UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT ENVIRONMENTAL CHEMICAL CORPORATION'S RULE 12(B)(6) MOTION TO DISMISS THE FIRST AMENDED COMPLAINT

SQUIRE PATTON BOGGS (US) LLP

Mitchell R. Berger (D.C. Bar No. 385467)
Alexandra E. Chopin (D.C. Bar No. 490736)
2550 M Street, NW
Washington, DC 20037
mitchell.berger@squirepb.com
alexandra.chopin@squirepb.com

Counsel for Defendant
Environmental Chemical Corporation

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

*Authorities upon which ECC chiefly relies are marked with asterisks.

Statutes

Rules

INDEX OF EXHIBITS

1. Exhibit 1: Report of the Committee on Armed Services, United States Senate, Inquiry Into The Role And Oversight Of Private Security Contractors In Afghanistan (Oct. 26, 2010) (referenced throughout the FAC and subject to judicial notice).

2. Exhibit 2: Special Insp. Gen. For Afghanistan Reconstr., Construction Of The Special Forces Kandak In Kandahar: Audit Of Costs Incurred By Environmental Chemical Corp., Financial Audit No. 16-30 (Apr. 2016) (referenced at FAC ¶ 218 n.277 and subject to judicial notice).

3. Exhibit 3: Continuing Services Agreement between Environmental Chemical Corporation and Armor Group North America, Inc. (April 14, 2007) (referenced at FAC ¶¶ 147, 174).

4. Exhibit 4: ECC Work Authorization (WA No. 1) for 2007 Shindand Mine Clearance Contract (April 16, 2007) (discussed at FAC ¶¶ 147, 174).

5. Exhibit 5: Continuing Services Agreement between Arvin Kam Construction and Environmental Chemical Corporation International (Oct. 2, 2010) (referenced at FAC ¶ 217).

6. Exhibit 6: Appellant's Motion for Summary Judgment, Appeal of ECCI-C Metag JV, ASBCA No. 59031 (referenced at FAC ¶ 226 n.283 and subject to judicial notice).

7. Exhibit 7: Opinion by Admin. Judge Dickinson on Cross-Motions for Summary Judgment, Appeal of ECCI-C Metag, JV, ASBCA No. 59031 (Oct. 22, 2015) (referenced at FAC ¶ 228 and subject to judicial notice).

8. Exhibit 8: Aug. 24, 2012 Letter from ECC to Arvin Kam (attaching CENTCOM Jul. 24, 2012 determination and Kerment L. Goss Aug. 16, 2012 Cure Notice) (referenced at FAC ¶ 225 n.280)

9. Exhibit 9: Notice of Motion and Motion for Summary Judgment of Defendant Environmental Chemical Corporation Doing Business as ECC Remediation Services and Memo. of Points and Authorities, *Arvin Kam Constr. Co. v. Envtl. Chem. Corp.*, No. 16-cv-02643-JD, ECF No. 37 (N.D. Cal. filed Aug. 24, 2018) (referenced at FAC ¶ 224 n.281 and subject to judicial notice).

10. Exhibit 10: ECC's Request for Equitable Adjustment ("REA") for Task Order 3 (Feb. 15, 2013) (subject to judicial notice as part of ASBCA administrative record referenced at FAC ¶¶ 226, 228).

11. Exhibit 11: ECC's Request for Equitable Adjustment ("REA") for Task Order 9 (May 20, 2013) (subject to judicial notice as part of ASBCA administrative record referenced at FAC ¶¶ 226, 228).

12. Exhibit 12: Anand Gopal, *The Battle For Afghanistan: Militancy and Conflict In Kandahar* 28-30, New Am. Found. (Nov. 2010) (referenced at FAC ¶¶ 148, 218).

13. Exhibit 13: Special Insp. Gen. for Afghanistan Reconstr., *Contracting With The Enemy: DOD Has Limited Assurance That Contractors With Links To Enemy Groups Are Identified And Their Contracts Terminated*, Audit No. 13-6 (Apr. 2013) (referenced at FAC ¶ 140 nn.182-83 and subject to judicial notice).

14. Exhibit 14: Special Insp. Gen. For Afghanistan Reconstr., *Kunduz Afghan National Police Provincial Headquarters: After Construction Delays and Cost Increases, Concerns Remain About the Facility's Usability and Sustainability*, SIGAR Inspection 13-4 (Jan. 24, 2013) (subject to judicial notice).

15. Exhibit 15: Contracting Officer's Final Decision (COFD), W5J9JE-10-D-0007, Task Order 0003, ANP UP Provincial HQ/Med, Kunduz, Afghanistan, Serial Letter No. 5950.003.COR.C-0027 (Nov. 20, 2013) (subject to judicial notice as part of ASBCA administrative record referenced at FAC ¶¶ 226, 228).

16. Exhibit 16: Indefinite Delivery Indefinite Quantity (IDIQ) Multiple Award Task Order Contract (MATOC) between U.S. Army Corps of Engineers and ECC for design and construction work in Northern Afghanistan, Contract No. W5J9JE-10-D-0007 (Mar. 8, 2010) (referenced at FAC ¶ 217 and subject to judicial notice).

17. Exhibit 17: Decl. of Col. Sadat in Support of Plaintiff Arvin Kam Construction Company's Motion for Summary Judgment, Arvin Kam Constr. Co. v. Envtl. Chem. Corp., No. 16-cv 02643-JD, ECF No. 42 (N.D. Cal. filed Aug. 24, 2018) (subject to judicial notice).

18. Exhibit 18: ECCI's Complaint, Appeal of ECCI-Metag, JV, ASBCA No. 59031 (subject to judicial notice as part of ASBCA administrative record referenced at FAC ¶¶ 226, 228).

19. Exhibit 19: Thomas Ruttig, *The Other Side*, Afghanistan Analysts Network (July 2009) (referenced at FAC ¶ 293 n.356, ¶ 470 n.529, ¶ 497 n.572, ¶ 511 n.578).

20. Exhibit 20: Aryn Baker, *How The Taliban Thrives*, Time Magazine (Sept. 7, 2009) (referenced at FAC ¶ 65 n.27, ¶ 89 n.85, ¶ 120 nn.127-28 ¶ 122 n.132, ¶ 123 n.140).

21. Exhibit 21: Mujib Mashal, Haqqanis *Steering Deadlier Taliban In Afghanistan*, Officials Say, N.Y. Times (May 7, 2016) (referenced at FAC ¶¶ 446-47 nn.507-08).

22. Exhibit 22: Jean MacKenzie, *Who Is Funding The Afghan Taliban? You Don't Want To Know*, Reuters Global News Journal (Aug. 13, 2009) (referenced at FAC ¶ 92 n.90, ¶ 94 n.94).

GLOSSARY

AAG	Afghan Attorney General
AFCEC	U.S. Air Force Civil Engineering Center
AFCEE	Air Force Center for Engineering and the Environment
AGMA	ArmorGroup Mine Action
ArmorGroup	ArmorGroup North America Inc.
Arvin Kam	Arvin Kam Construction Company
ATA	AntiTerrorism Act
CENTCOM	U.S. Central Command
ECC	Environmental Chemical Corporation
FTO	Foreign Terrorist Organization
IEEPA	International Emergency Economic Powers Act
ISAF	International Security Assistance Force, also known as the Coalition
JASTA	Justice Against Sponsors of Terrorism Act
SASC	U.S. Senate Armed Services Committee
SIGAR	Special Inspector General for Afghanistan Reconstruction
USACE	United States Army Corps of Engineers
USG	United States Government

I. INTRODUCTION

By withdrawing their claim against Environmental Chemical Corporation ("ECC") under 18 U.S.C. § 2339B, Plaintiffs necessarily concede that they cannot link ECC's actions to the actions of any Foreign Terrorist Organization ("FTO"). Section 2339B criminalizes support for an FTO, and Plaintiffs' withdrawal of their 2339B claim against ECC acknowledges that Plaintiffs cannot (and now do not undertake to) prove that ECC supported any FTO. Given the fundamental premise of the First Amended Complaint ("FAC") that Plaintiffs' claims arise from attacks planned, authorized, or committed by FTOs, Plaintiffs' concession that ECC is not linked to an FTO is dispositive of the entire FAC as against ECC.

In every other respect, the FAC has the same dispositive flaws as the original Complaint. Every one of Plaintiffs' claims under the AntiTerrorism Act, 18 U.S.C. § 2333 ("ATA"), requires some showing that ECC knew that its arms-length payments to its security and other subcontractors supported "acts of international terrorism", which the FAC contends were planned, authorized, or committed by an FTO in conjunction with the Taliban. FAC ¶ 2598. While the ATA and interpretive case law describe the knowledge element required for each cause of action in slightly different terms, Plaintiffs cannot demonstrate that ECC had the required knowledge, or *scienter*, for any of their remaining claims.

The "overarching" theme of the FAC is that the Taliban's actions in Afghanistan are inseparable from those of two FTOs, the Haqqani Network and Al-Qaeda, because the three entities formed a terrorism "syndicate." *Id.* ¶ 413. According to the FAC, the Taliban should be treated as entirely synonymous with al-Qaeda and/or the Haqqani Network because the Taliban was "intimately intertwined" or "operationally intertwined" with both groups. *Id.* ¶¶ 101, 471, 473. The result of this alleged merging of the three entities, Plaintiffs claim, is that material support to the Taliban must necessarily be construed as material support to at least one FTO. *See id.* ¶¶

413 ("Due to the mutually reinforcing ties … support for the one benefited the other."). Plaintiffs' theory is factually implausible. Nonetheless, given Plaintiffs' "syndicate" theory, their concession that they cannot show ECC support for any FTO necessarily means that Plaintiffs cannot show ECC support for the Taliban as a component of the alleged FTO+Taliban "syndicate."

If the Court instead determines that the FAC plausibly alleges attacks only by the Taliban on a stand-alone basis, then the FAC's claims against ECC must be dismissed because (i) Plaintiffs fail to plausibly allege a knowing or intentional link between ECC's alleged actions and the Taliban attacks, as required for their primary and secondary liability claims; and (ii) the Taliban is not an FTO and Plaintiffs' secondary liability claims therefore are not based on attacks by an FTO, as required by JASTA.

