrator," for instance where a defendant is alleged to have made payments that, after winding their way through one or more steps, ended up allegedly contributing to an attack. *Crosby v. Twitter, Inc.*, 921 F.3d 617, 627 n.6 (6th Cir. 2019); *see also, e.g.*, *Owens*, 897 F.3d at 276; *Atchley*, 2020 WL 4040345, at *8–*9; *Brill v. Chevron Corp.*, 2020 WL 1200695, at *1 (9th Cir. Mar. 12, 2020); *Kemper v. Deutsche Bank*, 911 F.3d 383, 392 (7th Cir. 2018); *Rothstein*, 708 F.3d at 97; *O'Sullivan v. Deutsche Bank*, 2019 WL 1409446, at *6 (S.D.N.Y. Mar. 28, 2019). Any other rule would effectively "allow recovery for even remote causes" of an attack

and impose liability that "goes forward to eternity." *Crosby*, 921 F.3d at 623.

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

First, DAI did not participate in the attacks that injured Plaintiffs, nor do Plaintiffs allege a direct relationship between DAI and the groups that did. Instead, they allege that subcontractors made protection payments to the Taliban, which DAI purportedly recouped through contract and reimbursement payments. *E.g.*, FAC ¶ 206. Even then, there is no well-pleaded allegation that DAI directed any such payments to be made, and the 2010 USAID OIG Report contradicts such a suggestion. *See supra* Argument, Parts I.A–B. *See also Atchley*, 2020 WL 4040345, at *10 (disregarding conclusory allegations of direct cash bribes and finding no proximate causation with regard to remaining allegations). This falls well short of the requisite "direct relation between the injury asserted and the injurious conduct alleged." *Owens*, 897 F.3d at 273 n.8.

The absence of a direct relationship is further highlighted by the allegations in *Cabrera v. Iran*, filed on the same day as this lawsuit by many of the Plaintiffs and their counsel. Case No. 19-cv-03835-JDB (D.D.C., filed Dec. 27, 2019). There, they allege that it was the Government of Iran that "caused Plaintiffs' injuries." Am. Compl. ¶ 9, ECF No. 8 ("*Cabrera v. Iran* Compl."); *see also id.* ¶¶ 143–47 (alleging Iran annually made "large cash payments to the Taliban," bounty payments to Taliban insurgents for "each U.S. soldier murdered" and "destroyed American military vehicle," and payments to individual Taliban commanders), ¶¶ 115, 123 (alleging Iran supplied the same EFPs and suicide bombs that caused many Plaintiffs' injuries here). The 273-page *Cabrera v. Iran* complaint does not mention DAI once.

Second, the allegations make clear that any protection payments were not "necessary" to fund the alleged attacks. *Owens*, 897 F.3d at 276 ("Plaintiffs' complaint fails to plausibly allege that any currency processed by BNPP for Sudan was . . . in fact . . . necessary for Sudan to fund

the embassy bombings."); *Rothstein*, 708 F.3d at 92 (even if defendant bank "had not transferred U.S. currency to Iran, Iran, with its billions of dollars in reserve, would . . . have funded the attacks"). Plaintiffs allege no well-pleaded facts of the amount of any payments attributed to DAI. Plaintiffs' claim that DAI's subcontractors made payments "worth at least several million dollars" is based on the "standard practice" allegations about unnamed companies. FAC ¶ 184 (citing *id.* ¶ 92). Plaintiffs also quote the OIG's statement that "an estimated $5.2 million of USAID funds were at risk of falling into the hands of insurgents if they demanded up to 20 percent of LGCD's award amounts for community development subprojects that were implemented in 2009," 2010 USAID OIG Report at 6 (quoted at FAC ¶ 204), but OIG identified no amounts actually paid and, instead, merely identified this amount as being "at risk."

Even this "at risk" estimate is dwarfed by the staggering sums that the Taliban received from other sources during this period. The U.N. report cited by Plaintiffs estimates that the Taliban earned roughly $155 million from heroin trafficking operations in 2009 alone, and another $100 million in 2011–12. *See* U.N. Security Council, *First Report of the Analytical Support & Sanctions Implementation Monitoring Team* (Sept. 5, 2012), ¶ 37, *available at* https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2012_683.pdf ("U.N. Security Council Report"), *cited at* FAC ¶¶ 84 n.75, 85 n.76, 89 n.87, 97 nn.96–97, 108 nn.116–20. The U.N. report states that the Taliban received another $360 million from an Afghan trucking company over a three-year period. *Id.* ¶ 39. The Amended Complaint alleges that the Taliban received between $20–32 million each year in protection money from telecommunications companies during the relevant period. *Compare* FAC ¶ 295 (alleging each of the Taliban's shadow provincial governments received "$50,000 to $60,000 in protection money each month alone"), *with id.* ¶ 63 (alleging 33 shadow provincial governments), *and id.* ¶ 307