Specifically, the FAC, like Plaintiffs' original Complaint, makes only conclusory or generalized allegations that ECC "knew or intended" that its arms-length payments to its security and construction subcontractors facilitated the terrorist attacks at issue (the "Attacks").[1] Plaintiffs fail to allege specific facts to establish ECC's actual knowledge that its contractor payments "would be used in preparation for, or in carrying out" those terrorist attacks, the *scienter* required by Sections 2339A and 2339C (Counts 1 and 3). Nor do Plaintiffs make any plausible, non-conclusory allegations that ECC "willfully" violated U.S. sanctions, the *scienter* required for their IEEPA primary-liability claim (Count 4), when ECC made arms-length payments to its subcontractors, none of which was then an FTO or otherwise sanctioned by the United States Government ("USG").

[1] The FAC contains no substantive, much less plausible, facts or allegations related to three of the five construction projects that allegedly gave rise to Plaintiffs' claims (2007 Shindand Ordnance Clearance, 2011 Kandahar Airfield, 2012 Ring Road contract). *See* FAC ¶¶ 147, 175, 217-18; *see infra* at 17, 30-31 & nn. 39-40.

Logically, because ECC did not "know or intend" that its arms-length payments to security and construction contractors "would be used in preparation for, or in carrying out" the Attacks, ECC also was not "aware" that, by making payments to its subcontractors for commercial services, ECC was "assuming a 'role' in terrorist activities"—the essential *scienter* element of Plaintiffs' JASTA secondary-liability claims (Counts 5 and 6). By making contractually-required payments to its subcontractors for the commercial services they rendered, ECC also did not provide "substantial assistance" to the unknown third parties who committed the Attacks, another essential element of the same JASTA secondary-liability claims. In any event, Plaintiffs' allegations that the attacks were "committed by the Taliban" defeats their JASTA claim, because the Taliban is not an FTO. FAC ¶ 2598. Confronted with this obstacle, Plaintiffs implausibly allege, at odds with USG statements, that al-Qaeda and the Haqqani Network (after its 2012 FTO designation) committed, planned, or authorized those Taliban attacks, and attempt to evade stringent ATA requirements by importing RICO into the realm of terrorist attacks (Count 6).

The inability of the FAC to hurdle the essential *scienter* elements of the ATA is not its only dispositive failing. ECC's payments for subcontractor services pursuant to (and in settlement of) arms-length contracts is ordinary-course commercial activity, not "international terrorism"—an essential element for all of Plaintiffs' ATA primary-liability claims (Counts 1, 3, and 4). Plaintiffs also concede that ECC obtained and paid for security and construction subcontractor services for a purely commercial purpose, that is, to perform and safeguard its construction projects in Afghanistan and thereby earn revenue, and to build critical facilities at the direction of the Army and the Air Force. *See* FAC ¶¶ 65-66, 96, 164. Plaintiffs further concede that ECC implemented USG directives, and took reasonable steps to guard against any support of terrorist activity.

Similarly, the FAC never plausibly alleges the required but-for and proximate cause connections between ECC's arms-length payments to its subcontractors and the Attacks, without both of which Plaintiffs cannot establish ATA primary liability (Counts 1, 3 and 4). Plaintiffs necessarily conceded the absence of that link when they dropped their Section 2339B count against ECC, thereby abandoning any claim that ECC supported the supposed FTO "syndicate" allegedly behind those Attacks. When the Court considers Plaintiffs' withdrawal of their Section 2339B claims alongside the number of independent intermediary actors between ECC and the attackers in Plaintiffs' imagined scenario of material support to the Taliban, the remoteness in time and geography between ECC's operations and the Attacks, and the attackers' access to multiple funding sources, the causation collapse is incontrovertible. *See Atchley v. AstraZeneca UK Ltd.*, No. 17-2136, 2020 U.S. Dist. LEXIS 126469, at *27 (D.D.C. July 17, 2020) (Defendants "alleged wrongful conduct must have 'led directly' to plaintiffs' injuries") (quoting *Owens v. BNP Paribas, S.A.*, 897 F.3d 266 (D.C. Cir. 2018) (*Owens II*)). After accounting for all of these pleading deficiencies, whatever may have remained of Plaintiffs' causation argument evaporated when Plaintiffs filed three other federal lawsuits alleging a causal link between the Attacks and the actions of multiple other defendants unrelated to ECC. *See King v. Habib Bank Limited*, No. 1:20-cv-04322 (S.D.N.Y. Jun. 5, 2020); *Cabrera v. Islamic Republic of Iran*, No. 1:19-cv-03835 (D.D.C. Dec. 27, 2019); *Brown v. National Bank of Pakistan*, No. 1:19-cv-11876 (S.D.N.Y. Dec. 27, 2019).

In apparent recognition of the cavities in their causation theory, the FAC cites to hundreds of publicly available documents in an attempt to give more heft to the primary and secondary liability claims, which otherwise rely impermissibly on generalized allegations. Time and again, however, Plaintiffs' citations tell an incomplete story. None of Plaintiffs' sources demonstrates

that ECC engaged in or supported acts of international terrorism; instead, those sources show ECC implemented USG directives and took steps to protect against any support of terrorist activity.

For example, Plaintiffs rely heavily on a report of an investigation into these same issues by the United States Senate Armed Services Committee ("SASC") and audits by the Special Inspector General for Afghanistan Reconstruction ("SIGAR"), to allege that ECC, through its subcontractors, paid protection money to the Taliban in connection with five construction contracts in Afghanistan. *See* FAC ¶¶ 148, 150-66, 217. In express contradiction of those allegations, Plaintiffs' cited sources and other public documents actually show:

- ECC did not know that the local private contractors providing security and construction services for its Afghanistan construction projects were affiliated with an FTO, the Taliban, or other terrorist group.[2]

- Despite intensive USG oversight and auditing of ECC's work, and related U.S. federal court proceedings, there has never been a USG or judicial finding that ECC's contractor-payments were diverted or otherwise used to support terrorist activity or terrorist groups.[3]

- ECC only hired security and construction subcontractors in Afghanistan that agreed to "comply with all applicable laws, statutes, ordinances, regulations or orders and standards in the performance of the work" on the project.[4]

- ECC actively took steps before and after hiring security and construction personnel to ensure that its subcontractors were employing local personnel that were not affiliated with an FTO, the Taliban, or any other terrorist group, by vetting its subcontractors and their

[2] *See* Ex. 1, Report of the Committee on Armed Services, United States Senate, *Inquiry Into The Role And Oversight Of Private Security Contractors In Afghanistan* (Oct. 26, 2010) ("Senate Report"), at 17-18.

[3] *See generally* Ex. 1 (Senate Report); Ex. 2 (April 2016 SIGAR audit); Order on Partial Summary Judgment, *Arvin Kam v. ECC*, No. 3:16-cv-02643-JD, 2019 U.S. Dist. LEXIS 64282 (N.D. Cal. Apr. 15, 2019).

[4] *See* Ex. 3 (ECC-ArmorGroup Continuing Services Agreement), at ¶¶ 5, 14; Ex. 4 (Task Order for Shindand Mine Clearance), at ¶ 2.0; Ex. 5 (ECC-Arvin Kam Continuing Services Agreement), at §§ 2.12, 13.3.

employees, notifying the USG of security issues, and terminating personnel when reports surfaced of their Taliban or insurgency affiliation.[5]

- In compliance with USG directives, further, once ECC received reports that any of its local security personnel had joined the Taliban, ECC terminated those personnel.[6]

- Plaintiffs' theories regarding ECC's relationship with Afghan subcontractor Arvin Kam are precisely backwards; ECC accelerated termination of Arvin Kam's work with ECC.[7] When ECC learned from the Air Force that Arvin Kam (ECC's subcontractor) had been designated by CENTCOM as "supporting an insurgency", ECC took the initiative to inform the Army of that designation, which led to the Army's termination of Arvin Kam's subcontract with ECC.

- After Arvin Kam filed claims for payment against ECC with the Afghan Attorney General ("AAG"), ECC timely informed the USG that ECC was being pressured by the Afghan government to settle those claims. The USG never required ECC to recoup ECC's initial settlement payment, including by way of counterclaim in the ASBCA litigation between the government and ECC, thus effectively acquiescing in that payment.[8]

- After defending itself against the AAG's extra-judicial demands, ECC returned to the United States and took all appropriate action to have its settlement with Arvin Kam declared void *ab initio* by a U.S. federal court. By voiding the settlement, ECC achieved the goal behind CENTCOM's insurgency determination (which ECC's actions had brought about in the first place).[9]

Circuit law empowers this Court to determine the legal insufficiency of Plaintiffs' claims based on these documents without converting this Motion into one for summary judgment. Through its analysis of these documents, this Motion demonstrates that further amendment of the

[5] *See, e.g.*, Ex. 1 (Senate Report) at 58-59 (describing "a strict vetting and screening process" for local hires); Ex. 5 (ECC-Arvin Kam Continuing Services Agreement) § 2.12 (warranting subcontractor "compl[iance] with, all federal, state and local laws…").

[6] Ex. 1 (Senate Report) at 19.

[7] Ex. 6 (ECC's Cross Motion for Summary Judgment before the ASBCA) at ¶ 6, Appeal of ECCI-Metag, JV, ASBCA, No. 59031 (filed Oct. 6, 2014); Ex. 7 (ASBCA Decision), at 1-2.

[8] *See Arvin Kam*, 2019 U.S. Dist. LEXIS 64282, at *11-12 ; Ex. 9 (N.D. Cal. Motion for Summary Judgment), at 6-7; Ex. 10 (Feb. 15, 2013 request for equitable adjustment ("REA") for Task Order 3), at 4 (disclosing "$343,732.85 in Arvin Kam claim settlement cost…."); Ex. 11 (May 20, 2013 REA for Task Order 9), at 3 (disclosing $55,000 in settlement costs to Arvin Kam).

[9] *See* Ex. 9 (N.D. Cal. Motion for Summary Judgment), at 6-7.

FAC cannot cure Plaintiffs' knowledge, causation, and other essential-element defects as to ECC. The claims against ECC accordingly must be dismissed with prejudice.

II. ARGUMENT

ATA civil actions require a plaintiff to make multi-level allegations supported by plausible facts, not only that the defendant has violated a predicate criminal statute, but also that the defendant has violated the additional elements established in 18 U.S.C. § 2333(a). Those additional civil elements are: "First, a U.S. national must have suffered an injury. Second, there must have been an act of international terrorism. And third, the U.S. national's injury must have occurred 'by reason of' the act of international terrorism. That is, there must be some causal connection between the act of international terrorism and the U.S. national's injury." *Owens II*, 897 F.3d at 270. Plaintiffs fail to plausibly allege facts to support the second and third of these elements.