(alleging payments of $2.6 million per month). Plaintiffs also allege that it was the "standard practice" of unnamed "companies" and "contractors" to make other substantial payments to the Taliban. *See, e.g.*, *id.* ¶ 79. Plaintiffs' sources also identify additional Taliban funding sources, such as major hawala businesses and chromite and cedar smuggling. *Meyer Interview* at 96–97, 99. This is independent of the support received from the Government of Iran.

Put in context, the Amended Complaint alleges that the Taliban spent $100–$155 million funding attacks in 2011, *see* FAC ¶ 97, a year in which the cited U.N. Report estimates the Taliban received income of roughly $400 million, *see* U.N. Security Council Report ¶ 34. All of this establishes that the Taliban is an enormous operation with multiple independent income streams that provided more than enough funding for the attacks at issue and had nothing to do with DAI. These facts are fatal to proximate cause. *Owens*, 897 F.3d at 276; *Rothstein*, 708 F.3d at 92.

Third, Plaintiffs fail to allege that payments to the Taliban proximately caused attacks "committed by" other groups. FAC ¶¶ 524–2569; *see infra* Argument, Part IV.A.1. While the Amended Complaint attempts to conflate these groups, it lacks well-pleaded facts to directly link non-Taliban attacks with alleged payments to the Taliban, thus defeating proximate cause. *Crosby*, 921 F.3d at 627 n.6; *Owens*, 897 F.3d at 273 n.8, 276; *Fields v. Twitter, Inc.*, 881 F.3d 739, 745 (9th Cir. 2018). The notion that payments by DAI or its subcontractors proximately caused not only all Taliban attacks across Afghanistan over eight years, but also attacks by the Haqqani Network and Kabul Attack Network over the same period, is akin to alleging that a "butterfly in China" was "the proximate cause of New York storms." *Atchley*, 2020 WL 4040345, at *8 (quoting *Crosby*, 921 F.3d at 623).

Fourth, the majority of the attacks were committed after the LGCD Contract ended in April 2011 (FAC ¶ 182(a)), some as late as 2017. In *Siegel v. HSBC North America Holdings*, 933 F.3d

217, 224 (2d Cir. 2019), the Second Circuit held that the defendant's cessation of banking services to an alleged intermediary "for the ten months preceding the [attacks] makes it implausible under the circumstances that HSBC had knowingly assumed a role in the Attacks." Here, the Amended Complaint lacks well-pleaded facts of payments under the LGCD Contract creating a direct link to attacks committed for years after that contract ended. Similarly, while the allegation of payments to the Haqqani Network in connection with the FATA Contract is not well pleaded, *supra* Argument, Part I.B.1, even if one were to credit it, there are still no well-pleaded facts establishing proximate cause as to attacks committed after that contract ended in 2011. *See* FAC ¶ 182(c) (three-year FATA Contract was awarded in January 2008). This, too, is fatal to proximate cause. *Owens*, 897 F.3d at 273, 276; *Crosby*, 921 F.3d at 627 n.6; *Fields*, 881 F.3d at 745.

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

The ATA defines "international terrorism" as "activities that (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; (B) appear to be intended (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or **(**iii**)** to affect the conduct of a government by mass destruction, assassination or kidnapping; and (C) occur primarily outside the territorial boundaries of the United States[.]" 18 U.S.C. § 2331(1). The allegations against DAI fall outside this statutory definition.

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

To be liable for committing an "act of international terrorism," a defendant's actions must objectively appear directed to a terrorist purpose, e.g., to "intimidate or coerce a civilian population," or "influence the policy of a government by intimidation or coercion." 18 U.S.C. § 2331(1)(B); *Kemper*, 911 F.3d at 390 (facts must lead an "objective observer" to conclude that

Defendants intended to achieve coercion or intimidation); *Weiss v. Nat'l Westminster Bank*, 768 F.3d 202, 207 n.6 (2d Cir. 2014) (ATA creates "an objective standard to recognize the apparent intentions of actions"). Here, however, Plaintiffs allege that each Defendant acted with commercial motives: to discourage the Taliban from attacking their projects and "maximize their profits" by reducing their overall security costs. FAC ¶¶ 2–3; *accord id.* ¶ 5 (payments were "the most efficient way to operate their businesses while managing their own security risks"), ¶ 8 ("Defendants paid the Taliban not to attack them"). The Amended Complaint also incorporates the 2010 USAID OIG Report, which contradicts the notion that DAI engaged in any wrongdoing at all, let alone with an objective terrorist intent, and instead found that DAI responded to Taliban threats by suspending or cancelling 27 LGCD subprojects in 2009 alone. 2010 USAID OIG Report at 3–4; *see supra* Argument, Part I.B.2.