The FAC generally states the conclusory elements of each ATA cause of action, but these conclusory allegations ultimately do not state valid claims, because none contain "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Plaintiffs' claims only will have "facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citation omitted). Failure to plead "sufficient factual matter" in this Circuit divests Plaintiffs of the presumption of the truth to which a plaintiff ordinarily is entitled in a court's consideration a motion to dismiss; Plaintiffs lose that presumption of truth equally because their allegations are contradicted by documents incorporated in the FAC or of which this Court can take judicial notice. *See Owens II*, 897 F.3d at 272-73 (internal citation marks and quotation omitted); *see also EEOC v. St. Francis Xavier Parochial Sch.*, 117 F.3d 621, 624 (D.C. Cir. 1997) ("[W]e

may consider only the facts alleged in the complaint, any documents either attached to or incorporated in the complaint and matters of which we may take judicial notice.").[10] ECC here illustrates the dispositive lack of factual plausibility and the many documentary contradictions of Plaintiffs' allegations, necessitating dismissal of Plaintiffs' primary and secondary liability claims.

A. The FAC Fails To State A Claim For Primary Liability.

1. The FAC Fails To Allege Plausible Facts To Show The Actual Knowledge Required Under 18 U.S.C. § 2339A And 18 U.S.C. § 2339C.

Plaintiffs allege no facts to show that ECC had actual knowledge or intent that its payments to its subcontractors would support terrorist attacks, the heightened *scienter* required by Section 2339A (Count 1), or Section 2339C (Count 3). The actual knowledge or intent requirement "extends both to the support itself, and to the underlying purposes for which the support is given."[11]

Applying that amplified standard here, Plaintiffs must allege plausible facts to show ECC "provided the support or resources acting with the knowledge or intent that the support would be used in preparation for, or in carrying out, specific terror-related crimes."[12] Plaintiffs must plead evidence of ECC's specific intent to pay its subcontractors and that ECC actually knew or intended those payments would be used to support terrorist activity. *See Wultz*, 755 F. Supp. 2d at 47.

The FAC does not say anything about actual knowledge, however, and instead features a number of dispositive pleading defects. To begin, Plaintiffs' allegations that ECC "should have

[10] The Court can take judicial notice of filings in proceedings before administrative bodies. *See Int'l Bhd. of Teamsters v. Atlas Air, Inc.*, 435 F. Supp. 3d 128, 134-35 & n.5 (D.D.C. 2020).

[11] *United States v. Mehanna*, 735 F.3d 32, 43 (1st Cir. 2013) (emphasis added) (§ 2339A) (quoting *United States v. Stewart*, 590 F.3d 93, 113 n.18 (2d Cir. 2009)); *see also Wultz v. Republic of Iran*, 755 F. Supp. 2d 1, 47 (D.D.C. 2010) (§ 2339C); *Owens v. Republic of Sudan*, 374 F. Supp. 2d 1, 13 (D.D.C. 2005) ("*Owens I*") (§ 2339A).

[12] *In re Chiquita Brands Int'l. Inc.*, 284 F. Supp. 3d at 1309; *see also Mehanna*, 735 F.3d at 43.

known" or "recklessly disregarded" do not meet the heightened *scienter* requirements under Section 2339A and 2339C. *See Backpage.com, LLC v. Lynch*, 216 F. Supp. 3d 96, 109 (D.D.C. 2016) (holding "reckless disregard" does not satisfy "knowing" mental state); FAC ¶¶ 112, 163, 220. Instead, the ATA "requires allegations of intentional misconduct—in addition to other state-of-mind requirements incorporated in §§ 2339A-2339C. . . ." *Wultz*, 755 F. Supp. 2d at 42. In other words, the "intentional misconduct" requirement for ATA civil actions mandates that Plaintiffs make plausible fact allegations of actual knowledge to satisfy the heightened mental state requirements for each predicate act. *See id.* at 53. Plaintiffs do not allege any facts to show that or how or when ECC had actual knowledge or intent, and therefore do not plausibly allege facts to satisfy the intentional misconduct element of the ATA. ECC is a decades-long contractor to the U.S. armed forces, with many ECC employees who were former U.S. military.[13] ECC worked hand in glove with the same military branches whose members include Plaintiffs. It is facially implausible that ECC would endanger their partners in the rebuilding of Afghanistan.

Specifically, Plaintiffs' allegations regarding ECC's mental state fall short of the actual knowledge standard, because they only make conclusory group allegations of *scienter* based on media and other third-party sources reporting on the general practices of private contractors in Afghanistan. Plaintiffs rely on these deficient allegations to leap to the conclusion that "Defendants knowingly (or recklessly) paid protection money to the Taliban." FAC ¶ 72; *see also, e.g.*, *id.* ¶¶ 9-11, 65-68, 112-13, 140, 2585-86. Plaintiffs depend almost entirely on this "shotgun" pleading approach, which is improper because it does not give each defendant fair notice of the

[13] Career Paths for Active Duty and Veterans, https://www.ecc.net/ecc/index.asp?page=100 ("ECC actively recruits people who have honorably served in the military … in 2019, nearly 20% of all new hires were military veterans!").

claims against it.[14] This Court routinely dismisses claims for this reason. *See, e.g.*, *Toumazou v. Turkish Republic of N. Cyprus*, 71 F. Supp. 3d 7, 21 (D.D.C. 2014) (dismissing because "the plaintiffs fail to distinguish between each entity, simply referring to all HSBC defendants collectively throughout the complaint and their briefing."); *Bates v. Nw. Human Servs., Inc.*, 466 F. Supp. 2d 69, 74 n.5 (D.D.C. 2006) (dismissing because "[i]t is unclear from the complaint exactly what role each defendant played in providing these services to the plaintiffs, as the plaintiffs almost entirely fail to distinguish between the defendants when making their factual allegations").

Plaintiffs also make many allegations that rest on "mere possibility," or are "merely consistent with … liability, [which] stops short of the line between possibility and plausibility of entitlement to relief." *Iqbal*, 556 U.S. at 678-79 (quoting *Twombly*, 550 U.S. at 570, 557) (internal quotation marks omitted); *see* FAC ¶¶ 3-6, 57-58, 72-73, 80, 88-91, 93-95 (all describing "typical" actions by "contractors" or "indications" of terrorist activity). None of these allegations shows ECC's actual knowledge that its payments to subcontractors "would be used in preparation for, or in carrying out" terror attacks.

The section of the FAC that specifically discusses ECC suffers from the same inadequacies. For example, Plaintiffs allege "ECC's payments were consistent with construction contractors' standard operating practice on projects with comparable funding profiles, security risks, and geographical coverage." FAC ¶ 219. Plaintiffs bootstrap this "standard operating practice"

[14] Plaintiffs' allegations against "Defendants" do not satisfy ATA pleading standards, *Jiggetts v. Dist. of Columbia*, 319 F.R.D. 408, 417 (D.D.C. 2017), because "given the extreme nature of the charge of terrorism, fairness requires extra-careful scrutiny of plaintiffs' allegations … to ensure that [ECC] does indeed have fair notice of what the plaintiffs' claim is and the grounds upon which it rests[.]" *Burnett v. Al Baraka Inv. & Dev. Corp.*, 274 F. Supp. 2d 86, 103-04 (D.D.C. 2003). ECC was not related to and, aside from the ArmorGroup Defendants, never worked with any other Defendant in Afghanistan.

allegation by rooting it in FAC Paragraphs 63 and 72-94, which contain only generalized allegations about protection payments made by unnamed contractors in Afghanistan, and are based on media reports, unrelated government investigations, and unrelated private studies. Like the rest of the FAC, Paragraphs 63 and 72-94 refer consistently and generally to "Western contractors," and companies or contractors "including Defendants," but never show that ECC itself had actual knowledge that its payments were going to support the attacks at issue here. *See also* FAC ¶¶ 4-5, 57, 60, 64, 68, 112, 114, 118, 135, 148, 165, 218. To the extent Paragraphs 63 and 72-94 do name names, Plaintiffs principally discuss companies unrelated to ECC. In one instance, the FAC refers to "the ArmorGroup Defendants" (which Plaintiffs redefine in the FAC to not include ECC) to allege that they were paying "real (yet no less unlawful) salaries they knew would benefit the insurgency." *Id.* ¶ 94. There are no facts and no citation support to show how or that ECC had actual knowledge that the ArmorGroup Defendants' payments "would benefit the insurgency."

This pattern continues throughout; rather than alleging facts specific to ECC, Plaintiffs extrapolate theories from unrelated source material about the general practices of unspecified "contractors" in Afghanistan to reach conclusions about ECC. For example, Paragraph 219 relies for support on Paragraph 92 to claim "ECC made payments to the Taliban worth at least several million dollars." But Paragraph 92 only alleges generally that "[c]ompanies paid" and conjectures that "many analysts estimated a largely consistent 20% across-the-board 'tax'" by the Taliban without alleging any specific facts plausibly showing ECC payments to the Taliban. FAC ¶¶ 92, 219. Plaintiffs' allegations fail for the same reasons as in *Owens II*, 897 F.3d at 276, where "[t]he complaint allege[d] that the Sudanese banks transmitted the funds from [the banks] directly to al Qaeda", but the court observed that there was "no nonconclusory allegation in the Complaint that plausibly shows that the moneys [the banks] transferred to [Sudan] were in fact sent to [al Qaeda]

or that [Sudan] would have been unable to fund the attacks by [al Qaeda] without the cash provided by [the banks].") (internal quotation marks and citation omitted).

Similarly, Paragraph 218 alleges that "ECC operated extensively in Kandahar Province, the traditional seat of Taliban power that was under near-total Taliban control" where "the Quetta Shura employed a standard practice of 'lev[ying] 'taxes' on major projects,' including by extracting 'protection money' from 'construction companies [and] private security firms.'" *Id.* ¶ 218. Plaintiffs base this allegation on a report that does not mention ECC or specify whether the companies and firms were American or Afghan.[15]

The FAC's new allegations that ECC and/or Defendants as a group had a general "policy" or "practice" of paying protection payments to the Taliban suffer from the same pleading defects. *See, e.g.*, FAC ¶¶ 218-19; *see also id.* ¶¶ 4, 9, 73, 79. The FAC does not allege concrete facts to support Plaintiffs' statement that "ECC maintained a general policy of paying the Taliban to protect the projects it implemented in Taliban-controlled or -influenced regions", but rather speaks in terms of generalized indications of ECC's "general policy". *See, e.g., id.* ¶ 218 (alleging a "pattern" by ECC "of hiring insurgent-connected contractors"). Similarly, the FAC bases its allegations of a general "Industry Practice" of protection payments by "U.S. construction and security contactors operating in Afghanistan" on "10 confidential witnesses," but none of these allegations make reference to ECC or any single Defendant. *Id.* "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." *Toumazou*, 71 F. Supp. 3d at 21 (internal quotation marks and citation omitted).[16] In tautological fashion repeated throughout the FAC,

[15] *See* Ex. 12 (Anand Gopal, The Battle for Afghanistan); *see also* FAC ¶¶ 218-19.