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

Numerous courts have reached the same conclusion on allegations materially indistinguishable from those alleged here. *See Freeman v. HSBC Holdings PLC*, 413 F. Supp. 3d 67, 92 (E.D.N.Y. 2019) (defendant banks "'appear' to have been purely motivated by the opportunity to make money" where they assisted Iran to evade sanctions); *Zapata v. HSBC Holdings*, 414 F. Supp. 3d 342, 359 (E.D.N.Y. 2019) ("[T]o an objective observer, HSBC's [alleged laundering of funds for drug cartels] appeared to be 'motivated by economics, not by a desire to 'intimidate or coerce.'" (quoting *Kemper*, 911 F.3d at 390)); *Kaplan v. Lebanese Canadian Bank*, 405 F. Supp. 3d 525, 532 (S.D.N.Y. 2019) (alleged provision of financial services to Hezbollah-affiliated individuals does not allege terrorist intent); *Stutts v. De Dietrich Grp.*, 2006 WL 1867060, at *2 (E.D.N.Y. June 30, 2006) ("engaging in commercial banking activity" with suppliers of chemicals to Iraq was not "designed to coerce civilians or government entities as required under § 2331"). *See also Mastafa v. Chevron Corp.*, 770 F.3d 170, 194 (2d Cir. 2014) (implausible that corporation "intend[ed]" corrupt transactions to "assist[]" Saddam's "torture and abuse of Iraqi persons"); *Brill v. Chevron Corp.*, 2017 WL 76894, at *1, *4 (N.D. Cal. Jan. 9, 2017) (oil-for-food deals not intended to intimidate or coerce).

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

The allegations also fail to establish that DAI's actions were "violent" or "dangerous to human life." 18 U.S.C. § 2331(1)(A). Although courts outside this circuit have suggested that "giving fungible dollars to a terrorist organization may be 'dangerous to human life,'" they have specified that "doing business with companies and countries that have significant legitimate operations" generally is not. *Kemper*, 911 F.3d at 390. Thus, *Kemper* held that providing "sanctions-avoidance services" to Iran was not "dangerous to human life," because Iran, although a designated state sponsor of terrorism, was still a sovereign with "legitimate operations" to fund.

Id. at 387, 390; *see also O'Sullivan*, 2019 WL 1409446, at *8 ("the provision of banking services" to Iran cannot be "considered as acts dangerous to human life, particularly [where the alleged causal chain is] so attenuated"); *Kaplan*, 405 F. Supp. 3d at 532 (plaintiffs did not adequately allege that provision of financial services to Hezbollah-affiliated individuals was violent or dangerous to human life). The challenged conduct arises from DAI's work with local subcontractors on development activities, and Plaintiffs "do not seriously contest, nor could they," that these subcontractors performed legitimate services. *Atchley*, 2020 WL 4040345, at *9. After all, USAID approved their selection, *see supra* n.3, and even mandated that it was "essential" that DAI prioritize the hiring of former insurgents and groups affiliated with the Taliban, LGCD Task Order No. 2 at 7, 25. DAI's retention and reimbursement of these subcontractors was neither violent nor inherently dangerous to human life.

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

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

Each predicate offense requires that an accused "know[]" or "intend[]" that the money or support provided is to be used for terrorist purposes. 18 U.S.C. § 2339A (providing "material support or resources … knowing or intending that they are to be used in preparation for, or in carrying out" certain federal terrorism offenses); *id.* § 2339C ("unlawfully and willfully provid[ing] or collect[ing] funds" with the intent or knowledge that the funds will be used to carry out terrorist acts against civilians). IEEPA similarly requires a knowing and willful violation of

an enumerated regulation. 50 U.S.C. § 1705(a) (prohibiting "willfully commit[ing], willfully attempt[ing] to commit, or willfully conspir[ing] to commit, or aid[ing] or abet[ting] in the commission of," a sanctions violation); *United States v. Reyes*, 270 F.3d 1158, 1170 (7th Cir. 2001) ("The government was required to establish that Reyes willfully attempted to export goods to another country, knowing the ultimate destination was an embargoed country, without a license.").