[16] This court has rejected similar attempts to establish a general practice or policy based on a handful of alleged wrongful events. *See Patrick v. District of Columbia*, 179 F. Supp. 3d 82, 89

Plaintiffs' rely upon the same types of general, conclusory allegations and public documents, none of which mention ECC or its subcontractors, let alone facts plausibly showing ECC made payments to the Taliban.[17]

a) The Senate Armed Services Committee Report Shows That ECC Did Not Have Actual Knowledge That Payments To Its Shindand Airbase Subcontractor Were Used To Fund Terror Attacks.

Even when they do make specific allegations about ECC regarding the Shindand Airbase contract, none plausibly show that ECC had actual knowledge. And while Plaintiffs rely heavily for their allegations on a report of the U.S. Senate Armed Services Committee ("SASC") following its 2010 inquiry into private security contractors in Afghanistan, Plaintiffs have cherry-picked the Senate Report, and fail to mention critical findings of the SASC. *See* Ex. 1 (Senate Report). Those omitted findings make it impossible for Plaintiffs to allege plausibly that ECC had actual knowledge to support their Section 2339A and 2339C claims.

Under its agreement with ECC, ArmorGroup committed to "supervise and direct operations within the Scope of Work", to "be solely responsible for the safety of its personnel and operations", and to "comply with all applicable laws, statutes, ordinances, regulations or orders and standards in the performance of the work hereunder." Ex. 3 (ECC-ArmorGroup Continuing Services Agreement), at ¶¶ 5 & 14. The Senate Report describes that ECC and ArmorGroup, with the help of the U.S. military, undertook an extensive due diligence process before hiring local security personnel for the Shindand Airbase project. *See* Ex. 1 (Senate Report) at 8-9, 58. ArmorGroup also warranted in its contract with ECC that it would conduct "a strict vetting and

(D.D.C. 2016) (rejecting "four anecdotes" as insufficient to establish a "discernible and specific pattern [of wrongful] conduct").

[17] The conclusory nature of these allegations is further apparent from the fact that the FAC repeats the same formulaic "general policy" argument for most Defendants. *See* FAC ¶¶ 148-49, 183-84, 187, 231-32, 248-49, 381-82, 403-04.

screening process" of potential employees, and that ArmorGroup required from each candidate "a signed declaration stating that they were not a member of the Taliban" and other verifications. *Id.* at 58-59. ECC and ArmorGroup also hired key personnel on the recommendation of U.S. military personnel on site at Shindand. The U.S. Military Team Leader referred ECC and ArmorGroup to two men, nicknamed Mr. Pink and Mr. White, who could provide the "30 local guards initially needed for the job." *Id.* at 8. The Senate Report concluded that Mr. White was "cooperating with American forces." *Id.*

In its investigation of the Shindand Airbase project, the SASC reported that "[t]he U.S. Military Team Leader … acknowledged recommending Mr. Pink to ECC" because "he 'was the person that we felt comfortable with,' and the Team Leader "did not suspect that Pink had Taliban ties or was working against Coalition interests." *Id.* at 9. Before the U.S. Military Team Leader recommended Mr. Pink, moreover, he "held a meeting with the Shindand governor and village elders from the Shindand District to make sure that they 'had no issues' with the referral of Pink to the contractor." *Id.* In addition, ECC's Security Manager discussed Mr. Pink and Mr. White with U.S. Military personnel before hiring them, and also "was advised that no derogatory information was found on any individual the company proposed to hire at Shindand." *Id.* at 10. ECC's Security Manager also met with Mr. Pink and Mr. White, who agreed to provide men from their villages to work as security guards at Shindand. *See id.*

Despite this due diligence, in December 2007, the SASC determined that Mr. Pink and his men ambushed and killed Mr. White. *See id.* at 14. ArmorGroup's Senior Team Leader stated in his interview with the SASC that he "attributed the shooting to competition over contracting work

at the airbase." *Id.* (explaining Mr. Pink wanted all of the Shindand security work).[18] Further, Mr. White and Mr. Pink "were rivals in everything, and just didn't like each other." *Id.* According to the Senate Report, it was in this context that an ECC employee allegedly commented, "it was kind of like a mafia thing. If you rub somebody out, you'll get a bigger piece of the pie." *Id.*; *but see* FAC ¶ 151 (mischaracterizing Senate Report). ECC accordingly did not have actual knowledge that Mr. Pink's killing of Mr. White was related to the Taliban or any other terrorist group.

The Senate Report confirms ECC's lack of actual knowledge that its payments to local security personnel allegedly would be used to fund terror attacks. On January 13, 2008, ArmorGroup received reports that Mr. Pink was "now aligned" with the Taliban. Ex. 1 (Senate Report), at 18. In response, ArmorGroup confiscated the cell phones of all of the local security guards, and on January 19, 2008, terminated all of the security personnel affiliated with Mr. Pink. *See id.* at 18-19. When interviewed by the SASC, the ArmorGroup Senior Team Leader stated his belief in retrospect that Mr. Pink had become affiliated with the Taliban because he no longer had income from Shindand Airbase. *See id.*

In the meantime, Mr. White's brother, nicknamed Mr. White II, met with ArmorGroup and ECC personnel about assuming his brother's role at Shindand. *See id.* at 17. The Senate Report concluded that, during that meeting, Mr. White II convinced ECC and ArmorGroup that he intended to pursue his brother's killer through government authorities, including the Afghan National Police ("ANP"). *See id.* Mr. White II also assured them that Mr. Pink and Mr. White's

[18] One ArmorGroup document examined by the SASC referred to Mr. Pink and Mr. White as "two feuding warlords," but sources SASC interviewed "said that the feud developed over time, resulting from competition for business at the airbase." Ex. 1 (Senate Report) at 8 & n.46. There is no suggestion that this feud was anything other than commercial, or that it involved any affiliation with the Taliban, confirming that ECC did not have actual knowledge that ArmorGroup's payments to local security personnel allegedly were going to support terror attacks.

feud "[would] have no bearing on the situation at the airfield." *Id*. ECC and ArmorGroup believed Mr. White II to be a Commander in the ANP when they hired him, or at least had a "close working relationship with the ANP." *Id.* at 17-18. All of these findings confirm ECC (and ArmorGroup for ECC) conducted due diligence in hiring local personnel, and that ECC did not have actual knowledge that its payments to its subcontractor allegedly would be used to fund terror attacks.

The earliest ECC allegedly learned of Mr. White II's alleged affiliation with the Taliban was August 21, 2008, when Mr. White II was killed while hosting a "Taliban meeting held in the village of Azizabad that was raided by U.S. and Afghan military forces." *Id*. at 5; FAC ¶¶ 154-55. The Senate Report discusses evidence that contradicts this conclusion, however. In the weeks following the Azizabad raid "information circulated that the raid was a result of false information provided to coalition forces by Mr. Pink . . . ." Ex. 1 (Senate Report) at 32; *see also id.* (Afghan President stating that Azizabad raid resulted from "total misinformation fed to the [coalition] forces"). In September 2008, Mr. Pink was arrested, tried, and convicted for "providing false information that led to" the Azizabad raid, thereby corroborating the statements of the Afghan President. *Id.* at 32 (noting that the verdict was later overruled).

The day after the Azizabad raid, ArmorGroup dismissed its guards from the Shindand Airbase project. *See id.* at iv, 30, 33. Plaintiffs admit this fact. *See* FAC ¶ 163. Although the FAC alleges that ArmorGroup subsequently "authorized a $1,000 discretionary payment to White II's family" as part of an ArmorGroup policy for compensating the families of guards killed on the job, ArmorGroup employees confirmed to the SASC that this payment was never made. *See* Ex. 1 (Senate Report), at 31-32. In any event, the FAC fails to allege facts to show that ECC had actual knowledge of or authorized ArmorGroup's discretionary payment.

The FAC also includes limited and conclusory allegations that ECC's subcontractor on the 2007 Shindand Ordnance Clearance contract, ArmorGroup's sister company Armor Group Mining Action (AGMA), made protection payments to the Taliban as part of the Shindand Ordnance project. FAC ¶ 175. Plaintiffs acknowledge that "ECC hired AGMA to conduct mine clearance around the Shindand Airbase in Herat Province," not to provide security services for the project.[19] *Id.* ¶¶ 147, 217. There are no allegations that Messrs. White (I, II, or III) or Pink had any involvement in this contract or that AGMA or ECC provided any protection payments or other support to these men or anyone affiliated with the Taliban in relation to this contract.[20]

b) ECC Did Not Have Actual Knowledge That Arvin Kam Had Any Affiliation With The Taliban, Any FTO, Or Any Terrorist Group While Employed By ECC On The Kunduz Police Project.

Plaintiffs also make allegations about ECC paying a settlement to Arvin Kam Construction Company, an Afghan construction firm that was a subcontractor on a U.S. Army Corps of Engineers ("USACE" or "the Army") project to build a police station in Kunduz. *See* FAC ¶¶ 224-28. Plaintiffs insinuate that the settlement amounted to a payment to a terrorist group, but Plaintiffs' allegations say nothing, as they must, about what ECC actually knew or intended or for what purpose the settlement money was to be used. *See id.* ¶ 227. The FAC also does not contain any facts to show that ECC had actual knowledge that any FTO or terrorist group was employed

[19] AGMA employed Mr. White II (and a Mr. White III) as security on its subcontract for another project in Afghanistan that was not affiliated with ECC or the Shindand Airbase project. *See* FAC ¶ 158; Ex. 1 (Senate Report) at 33-34.