The allegations do not meet this standard. There is no well-pleaded allegation that DAI knew of or intended to provide support for terrorist acts, and the OIG Report rebuts such conclusions. Plaintiffs try to circumvent these defects by invoking media reports of a purported prevailing "practice[,] known to virtually everyone in Afghanistan." FAC ¶ 208 (alleging DAI knowledge by referencing FAC ¶¶ 112–26). But, allegations of "common knowledge" do not meet the statutory standard of actual knowledge required for criminal liability. There must be plausible allegations that a defendant was *actually* aware of the relevant information, not merely should have been, for criminal liability to attach. *Kaplan*, 405 F. Supp. 3d at 535; *Averbach v. Cairo Amman Bank*, 2020 WL 486860, at *12 (S.D.N.Y. Jan. 21, 2020), *report and recommendation adopted*, 2020 WL 1130733 (S.D.N.Y. Mar. 9, 2020). Similarly, IEEPA requires knowledge that a defendant's actions violate certain sanctions regulations, but even that is absent here given the lack of well-pleaded factual allegations and the contrary findings of the 2010 USAID OIG Report.

IV. THE SECONDARY LIABILITY CLAIMS SHOULD BE DISMISSED.

Counts Five and Six allege claims for ATA secondary liability based on the attacks committed by the Taliban. 18 U.S.C. § 2333(d)(2); FAC ¶¶ 2598, 2613. When Congress amended the ATA to provide for such claims, it carefully circumscribed the cases to which they would apply. As relevant here, Congress requires that (1) the "injury aris[e] from an act of international terrorism committed, planned, or authorized by an organization that had been designated as a [FTO]"; (2) the FTO must have been so designated "as of the date on which such act of

international terrorism was committed, planned, or authorized"; and (3) the defendant's assistance must have been both "knowing[]" and "substantial." 18 U.S.C. § 2333(d)(2). As the Chair of the House Judiciary Committee explained, "Secondary liability should only attach to persons who have actual knowledge that they are directly providing substantial assistance to a designated foreign terrorist organization in connection with the commission of an act of international terrorism." Statement of Rep. Goodlatte, 162 Cong. Rec. H5240 (daily ed. Sept. 9, 2016).

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

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

Because the Taliban is not a designated FTO, Plaintiffs attempt to allege the involvement of other entities that have been so designated—al-Qaeda and the Haqqani Network—in the attacks at issue. Plaintiffs attempt to do this in two ways. Both theories fail for lack of well-pleaded factual allegations, and the second also fails as a matter of law. This Court recently rejected similar theories advanced by the same Plaintiffs' counsel in *Atchley*, 2020 WL 4040345, at *11.

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

Count Five alleges that although the Taliban committed the attacks at issue, FAC ¶¶ 2598, 2604, the attacks were also "committed, planned, and/or authorized" by al-Qaeda and the Haqqani Network, *id.* ¶ 2603. This is not supported by well-pleaded facts. With few exceptions, the Amended Complaint (¶¶ 524–2569) pleads that each attack was committed by a single group:

- The majority were "committed by the Taliban," which is not a FTO. *See* App'x.

- Others were "committed by the Kabul Attack Network," which is not a FTO, and also is not mentioned in Counts Five or Six. *See id.*

- Others were "committed by the Haqqani Network," but the majority of these attacks occurred before its FTO designation on September 19, 2012. *See id.* Section 2333(d)(2) requires the FTO to have been so designated "as of the date on which such act of international terrorism was committed, planned, or authorized."

- The remaining attacks were allegedly committed by al-Qaeda and either the Taliban or the Haqqani Network. But the majority of these attacks had not previously been attributed to al-Qaeda, and Plaintiffs now tack on an inadequate, bare-bones assertion that al-Qaeda was involved, which calls into question similarly bare-bones assertions of al-Qaeda involvement with newly alleged attacks. *See* App'x.

Because the majority of the attacks are not plausibly alleged to have been committed by a FTO, Plaintiffs conclusorily allege that each of the attacks "was planned and authorized" by al-Qaeda. FAC ¶ 522. But the paragraphs describing the specific attacks (*id.* ¶¶ 524–2569) do not allege al-Qaeda's involvement in the planning or authorization of any specific attack. Instead, Plaintiffs allege that al-Qaeda provided general support and inspiration to the Taliban, *e.g.*, it recruited, trained, and provided weapons and general logistical support to Taliban fighters, *id.* ¶¶ 16, 464–512, 522, "often assumed a position of moral, religious, and tactical authority over Taliban members," *id.* ¶ 482, and conducted a propaganda campaign to incite its members, *id.* ¶¶ 16, 470.