[20] Like ECC's agreements with ArmorGroup for the Shindand Airbase, AGMA was obligated under its agreement with ECC to "comply with all applicable federal, state, and local statutes; DOD/Air Force/host nation instructions, manuals, handbooks, regulations, guidance, and policy letters." Ex. 4 (Task Order for Shindand Mine Clearance), ¶ 2.0. Plaintiffs allege no facts to plausibly support an inference that ECC or AGMA engaged in any wrongdoing related to this project, let alone that ECC knew of or approved any Taliban protection payments on its behalf by AGMA.

by ECC on the Kunduz project, or that ECC had actual knowledge or intent to make payments to Arvin Kam that would be used to support terror attacks.

Nearly two years after ECC hired Arvin Kam as a subcontractor on the Kunduz project,[21] on July 24, 2012, CENTCOM determined that Arvin Kam was "actively supporting an insurgency," a classification requiring ECC to terminate Arvin Kam.[22] It was the Air Force that notified ECC of this Section 841 determination. AFCEE is an Air Force agency that had been overseeing an unrelated contract on which Arvin Kam was ECC's construction subcontractor.[23]

By contrast, the Army (USACE) never informed ECC of CENTCOM's Section 841 determination. According to one SIGAR Report, this failure to notify was not uncommon.[24] It was ECC that affirmatively provided the Army with a copy of the Section 841 Notice, and "notified the [USACE] that it had received the § 841 notification … provided a list of projects and contract values that appellant had subcontracted to Arvin Kam," and "request[ed] that [the CO] promptly inform us if we are to take action, such as termination of this subcontractor."[25] The Army CO responded four days later, on August 16, 2012, and instructed ECC to terminate Arvin Kam within ten days. ECC terminated Arvin Kam on August 24 in compliance with the Army's directive. In other words, the FAC spins an implausible tale that depicts as a negative ECC's affirmative steps

[21] FAC ¶ 224; Ex. 5 (ECC-Arvin Kam Continuing Services Agreement).

[22] *See* Section 841, National Defense Authorization Act for Fiscal Year 2012, Publ. L. 112-81, 125 Stat. 1298, 1510-13 (Dec. 31, 2011); *see also* FAC ¶ 224.

[23] Ex. 7 (ASCBA Decision), at 1-2.

[24] SIGAR examined the USG's process for Section 841 designations during this time period and found that, despite being required to do so, the government contracting agencies "have not consistently informed their prime contractors of Section 841 designations or sent them copies of the notification letters." Ex. 13 (April 2013 SIGAR Report), at 6. This is exactly what happened here with USACE.

[25] Ex. 7 (ASBCA Decision), at 16.

to sound the alarm and immediately share that new information with the Army, to seek written guidance from the Army, and to comply with the Army's directives.

The USG: 1) engaged in intensive oversight and auditing of ECC's work on the Kunduz Police project,[26] *see* FAC ¶¶ 2, 133-34, 2) knew ECC was paying Arvin Kam for its construction work on the project, and 3) took no action against ECC despite being authorized to terminate or void its contracts with ECC. *See generally* Ex. 14 (Jan. 2013 SIGAR Report). Since then, moreover, the Army and other USG agencies have continued to award key contracts to ECC. Despite widespread scrutiny of the Arvin Kam "insurgency" issue during investigations and proceedings before the Army Corps of Engineers, the Armed Services Board of Contract Appeals ("ASBCA"), the SASC, and the SIGAR, the USG has never alleged that ECC was in league with Arvin Kam, or that ECC knew that its payments to subcontractors would be diverted to support terrorist activities.

When ECC subsequently filed a reimbursement claim for costs and delays resulting from the termination, *see* FAC ¶¶ 225-26, the ASBCA concluded that the USG failed to establish that it had a right to terminate Arvin Kam under Section 841, and also failed to prove the Army knew Arvin Kam was supporting an insurgency prior to receiving the order to terminate Arvin Kam. *See* Ex. 7 (ASBCA decision), at 25. If the Army did not know, neither did ECC. In fact, the Army's contracting officer on the Kunduz project confirmed: "[T]he termination was not based on what ECC[] knew or did not know, or on whether ECC[] had employed due diligence regarding investigation of Arvin Kam." Ex. 15 (Final Decision of Contracting Officer), at 13.

[26] The SIGAR audit of the Kunduz Police Project concluded that ECC had properly carried out its construction duties and did not identify any instances of fraud, inflation of costs, or improper payments. *See* Ex. 14 (January 2013 SIGAR Audit), at 1 ("Construction quality at the Kunduz ANP Provincial Headquarters generally meets contract specifications").

The FAC does not and could not make plausible allegations that ECC knew of any connection between Arvin Kam and any of the Attacks. The Court can take judicial notice that ECC hired Arvin Kam only 1) in response to the USG's SIGAR-audited "Afghan First Initiative", and 2) after ECC's due diligence review determined that Arvin Kam was qualified to subcontract on the project, and was not on the Excluded Parties List System (a USG-generated list of legally barred contracting parties).[27] In its agreement with ECC, Arvin Kam "agree[d] to be bound by, and . . . comply with, all federal, state and local laws, ordinances, codes, and regulations (Laws) applicable to the Work." Ex. 5 (ECC-Arvin Kam Continuing Services Agreement) §§ 2.12, 13.3. Consistent with ECC's due diligence of Arvin Kam, when ECC sought reimbursement of its increased costs according to the contract terms, ECC reasoned that "[t]he Government clearly has knowledge about Arvin Kam, which ECCI does not. … [T]he subcontracts were awarded to Arvin Kam, after ECCI conducted its due diligence. As such, the Government … is penalizing ECCI (via the Cure Notice), as if it is ECCI's fault for having subcontracted with Arvin Kam."[28]

Following its termination, Arvin Kam submitted a $9 million complaint against ECC to the Afghan Attorney General ("AAG"), claiming that ECC owed it for work it had performed on the Kunduz project prior to the USG-directed termination, and that the U.S. military had improperly

[27] *See* Ex. 6 (ECC's ASBCA Cross Motion for Summary Judgment), at 5. The "Afghan First Initiative" or "AFI," which was intended "to ensure that a greater number of contracts are awarded to Afghan companies" and thereby "support U.S. counterinsurgency (COIN) objectives by helping create job opportunities to improve the economy." *See* SIGAR Report (Afghan First Initiative Has Placed Work with Afghan Companies, but Is Affected by Inconsistent Contract Solicitation and Vetting, and Employment Data Is Limited), https://www.sigar.mil/pdf/audits/2012-01-31audit-12-06.pdf, at 1. The AFI was codified in Section 886 of Fiscal Year 2008 National Defense Authorization Act, P.L. 110-181, § 886, and fully integrated into the USG's contracts with ECC and other U.S. contractors in Afghanistan. *See* Ex. 16 (ECC Multiple Award Task Order Contract with USACE), at 14, 26, 56, 81.

[28] Ex. 15 (Final Decision of Contracting Officer), at 7.

designated it as "supporting an insurgency."[29] The AAG's Investigations Unit subsequently summoned ECC and Arvin Kam to its offices on a Saturday so that ECC could answer the AAG's questions about Arvin Kam's claims. ECC sought guidance from the United States government regarding the AAG's involvement, but never received a response. Ex. 9 (N.D. Cal. Motion for Summary Judgment), at 6-7. Under pressure from the AAG, ECC settled Arvin Kam's claims for work it completed and the Government had accepted prior to its termination, including the Kunduz Police contract. *See id;* FAC ¶ 227.

Plaintiffs fail to tell this Court the rest of the story, however. ECC subsequently obtained an order from a U.S. federal court voiding the Arvin Kam settlement *ab initio*.[30] *See Arvin Kam Constr. Co.*, 2019 U.S. Dist. LEXIS 64282, at *12. Further, ECC informed the USG, including the Army, on several occasions of its settlement with Arvin Kam. *See, e.g.*, Ex. 10 (Feb. 15, 2013 REA for Task Order 3), at 4 ("ECC experienced increased costs from the directed termination" including "$343,732.85 in Arvin Kam claim settlement cost…."); Ex. 11 (May 20, 2013 REA for Task Order 9), at 3 (similarly disclosing $55,000 in settlement costs to Arvin Kam). Despite that notice, the government never objected to ECC's settlement with Arvin Kam, never demanded that ECC recover its settlement payment, and never took any legal or other action against ECC. In fact, the U.S. agencies that oversaw ECC's contracts involving Arvin Kam, including USACE, continue to contract with ECC on other projects to this day. These facts all indicate that the USG did not object to the settlement payments to Arvin Kam as improper or illegal.

[29] Ex. 17 (Decl. of Col. Sadat, Arvin Kam Motion for Summary Judgment), at 1-2. The Afghan National Directorate of Security concluded that "[Arvin Kam] did not provide any support to any domestic or foreign entities involved in terrorism or terrorism related activities," and "[t]he Office of the President of Afghanistan directed the Afghan Ministry of Justice to clear [Arvin Kam] of any suspicion involving aid and support to terrorism." *Id.*

[30] *See* Ex. 9 (N.D. Cal. Motion for Summary Judgment), at 6-7.

The FAC and the documents it incorporates by reference or that are subject to judicial notice all confirm that Plaintiffs cannot (and did not) plausibly allege that ECC had actual knowledge that its payments to Arvin Kam pursuant to arms-length contracts were to "be used in preparation for, or in carrying out" terrorist attacks. Plaintiffs accordingly fail to satisfy the heightened *scienter* requirements of Sections 2339A and 2339C as to either the Shindand project or the Kunduz project, the two ECC projects about which Plaintiffs make substantive allegations.

2. Plaintiffs Do Not Plausibly Allege ECC "Willfully" Violated IEEPA.

Plaintiffs' attempt to use the International Emergency Economic Powers Act, 50 U.S.C. §§ 1705(a), 1705(c) ("IEEPA"), as a predicate act for primary liability under the ATA fails because the FAC does not plausibly allege that ECC "willfully violate[d], attempt[ed] to violate, conspire[d] to violate, or cause[d] a violation of regulations issued pursuant to IEEPA." *Owens v. BNP Paribas, S.A.*, 235 F. Supp. 3d 85, 88 n.3 (D.D.C. 2017) ("*Owens III*"). The *scienter* requirement for criminal IEEPA violations—the only type that can serve as an ATA predicate act—obliges Plaintiffs to allege "willfulness." This "requires more than mere voluntariness of action (or omission), but instead criminalizes conduct only if undertaken with knowledge that it was unlawful. In other words, in this context, 'willfully' means with 'knowledge of illegality.'" *United States v. Quinn*, 401 F. Supp. 2d 80, 101 (D.D.C. 2005); *see also United States v. Mousavi*, 604 F.3d 1084, 1094 (9th Cir. 2010) (requiring proof beyond a reasonable doubt that defendant acted with knowledge). Plaintiffs fail to clear this heightened *scienter* requirement, just as they do with regard to their 2339A-C claims.

While the FAC relies on Executive Order 13224, listing the Taliban as a Specially Designated Global Terrorist in 2002,[31] Plaintiffs make only conclusory and shotgun allegations that all "Defendants" "willfully … engage[d] in transactions with the Taliban." FAC ¶¶ 2592, 2596. The Court cannot credit these fact-free allegations, nor apply the FAC's group pleading as against any of the Defendants individually. Moreover, Plaintiffs have not alleged that ECC engaged in any transactions with the Taliban, nor have they pled sufficient facts to show that ECC's payments to its subcontractors were illegal under IEEPA. *See* FAC ¶ 2592.

An IEEPA-based ATA claim, like all ATA claims, must plausibly allege that ECC itself engaged in an "act of international terrorism" that caused Plaintiffs' injuries. *Taamneh v. Twitter, Inc.*, 343 F. Supp. 3d 904, 911 (N.D. Cal. 2018). Sanctions violations cannot constitute acts of "international terrorism", because they are economically driven and do not supply the requisite causation. *See, e.g., Owens II,* 897 F.3d at 274; *see also Kemper v. Deutsche Bank AG,* 911 F.3d 383, 390 (7th Cir. 2018); *see also infra* Part II(A)(3) (no proximate causation); II.B (no act of international terrorism). Plaintiffs' reliance on sanctions is dispositive of their IEEPA claim.

3. Plaintiffs Fail To Allege Either Proximate Causation Or But-For Causation For Their Primary Liability Claims.

Plaintiffs cannot plead a valid ATA claim unless they also plausibly allege facts to demonstrate proximate causation because "the ATA ultimately is a tort statute. That means that causation must be proven before liability is established." *Kemper*, 911 F.3d at 390; *see Owens II*, 897 F.3d at 275. In fact, it is "textbook tort law" that Plaintiffs must have plausibly alleged facts to show both proximate cause and but-for causation, according to *Comcast Corp. v. Nat'l Ass'n of African Am.-Owned Media*, 206 L. Ed. 2d 356, 361 (U.S. 2020).

[31] Specially Designated Nationals and Blocked Persons List, U.S. Department of the Treasury, https://sanctionssearch.ofac.treas.gov/Details.aspx?id=261

Plaintiffs' withdrawal of their 2339B claim against ECC necessarily forecloses either type of causation. By abandoning their prior claim that ECC provided material support to an FTO, Plaintiffs acknowledge that they cannot link ECC's actions to the alleged FTO-led "syndicate" in which the Taliban was "intimately intertwined" with Al Qaeda and the Haqqani Network. FAC ¶¶ 101, 471, 473.

Independent of that 2339B concession, Plaintiffs' causation theory fails to establish but-for causation, because it depends on the notion that ECC's subcontractor payments were diverted to the Taliban and thereby "gave the Taliban fungible resources that were vital to [the Taliban's] ability to sustain its terrorist enterprise." FAC ¶ 99 (emphasis added); *see also id.* ¶ 110. As a matter of law, Plaintiffs' money-is-fungible causation theory cannot satisfy but-for causation, because it acknowledges that the Taliban acquired funds from multiple sources, any one of which could have funded the Attacks. Indeed, in multiple other lawsuits, Plaintiffs purport to identify those other funding sources, and acknowledge that those sources are unrelated to ECC. As another district court explained, "[e]ven if an ATA plaintiff could show that a particular dollar was used in furtherance of a particular attack . . . . that plaintiff still could never prove that absent the defendant's providing that dollar, a group like Hamas would not have made up the shortfall from elsewhere." *Linde v. Arab Bank, PLC*, 97 F. Supp. 3d 287, 324 (E.D.N.Y. 2015).

There likewise is no plausible proximate causal-connection between ECC's arms-length subcontractor payments and the attacks at issue. Among other elements, proximate cause requires a "substantial factor" relationship between a defendant's acts and a plaintiff's injury. *Owens II*, 897 F.3d at 275. Because the Taliban has multiple funding sources, and given the alleged number of intermediary actors between ECC's subcontractor payments and the attackers, and the alleged remoteness in time and geography between ECC's operations and the attacks, Plaintiffs cannot

allege plausibly that ECC's payments were a substantial factor in the terror attacks at issue here. *Kaplan v. Lebanese Canadian Bank, SAL*, 405 F. Supp. 3d 525, 533 (S.D.N.Y. 2019) (granting motion to dismiss where, *inter alia*, plaintiff did not show that "Hizbollah would not have been able to carry out the attacks absent those specific funds"). Equally, those same factors demonstrate that it was not "reasonably foreseeable" that ECC's subcontractor payments would cause the terror attacks in this case.

a) The Supreme Court's Ruling In *Comcast* Requires But-For Causation, And Invalidates Plaintiffs' Reliance On The "Fungible Dollars" Argument.

The Supreme Court recently confirmed that the "ancient and simple 'but for' common law causation test…supplies the 'default' or 'background' rule against which Congress is normally presumed to have legislated when creating its own new causes of action." *Comcast*, 206 L. Ed. 2d at 362 (quoting *University of Texas Southwestern Medical Center v. Nassar*, 570 U.S. 338, 347 (2013)); *see also Babb v. Wilkie*, 206 L.Ed.2d 432, 448 (2020) ("But-for causation is 'the background against which Congress legislate[s],' and it is 'the default rul[e Congress] is presumed to have incorporated, absent an indication to the contrary in the statute itself.'") (quoting *Nassar*, 570 U.S. at 347).

This default rule applies in any tort case, including under the ATA. *See Comcast*, 206 L. Ed. 2d at 360 ("In the law of torts, … a plaintiff must first plead and then prove that its injury would not have occurred 'but for' the defendant's unlawful conduct"); *Babb*, 206 L.Ed.2d at 447-48 ("We have explained that '[c]ausation in fact—*i.e.*, proof that the defendant's conduct did in fact cause the plaintiff 's injury—is a standard requirement of any tort claim."') (quoting *Nassar*, 570 U.S. at 346, and citing various types of tort cases). "[T]hese are the default rules [Congress] is presumed to have incorporated, absent an indication to the contrary in the statute itself." *Nassar*,

570 U.S. at 347. There is no indication in the language of the ATA that Congress removed the but-for causation requirement in the statute.

The ATA's "by reason of" language requires "some causal connection between the act of international terrorism and the U.S. national's injury." *Owens II*, 897 F.3d at 270. Plaintiffs are accordingly obligated to meet the but-for causation standard in addition to proximate cause. *Owens III* addressed this same language in the context of the ATA, and held that "the 'by reason of' language has a well-understood meaning . . . . This language requires 'a showing that the defendant's violation not only was a 'but for' cause of the injury, but was the proximate cause as well.'" 235 F. Supp. 3d at 96 (internal citation omitted) (quoting *Rothstein v. UBS AG*, 708 F.3d 82, 95 (2d Cir. 2013)); *see also Comcast*, 206 L. Ed. 2d at 363 (holding that "'by reason of '… [is a] term[] we have often held indicate[s] a but-for causation requirement") (quoting *Gross v. FBL Fin. Servs.*, 557 U.S. 167, 176-77 (2009)).

Comcast vitiates prior out-of-circuit-precedent holding that the ATA does not require but-for cause, because those older cases did not engage in the textual analysis required by *Comcast*, but instead implemented a non-textual and policy-based desire to make it easier to punish terrorists. This is evident from those cases' focus on concerns about the functionality and legislative history of the ATA, rather than on statutory construction.[32] *See* 206 L. Ed. 2d at 362. *Comcast* also nullifies past ATA cases that depended upon legislative history, because *Comcast* held that

[32] For example, in *Goldberg v. UBS AG*, the district court relied on "[c]ommon sense" to hold that the ATA does not require but-for causation, because "[s]uch a burden would render the statute powerless to stop the flow of money to international terrorists, and would be incompatible with the legislative history of the ATA." 660 F. Supp. 2d 410, 429 (E.D.N.Y. 2009); *see also Kemper*, 911 F.3d at 391; *Gill v. Arab Bank PLC*, 893 F. Supp. 2d 474, 507-08 (E.D.N.Y. 2012); *Strauss v. Credit Lyonnais, S.A.*, No. CV-06-0702, 2006 U.S. Dist. LEXIS 72649, at *57 (E.D.N.Y. Oct. 5, 2006); *Linde*, 97 F. Supp. 3d at 323, 325.

legislatively-created tort causes of action mandate a but-for causation standard unless Congress expressly provides otherwise. *See id.* (citing cases).

The FAC does not—and cannot—plausibly allege that the Taliban attacks at issue would not have occurred in the absence of ECC's payments to its subcontractors. The FAC nowhere alleges that ECC's payments to its subcontractors directly funded the attacks in which Plaintiffs were harmed, or that ECC's payments were irreplaceable for purposes of the Taliban's funding stream. Instead, the FAC emphasizes that "Defendants' protection payments . . . gave the Taliban fungible resources." FAC ¶ 99 (emphasis added); *see also id.* ¶ 110. While Plaintiffs allege their claims based on the principle that money is fungible, such that Plaintiffs do not need to trace ECC's subcontractor payments to the Taliban attacks here, the "but for" standard reiterated in *Comcast* cannot be satisfied with a "money is fungible" approach. *See id.* ¶¶ 99, 110.

This Circuit rejects the FAC's attempt to cure the defects in that argument, namely that Defendants' funding of the Taliban was "necessary" or "essential" by enabling local Taliban commanders "to pay fighters and to launch attacks." *See id.* ¶¶ 98, 104; *Owens II*, 897 F.3d at 276 ("The complaint allege[d] … these funds were necessary for al-Qaeda to carry out the embassy bombings … 'these are conclusory allegations that do not meet *Twombly's* plausibility standard with respect to the need for a proximate causal relationship'") (quoting *Rothstein* , 708 F.3d at 97 (emphasis added).