As this Court recently observed in rejecting similar allegations, "That dog won't hunt." *Atchley*, 2020 WL 4040345, at *11. Generalized allegations of support are insufficient to satisfy the express statutory language of § 2333(d)(2), which requires a plaintiff's injury to arise from a specific "act of international terrorism" that was "committed, planned or authorized by" a FTO. Had Congress intended for Section 2333(d)(2) to cover generalized support and inspiration, it would have said so, instead of requiring the FTO's planning and authorization to relate to a specific "act of international terrorism." *Atchley*, 2020 WL 4040345, at *11; *Taamneh v. Twitter, Inc.*, 343 F. Supp. 3d 904, 915 (N.D. Cal. 2018) (noting "concerns about Plaintiffs' JASTA [§ 2333(d)(2)] claims because Plaintiffs seem to take the position that, in the instant case, ISIS's 'act of

international terrorism' encompasses *all* of ISIS's terrorist operations, and not the Reina attack specifically"). As a result, *Atchley* held that Hezbollah (a FTO) did not "plan[]" specific attacks by Jaysh al-Mahdi (a non-FTO) by providing training and general support, and that Hezbollah did not "authorize[]" the attacks by exerting religious authority over JAM. 2020 WL 4040345, at *11.

Similarly, Plaintiffs allege no well-pleaded facts to support their conclusory allegation that the Taliban attacks were planned or authorized by the Haqqani Network after its FTO designation in September 2012. FAC ¶ 2603. Instead, Plaintiffs conclusorily allege that the Haqqani Network was "part of the Taliban," *e.g.*, *id.* ¶ 2571 n.604, but the U.S. Government treats the two groups as separate, most notably in its decision to designate the Haqqani Network as a FTO, but not the Taliban. U.S. Dep't of State, Foreign Terrorist Organizations, https://www.state.gov/foreign-terrorist-organizations/ (last visited Sept. 9, 2020). Plaintiffs themselves cite U.S. Government documents describing the two as separate groups. *See* FAC ¶ 74 (quoting the U.S.'s Task Force 2010 describing the two as separate "insurgent groups"), ¶ 443 (quoting a U.S. State Department publication referring to Haqqani as merely a "Taliban-affiliated group"). Plaintiffs also allege, and incorporate sources reflecting, that the Haqqani Network had its own funding sources and leadership, and carried out its own attacks. *See, e.g.*, *id.* ¶¶ 70, 93, 278, 444; *Haqqani Network Financing* (cited at FAC ¶¶ 101, 107, 190, 270). Count Five thus fails to satisfy the FTO requirement as to the attacks committed by the Taliban.

While Plaintiffs plead certain attacks committed by a designated FTO—the Camp Chapman Attack (al-Qaeda), and the attacks committed by the Haqqani Network after its FTO designation—those attacks fall outside of Count Five, which is based on attacks committed by the

Taliban. FAC ¶¶ 2597–2605.[7] Plaintiffs do not allege that the Taliban committed those specific attacks. *See, e.g.*, *id.* ¶¶ 657–58, 768–69, 1488–89, 1558–59. The attacks committed by the Kabul Attack Network (*see* App'x) also fall outside of Count Five, because that entity is not a FTO and the Taliban is not alleged to have committed them.

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

Count Six attempts to circumvent § 2333(d)(2)'s FTO requirement by characterizing the "act of international terrorism" not as the specific attacks that caused each Plaintiff's respective injuries, but rather as a singular "Taliban-al-Qaeda Campaign," which Plaintiffs describe as a criminal conspiracy and pattern of racketeering activity punishable under RICO that was "committed, planned and/or authorized by al-Qaeda . . . and the Haqqani Network." FAC ¶¶ 2608, 2614. Plaintiffs then characterize the various attacks that injured them as "part of the pattern of racketeering activity," as opposed to separate acts of international terrorism. *Id.* ¶ 2612. This pleading device fails for multiple reasons.

First, it is contrary to the plain language of the ATA, as this Court found in rejecting a materially identical theory in *Atchley*, 2020 WL 4040345, at *11 (attempt to aggregate hundreds of alleged attacks into a single "16-year racketeering scheme" is "out of step with the statutory text"). The ATA imposes liability for injuries resulting from "*an act* of international terrorism." 18 U.S.C. § 2333(d)(2) (emphasis added). A multi-year campaign consisting of separate attacks occurring at different times and in different places over a nine-year period, each resulting in separate and distinct injuries to each Plaintiff, is not a single "act." As the Court held in *Atchley*,

[7] Plaintiffs' allegations concerning the Camp Chapman Attack became notably *less* specific in the Amended Complaint: where that attack had first been alleged to have been committed by al-Qaeda, the Pakistani Taliban, and the Haqqani Network, Plaintiffs now omit much of that detail and conclusorily allege that it was committed "by the Taliban (including the Haqqani Network) and al-Qaeda." *Compare* Compl. ¶¶ 472–73, *with* FAC ¶¶ 743–44.

"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 [nine] years." 2020 WL 4040345, at *11; *see also Taamneh*, 343 F. Supp. 3d at 916 (emphasizing that use of the singular "act" in § 2333(d)(2) requires a "connect[ion] with a specific crime," not a terrorist group's "general course of conduct"). Plaintiffs' allegations "collaps[ing] numerous attacks into one overarching campaign" are nothing more than an impermissible "attempt to skirt the requirement that an FTO 'plan' or 'authorize' the particular 'act of international terrorism.'" *See Atchley*, 2020 WL 4040345, at *11.

Of the crimes that could serve as a predicate terrorist "act," few fit the mold less readily than a RICO violation, which by definition consists of a "pattern" of activity and "at least two acts." 18 U.S.C. §§ 1961(5), 1962(a)–(d). Count Six uses "act" interchangeably to describe the individual attacks cited for purposes of their RICO predicate, *see* FAC ¶ 2609, and the purported singular "Taliban-al-Qaeda Campaign" to plead the elements of their ATA claim, *see id.* ¶ 2610.

Second, Count Six fails to allege a perpetrator "distinct from the RICO enterprise." *United States v. Philip Morris USA, Inc.*, 566 F.3d 1095, 1113 (D.C. Cir. 2009) (per curiam). Instead, they are one and the same: Plaintiffs plead that the purported RICO enterprise (the "Taliban-al-Qaeda Campaign") was simply "the affairs of the Taliban." FAC ¶ 2608. Plaintiffs do not connect specific perpetrators with any particular offenses, nor allege that DAI "substantially assisted" any individual perpetrator with any particular offense. Instead, Plaintiffs conflate the perpetrator with the RICO enterprise, lump all Defendants together, and allege that "Defendants aided and abetted and knowingly provided substantial assistance to the Taliban, its members, and the Taliban-al-Qaeda Campaign." *Id.* ¶ 2613. Such allegations are inadequate. *See, e.g., Philip Morris USA,*

Inc., 566 F.3d at 1113; *Feld Entm't, Inc. v. Am. Soc'y for the Prevention of Cruelty to Animals*, 873 F. Supp. 2d 288, 317 (D.D.C. 2012).

Third, there are no well-pleaded facts to support the claim that al-Qaeda "committed, planned, or authorized" the purported "al-Qaeda-Taliban Campaign." Although Plaintiffs allege in conclusory fashion that al-Qaeda planned or directed the campaign, there are no well-pleaded allegations that al-Qaeda did more than provide general training or support, and certainly not that it planned or authorized an entire "campaign." *See supra* Argument, Part IV.A.1; *Atchley*, 2020 WL 4040345, at *11 ("Unfortunately for plaintiffs, Congress opted for a more limited statute, circumscribing aiding-and-abetting liability to situations where an FTO *itself* had a significant role in a particular attack," not where it had generally provided a non-FTO with material support).

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

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

First, the requirement that assistance be "knowing" sets a high bar. Congress limited secondary liability to persons who "knowingly" assisted "*such* an act of international terrorism," meaning "an act of international terrorism committed, planned, or authorized by [a FTO]." *Id.* (emphasis added); *see King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) ("such" refers to something that has "just been mentioned"); *Flores-Figueroa v. United States*, 556 U.S. 646, 650 (2009) (when the word "knowingly" is used as an element of an offense, it is most naturally read "as applying to all the subsequently listed elements"). Thus, Plaintiffs must plead that DAI knew that a FTO had the requisite involvement in the underlying attack. This also "requires the secondary actor to be 'aware' that, by assisting the principal, it is itself assuming a 'role' in terrorist activities." *Linde v. Arab Bank*, 882 F.3d 314, 329 (2d Cir. 2018); *Weiss v. Nat'l Westminster Bank*, 381 F. Supp.