Applying the but-for causation standard in this case, Plaintiffs cannot plausibly trace ECC's payments to the Attacks, because the Taliban had multiple funding sources to fund its attacks. Now-superseded ATA decisions in the federal district courts expressed that very concern: "But-for causation … is nearly impossible to prove, because money is fungible. … [and a] plaintiff still could never prove that absent the defendant's providing that dollar, a group like Hamas would not

have made up the shortfall from elsewhere." *Linde*, 97 F. Supp. 3d at 324.[33] Plaintiffs and pre-*Comcast* courts may consider that outcome undesirable, but neither can dispense with but-for causation in ATA cases—it is the rule.

b) Plaintiffs Never Demonstrate Proximate Cause Because They Rely On Generalized Allegations Instead of Plausible Facts.

The FAC likewise fails to meet the ATA's "traditionally rigorous proximate cause requirement."[34] Under that standard, an ATA plaintiff must plausibly allege both (1) that the defendant's conduct was a "substantial factor" in causing his or her injuries and (2) that those injuries were "reasonably foreseeable or anticipated as a natural consequence" of the defendant's conduct. *Owens II*, 897 F.3d at 273. Plaintiffs cannot establish proximate cause as to ECC, because—even in Plaintiffs' most fantastic scenario—the many independent intermediary actors between ECC and the terrorists who committed the Attacks, and the remoteness in time and geography between ECC's construction projects and the Attacks, destroys the alleged proximate cause. *Atchley*, 2020 U.S. Dist. LEXIS 126469, at *27; *see supra* at 4, 24-25. Also dispositive of Plaintiffs' claims is their sudden reliance on an alleged amorphous Taliban-al-Qaeda "syndicate" of the same ilk rejected in *Brill v. Chevron Corp.*, No. 15-cv-04916, 2018 U.S. Dist. LEXIS 137579, at *13-14 (N.D.Cal. Aug. 14, 2018) ("Plaintiffs offer no facts indicating that Chevron's money somehow retained its identity and cohesiveness as it traveled through the hands of these

[33] *See also Strauss*, 2006 U.S. Dist. LEXIS 72469 at *58-59 ("Because money is fungible, it is not generally possible to say that a particular dollar caused a particular act or paid for a particular gun."); *Gill*, 893 F. Supp. 2d at 507-08 ("[R]equiring an ATA plaintiff, at least in the material support context, to prove but-for causation would come up against the basic problem of the fungibility of money").

[34] *Shatsky v. PLO*, No. 02-2280 (RJL), 2017 U.S. Dist. LEXIS 94946, at *23 (D.D.C. June 20, 2017), *vacated on other grounds by* No. 17-7168, 2020 U.S. App. LEXIS 11734 (D.C. Cir. Apr. 14, 2020); *see also Owens II*, 897 F.3d at 273.

many intermediaries. [P]laintiffs . . . must allege more than that Chevron contributed funds to an evil empire.").

To satisfy the substantial-factor requirement, a plaintiff "must" establish "some direct relation between the injury asserted and the injurious conduct alleged"; the "central question" is whether ECC's allegedly wrongful conduct "led directly" to the Plaintiffs' injury. *Owens II*, 897 F.3d at 273 n.8 (citations and internal quotes omitted).[35] Plaintiffs here have the same problem the Second Circuit identified in *In re Terrorist Attacks,* 714 F.3d at 124, *i.e.*, the "plaintiffs do not allege that the Rule 12(b)(6) defendants participated in the September 11, 2001 attacks or that they provided money directly to al Qaeda; nor are there factual allegations that the money allegedly donated by the Rule 12(b)(6) defendants to the purported charities actually was transferred to al Qaeda and aided in the September 11, 2001 attacks." Plaintiffs' allegations are even more attenuated, particularly given that ECC and ArmorGroup took meaningful steps to prevent terrorist associations.

Plaintiffs must also plausibly allege that their "injur[ies] w[ere] reasonably foreseeable or anticipated as a natural consequence" of ECC's conduct.[36] "Foreseeability alone is not sufficient to establish proximate cause." *Bank of Am. Corp. v. City of Miami*, 197 L. Ed. 2d 678, 689 (2017). When an ATA defendant engages in business with an entity that is not designated as an FTO, as ECC did here with its non-FTO subcontractors, federal courts reject causation based on attacks committed by third parties, even if a plaintiff alleges that the defendant's counter-party in the

[35] *See also Fields v. Twitter, Inc.*, 881 F.3d 739, 744 (9th Cir. 2018) ("[T]o satisfy the ATA's 'by reason of' requirement, a plaintiff must show at least some direct relationship between the injuries that he or she suffered and the defendant's acts."). Plaintiffs' allegations fall short of those requirements, much as in *Terrorist Attacks on September 11, 2001 v. Al Rajhi Bank* (*In re Terrorist Attacks on September 11, 2001*), 714 F.3d 118, 124 (2d Cir. 2013).

[36] *Rothstein*, 708 F.3d at 91 (quoting *Lerner v. Fleet Bank, N.A.*, 318 F.3d 113, 123 (2d Cir. 2003)); *Fields*, 881 F.3d at 747.

business relationship funded or supported the third-party attackers. "Thus, given that Defendants' alleged Iranian clients are engaged in worldwide commerce, it strains credulity to assume or infer that any person or business that provides services to such organizations, even illegal services, becomes 'a substantial factor in the sequence of responsible causation' for any terrorist attack that the Iranian organization later supports." *Freeman v. HSBC Holdings PLC*, 413 F. Supp. 3d 67, 94, 97 n.38 (E.D.N.Y. 2019) (quoting *Rothstein*, 708 F.3d at 91).[37]

ECC's subcontractors were certainly not FTOs. Plaintiffs thus have a higher burden of proof, and must allege plausible facts to show how ECC's commercial relationship with its subcontractors pursuant to contracts with the U.S. military substantially and foreseeably contributed to the terror attacks here. Plaintiffs fail to carry that burden because, both now and during the life of the subcontracts, the non-FTO counter-parties here (ECC's subcontractors) have a host of legitimate business activities and do not "solely exist for terrorist purposes."[38]

Plaintiffs do not even attempt to link two of ECC's projects (Ring Road[39] and Shindand Ordnance Clearance[40]) to the Taliban attacks at issue here. Plaintiffs' effort to do so with ECC's

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[37] *Brill*, 2018 U.S. Dist. LEXIS 137579, at *13-14 (dismissing ATA claims based on illegal "kickbacks" to pre-war Iraqi officials who allegedly helped Saddam Hussein fund terrorist attacks, because imposing ATA liability on the defendant "only for doing business, albeit illegally, with a rogue state would extend the scope of the [ATA] far beyond Congress's mandate").

[38] *Freeman*, 413 F. Supp. 3d at 94; *O'Sullivan v. Deutsche Bank AG*, No. 17 cv 8709-LTS-GWG, 2019 U.S. Dist. LEXIS 53134, at *28 (S.D.N.Y. Mar. 28, 2019) (same); *Brill*, 2018 U.S. Dist. LEXIS 137579, at *13-14 (collecting cases).

[39] "On January 17, 2012, the Asian Development Bank awarded a multiyear, $477 million contract to a joint venture that ECC controlled and directed, under which ECC was to construct a 233-kilometer portion of Afghanistan's Ring Road." *Id.* ¶ 217(e). Plaintiffs only generally allege that the "Ring Road was a particularly frequent target of the Taliban, with contractors regularly paying protection money to secure their work on the road." *Id.* ¶ 218. Plaintiffs do not allege that ECC made any payments to the Taliban that led directly to the terror attacks at issue here.

[40] Plaintiffs do not make any specific allegations concerning ECC's contract to clear ordnance on Shindand Airbase, nor do they allege that ECC made any payments to its subcontractors that were subsequently passed onto the Taliban. *See supra* at n. 1; FAC ¶ 217(c).

three other projects (Kandahar Airfield,[41] Shindand Airbase Construction, and the Kunduz Police project) fail the *Owens II* proximate-cause test as a matter of law, because the FAC contains no plausible allegations that ECC's subcontractor-payments "led directly" to Plaintiffs' injuries or that those injuries were "reasonably foreseeable." 897 F.3d at 273 n.8.

With regard to Shindand Airbase, Plaintiffs allege that ECC's subcontractor, ArmorGroup, "paid … substantial sums of money under its contract with ECC" to security personnel who were allegedly affiliated with the Taliban. FAC ¶ 150. But the FAC fails to establish proximate causation, because it never plausibly alleges that ECC made direct payments to the Taliban during the Shindand Airbase project, that ECC's payments to ArmorGroup at Shindand Airbase were given to the Taliban, or that ArmorGroup exists solely to further terror. *See supra* Part I(A)(3). The FAC also does not allege facts to show that the payments ArmorGroup made to its Shindand Airbase individual security personnel who were allegedly affiliated with the Taliban "led directly" to the Attacks. Equally problematic is that the FAC does not directly connect the security personnel working for ArmorGroup with any of the Attacks.

Further, any payments and support that ArmorGroup allegedly provided to security personnel hired by Mr. Pink and Mr. White cannot establish proximate cause because they were too remote in time and distance from the attacks at issue here. The earliest Attacks at issue here occurred on December 30, 2009, over one year after ArmorGroup ceased providing security services to ECC on the Shindand Airbase Contract and nearly 16 months after ArmorGroup

[41] On February 28, 2011, the Air Force awarded ECC a contract to construct "infrastructure for an airfield in Kandahar, Afghanistan." FAC. ¶ 217(a). SIGAR auditors did not conclude that any ECC payments were diverted to terrorist groups or to support terrorist activity. SIGAR auditors concluded certain ECC payments made to local laborers lacked certain documentation, see Ex. 2 (2016 SIGAR Report), at 16-17, FAC ¶ 218, but noted ECC had other relevant information about the Afghan laborers, including information about the work performed and monthly salaries. Ex. 2 (2016 SIGAR Report), at 27-28.

terminated all personnel connected to Mr. Pink and Mr. White II, and therefore allegedly affiliated with the Taliban. *See* FAC ¶ 458.

In addition, the December 2009 attacks took place in Khost Province, approximately 600 miles from the Shindand Airbase in Herat Province. *See id.* None of the Plaintiffs were attacked in Herat Province. The attacks closest to Shindand Airbase were in neighboring Badghis province, but both attacks occurred on May 17, 2010 and April 24, 2011—17 months and 29 months, respectively, after ArmorGroup stopped working as ECC's security subcontractor. *Id.* ¶¶ 576, 976.[42] Given these facts, Plaintiffs cannot establish that ECC's payments to ArmorGroup "led directly" to any of Plaintiffs' injuries or that any such injuries were a foreseeable consequence of ECC's actions. *Owens II*, 897 F.3d at 273 n.8.