3d 223, 239 (E.D.N.Y. 2019) ("knowingly provid[ing] services to a terrorist organization, without more, is insufficient to satisfy JASTA's scienter requirement"). This requires *actual* knowledge. *Brill*, 2020 WL 1200695, at *1. Thus, "the trend in JASTA case law [is] toward disallowing claims against defendants who did not deal directly with a terrorist organization or its proxy." *Averbach*, 2020 WL 486860, at *12.[8]

The Amended Complaint fails to meet this standard. It lacks well-pleaded allegations that DAI dealt directly with a terror group, let alone a FTO, or knew of a FTO's involvement in an act of international terrorism. *Siegel*, 933 F.3d at 224; *Honickman ex rel. Goldstein v. BLOM Bank*, 2020 WL 224552, at *9 (E.D.N.Y. Jan. 14, 2020) (no plausible allegation that bank was aware its customers were affiliated with Hamas, let alone that by serving customers it was "assuming a role in Hamas' violent or life-endangering activities"). The Taliban is not a FTO, and the allegations of payments to the Haqqani Network are based on speculation from a source that did not name DAI and predated that group's FTO designation by over two years. *See* FAC ¶ 190 (quoting *Haqqani Network Financing* at 44).

Second, Counts Five and Six fail to allege that DAI provided substantial assistance directly to the Taliban, "the person who committed such an act of international terrorism." 18 U.S.C. § 2333(d)(2). And there are insufficient allegations that any assistance was "substantial." *Id.* Congress has directed courts to apply the factors in *Halberstam v. Welch*, 705 F.2d 472, 483–84

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

(D.C. Cir. 1983), to distinguish "substantial" from mere incidental assistance. *See* JASTA § 2(b), Pub. L. No. 114-222. These factors overwhelmingly weigh in DAI's favor:

The first and second *Halberstam* factors—the nature of the act allegedly encouraged, and the amount and kind of assistance given—"dictate[] what aid might matter, *i.e.*, be substantial." 705 F.2d at 484. Here, while Plaintiffs make group-pleading allegations that Defendants made protection payments, they specifically allege that Defendants did so to *prevent* attacks. *See supra* Part III.A.1 Plaintiffs' allegations also are based on a mischaracterization of the 2010 USAID OIG Report, which found no such involvement by DAI, identified no specific payments, found instead that DAI had suspended and terminated projects in response to insurgent threats, and included USAID's discussion of DAI's extensive due diligence efforts. *See supra* Part I.B.2. This falls far short of pleading that the Taliban's attacks were "heavily dependent" on DAI, or that DAI was "essential part of" attacks spanning eight years and all of Afghanistan. *Atchley*, 2020 WL 4040345, at *12 (quoting *Halberstam*, 705 F.2d at 488). As discussed above, the Taliban had more than enough funding from numerous independent sources to fund its attacks, as well as (according to many Plaintiffs and their counsel) the support of the Government of Iran. *See supra* Part III.A.

The third and fourth factors—whether the defendant was present at the principal violation, and the defendant's relationship to the principal wrongdoer, *Halberstam*, 705 F.2d at 478, 484—also weigh in DAI's favor. DAI was neither present at any attack, nor had a "position of authority" or other special relationship with the Taliban. *Id.* at 484; *Taamneh*, 343 F. Supp. 3d at 917–18.

The fifth factor, state of mind, requires a showing that the defendant "was one in spirit with the [principal wrongdoer]." *Halberstam*, 705 F.2d at 484. This factor goes beyond knowledge of illegal activities and turns on whether the defendant shared the primary wrongdoer's aim, intended to assist the principal tort, and desired to help those activities succeed. *See Atchley*, 2020 WL

4040345, at *12.[9] It is implausible, to say the least, to contend that an international development company like DAI was "one in spirit" with the Taliban, shared the Taliban's intent to kill American soldiers, and desired to help the Taliban's activities succeed. *See also* 2010 USAID OIG Report.

The final *Halberstam* factor, the duration of the aid provided, also weighs in DAI's favor. There are no well-pleaded factual allegations regarding the date or other circumstances of any purported payments by DAI or a DAI subcontractor. Plaintiffs also acknowledge that the LGCD contract ended in April 2011. FAC ¶ 182(a). Thus, there are no facts to plausibly allege that DAI substantially assisted any specific attack, let alone ones that continued as late as 2017.

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

CONCLUSION

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

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[9] *See also Linde*, 882 F.3d at 329 n.10; *Crosby*, 303 F. Supp. 3d at 574-75; *Taamneh*, 343 F. Supp. 3d at 917-18; *Copeland v. Twitter, Inc.*, 352 F. Supp. 3d 965, 975-76 (N.D. Cal. 2018). Even before JASTA added secondary liability in § 2333(d), courts interpreting § 2333(a) to permit such claims held that "'substantial assistance'" requires a showing of the defendant's "desire to help [the unlawful] activity succeed." *Goldberg v. UBS*, 660 F. Supp. 2d 410, 425 (E.D.N.Y. 2009); *see Rothstein v. UBS*, 647 F. Supp. 2d 292, 295 (S.D.N.Y. 2009), *aff'd*, 708 F.3d 82 (2d Cir. 2013).

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Respectfully submitted,

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APPENDIX

- **Attacks allegedly "committed by the Taliban"**: FAC ¶¶ 568, 577, 590, 597, 607, 626, 634, 665, 709, 754, 779, 795, 804, 813, 820, 827, 840, 849, 873, 880, 897, 905, 915, 926, 937, 952, 969, 977, 985, 991, 998, 1010, 1030, 1040, 1044, 1053, 1060, 1067, 1073, 1104, 1114, 1129, 1136, 1157, 1164, 1181, 1197, 1204, 1222, 1255, 1265, 1274, 1298, 1316, 1334, 1359, 1366, 1381, 1389, 1398, 1406, 1414, 1426, 1439, 1456, 1468, 1477, 1502, 1508, 1516, 1529, 1547, 1571, 1594, 1605, 1619, 1632, 1655, 1669, 1692, 1712, 1720, 1758, 1765, 1777, 1784, 1791, 1825, 1834, 1840, 1849, 1858, 1866, 1913, 1948, 1967, 1971, 1980, 1990, 2009, 2016, 2025, 2034, 2064, 2079, 2115, 2123, 2130, 2149, 2153, 2192, 2201, 2208, 2228, 2260, 2279, 2296, 2327, 2341, 2349, 2356, 2384, 2399, 2407, 2414, 2421, 2425, 2443, 2447, 2451, 2468, 2487, 2519, 2537, 2544, 2554.

- **Attacks allegedly "committed by the Kabul Attack Network"**: FAC ¶¶ 525, 725, 761, 786, 961, 1021, 1211, 1230, 1373, 1449, 1582, 1740, 1887, 2139, 2249, 2304, 2373.

- **Attacks allegedly "committed by the Haqqani Network" (pre-FTO designation)**: FAC ¶ 551 (8/31/2010), ¶ 641 (7/24/2010), ¶ 675 (7/18/2010), ¶ 684 (8/6/2011), ¶ 699 (9/1/2012), ¶ 1188 (5/11/2010), ¶ 1246 (2/27/2011), ¶ 1344 (11/27/2010), ¶ 1430 (7/22/2012), ¶ 1539 (5/14/2010), ¶ 1659 (6/23/2010), ¶ 1677 (5/7/2012), ¶ 1702 (2/28/2011), ¶ 1769 (4/22/2012), ¶ 1809 (7/24/2010), ¶ 1816 (8/3/2011), ¶ 1896 (8/6/2011), ¶ 1938 (9/3/2012), ¶ 2041 (8/6/2011), ¶ 2055 (7/14/2010), ¶ 2086 (7/13/2012), ¶ 2096 (6/26/2010), ¶ 2107 (6/11/2010), ¶ 2167 (9/1/2012), ¶ 2185 (5/7/2012), ¶ 2219 (9/27/2011), ¶ 2237 (5/6/2010), ¶ 2287 (1/31/2011), ¶ 2334 (7/8/2012), ¶ 2436 (12/16/2012), ¶ 2477 (11/5/2010), ¶ 2509 (7/8/2012).

- **Attacks allegedly "committed by the Haqqani Network" (post-FTO designation)**: FAC ¶¶ 542, 615, 648, 693, 717, 736, 744, 831, 865, 1287, 1306, 1551, 1643, 1647, 1798, 1876, 1905, 1955, 1998, 2048, 2269, 2527; (al-Qaeda and Taliban); *id.* ¶¶ 560, 658, 859, 890, 1082, 1092, 1122, 1147, 1174, 1325, 1489, 1559, 1563, 1684, 1728, 1751, 1923, 1930, 2072, 2315, 2366, 2392, 2562 (al-Qaeda and Haqqani Network).

- **Attacks alleging al-Qaeda involvement**: *Compare* Compl. ¶¶ 400, 420, 428, 447, 458, 523, 544, 546, 565, 667, 825, 843, 874, 896, 918, 936, 953, 1001 1029, 1176, 1186, 1255, *with* FAC ¶¶ 614–15, 647–48, 657–58, 692–93, 716–17, 830–31, 858–59, 864–65, 889–90, 1121–22, 1488–89, 1558–59, 1646–47, 1683–84, 1727–28, 1750–51, 1797–98, 1929–30, 1997–98, 2365–66, 2391–92, 2561–62.