The same issues defeat proximate cause with regard to the Kunduz Police contract. The FAC does not allege any plausible facts to show that ECC made direct payments to the Taliban during the Kunduz Police project, or that ECC's payments to Arvin Kam for its work on the project or in settlement of Arvin Kam's claims were given to the Taliban. *See supra* Part II(A)(1)(b). Plaintiffs also never allege substantive facts to show that ECC directly supported a terrorist group, financially or otherwise, which "led directly" to the terror attacks on Plaintiffs. Instead, Plaintiffs assert that ECC should be primarily liable under the ATA for payments it made for construction services to its subcontractor, because CENTCOM determined (nearly two years into the project) that Arvin Kam was "supporting an insurgency" in Afghanistan. FAC ¶ 224. The FAC contains

[42] Similarly, Plaintiffs' allegations regarding the Kunduz Police project are too remote: Three attacks on Plaintiffs occurred in Kunduz Province in June 2010—over two months before ECC was awarded the Kunduz Police project on September 16, 2010. *See* FAC ¶¶ 589, 1059, 1507. One attack occurred in neighboring Baghlan Province on January 20, 2011, over two and a half years before Arvin Kam was designated as "supporting an insurgency." *Id.* ¶¶ 2227. *See, e.g.*, *Siegel v. HSBC N. Am. Holdings*, 933 F.3d 217, 224 (2d Cir. 2019).

no facts evidencing that ECC knew before the CENTCOM notification that Arvin Kam was "supporting an insurgency," nor were the facts supporting the CENTCOM determination ever disclosed to ECC. The government's acquiescence in ECC's actions concerning Arvin Kam reflects government's view that ECC's payments to Arvin Kam were not causally linked to any insurgent activity.

B. Payments For Legitimate Services Pursuant To An Arms-Length Contract Are Not An Act of International Terrorism.

To establish their primary liability claims under the ATA, Plaintiffs must allege that ECC itself committed an act of "international terrorism." 18 U.S.C. § 2331. Plaintiffs thus must allege plausible facts to show that ECC's actions "appear to be intended" to "intimidate or coerce a civilian population," to "influence the policy of a government by intimidation or coercion," or to "affect the conduct of a government by mass destruction, assassination, or kidnapping." *Id.* This test "does not depend on the actor's beliefs, but imposes on the actor an objective standard to recognize the apparent intentions of actions." *Weiss v. Nat'l Westminster Bank PLC*, 768 F.3d 202, 207 n.6 (2d Cir. 2014). Plaintiffs also must have alleged that ECC's actions were "violent" or "dangerous to human life." 18 U.S.C. § 2331(1)(A).

Plaintiffs concede that ECC engaged security and construction subcontractor services for a purely commercial purpose, that is, to perform and safeguard its construction projects in Afghanistan so that ECC could earn revenue and perform under its contracts with the U.S. military.[43] Plaintiffs also admit that ECC paid its subcontractors pursuant to (and in settlement of)

[43] *See e.g.*, FAC ¶¶ 3-4 ("Defendants" payments were "[t]o protect those businesses and maximize their profits," "saved Defendants money," and were viewed as the "the cost of doing business"), ¶ 65 (alleging "Defendants" "chose to pay not because of any reconstruction imperative, but because it served their financial interests"), ¶ 164 ("ECC had financial motives for buying security").

arms-length contracts.[44] *See id*. ¶¶ 94, 95. Surprisingly, Plaintiffs have emphasized Defendants' alleged financial motivations in the FAC, by arguing that ECC had "a profit motive for Defendants to orchestrate protection payments." *Id*. ¶ 66; *Kemper*, 911 F.3d at 390 (defendant was "motivated by economics, not by a desire to 'intimidate or coerce,'", and consequently could not have intended to "intimidate or coerce a civilian population," to "influence the policy of a government by intimidation or coercion," or to "affect the conduct of a government by mass destruction, assassination, or kidnapping") (citing 18 U.S.C. § 2331(1)(B)).

Because Plaintiffs' Section 2331 "act of international terrorism" argument merely alleges routine commercial activity, Plaintiffs must plead additional facts to show that ECC's payments to its subcontractors were "violent" or "dangerous to human life" and were "intended to intimidate or coerce." 18 U.S.C. § 2331(1)(A)-(B).[45] As here, "the provision of [commercial] services, which are not inherently violent or dangerous," cannot qualify as "acts dangerous to human life, particularly because the factual allegations delineating relationships between those services and the terrorist attacks at issue are so attenuated." *O'Sullivan*, 2019 U.S. Dist. LEXIS 53134, at *33.[46]

a) Plaintiffs Have Not Sufficiently Alleged Terroristic Intent Under 18 U.S.C. § 2333(a).

Plaintiffs do not allege, as they must, that ECC had knowledge or intent that it would be supporting terror groups or terrorist activity rather than paying subcontractors for contracted

[44] Defendants' reliance on local personnel was also mandated by the Afghan First Initiative. *See supra* n.27.

[45] *Kaplan*, 405 F. Supp. 3d at 532 (dismissing case because "the provision of financial services does not, in itself, equate to international terrorism. Plaintiffs must plausibly allege that Defendant's own actions" involved violence, were intended to intimidate or coerce) (citing *Linde*, 882 F.3d at 326).

[46] ECC notes that all of Plaintiffs' claims are barred by the ATA's Act of War exception, because the attacks on Plaintiffs took place during the course of the United States' armed conflict with the Taliban. *See* 18 U.S.C. 2336(a); ECF No. 104-1 (IRD, Blumont Motion to Dismiss), at 44-45.

security and construction services. At Shindand Airbase, ECC paid its subcontractor, ArmorGroup, and ArmorGroup was responsible for vetting and paying its local security personnel, including Mr. Pink, Mr. White, and Mr. White II. *See supra* at Part II(A)(1)(a) (discussing personnel at Shindand Airbase project); Ex. 1 (Senate Report) at 8-9, 58; FAC ¶ 217(a). ArmorGroup warranted in the subcontract with ECC that its employees were "subject to a strict vetting and screening process" and that ArmorGroup required from each candidate "a signed declaration stating that they were not a member of the Taliban" and other verifications. Ex. 1 (Senate Report) at 58-59.

As further evidence that ECC did not have terroristic intent, ECC with ArmorGroup undertook a due diligence process before it hired its key local security personnel at Shindand Airbase. The Senate Report did not find fault with ECC's and ArmorGroup's extensive due diligence process, and determined that ArmorGroup's decision to rely on local personnel to provide security was commercially reasonable and necessary. *Id.* at 81, 88.

The lack of terrorist intent equally is evident from ECC's termination (through ArmorGroup) of Shindand Airbase security personnel suspected to be affiliated with the Taliban. The Senate Report confirms that "in January 2008 ArmorGroup fired at least 15 guards at Shindand after determining that some of them were providing information on airfield security to a local warlord who was reportedly aligned with the Taliban." *Id.* at 61. Following the Azizabad raid, in August 2008, when ECC learned that Mr. White II was affiliated with the Taliban, ECC (through ArmorGroup) terminated all Shindand Airbase security guards under Mr. White II's supervision. *See id.* at 33-34; FAC ¶ 163.

ECC's conduct on the Kunduz Police project with Arvin Kam reinforces that ECC took action to avoid any support for terrorists or insurgents. Before it contracted with Arvin Kam, ECC

completed a due diligence review to confirm that Arvin Kam was a suitable contracting partner. Ex. 18 (ASBCA Complaint), ¶ 5. During the contract's performance, when ECC learned of Arvin Kam's insurgency designation from the Air Force, it proactively informed the Army contracting officer for the Kunduz project. *See* Ex. 7 (ASBCA Decision), at 1-2.

ECC's actions and the Senate Report's conclusions individually and collectively negate any plausible allegation of terroristic intent. Plaintiffs' allegations show only that ECC's payments to its subcontractors objectively were motivated by a desire to efficiently and securely manage its various construction contracts and to earn revenue, and to implement the USG's plans to reconstruct Afghanistan after many years of conflict. *See* FAC ¶¶ 3-5, 59; *Strauss*, 379 F. Supp. 3d at 160-61 (holding that there was no terroristic intent because defendant "merely provided banking services to [the FTO] for ostensibly charitable purposes"). In contrast, *Linde* held Arab Bank had terroristic intent, because the evidence "demonstrated that defendant Arab Bank processed bank transfers that 'were explicitly identified as payments for suicide bombings.'" *Strauss*, 379 F. Supp. 3d at 160 (contrasting *Strauss* with *Linde*, 882 F.3d at 321).

b) The FAC Fails To Allege Plausibly That ECC Engaged In "Violent Acts or Acts Dangerous To Human Life."

The FAC also fails to allege plausibly that ECC's routine commercial payments to its subcontractors were "violent acts or acts dangerous to human life". *Linde*, 882 F.3d at 319, 327 (holding that even "providing routine financial services to members and associates of terrorist organizations" cannot alone "compel a finding as a matter of law, the services were violent or life-endangering acts."). The FAC's only relevant, non-conclusory allegations about ECC are: 1) that ECC hired and paid its subcontractors pursuant to arms-length contracts for security and construction services; 2) that ArmorGroup (on behalf of ECC as its security subcontractor) terminated local employees after ECC and ArmorGroup learned that some of the Shindand Airbase

security personnel had a possible Taliban connection; 3) that ECC terminated Arvin Kam in accord with the USG's instructions; and, 4) that ECC settled (but later voided) Arvin Kam's claims seeking payment for pre-termination construction work. None of these amount to allegations comprising an act dangerous to human life by ECC. *See Kaplan*, 405 F. Supp. 3d at 532 (holding although defendant was aware it was violating U.S. sanctions by providing financial services to Hizbollah affiliates, "the provision of financial services does not, in itself, equate to international terrorism"); *O'Sullivan*, 2019 U.S. Dist. LEXIS 53134 at *31-33 (holding "the provision of banking services, which are not inherently violent or dangerous" were not "acts dangerous to human life").

C. Plaintiffs Fail To State A Claim For Secondary Liability Under The ATA.

Plaintiffs' withdrawal of their claim against ECC under 18 U.S.C. § 2339B—material support of an FTO—equally collapses their secondary-liability claim under JASTA (Count 5), which depends on alleged ECC support for an Attack committed by an FTO. *See* FAC ¶¶ 522 ("Each of the acts of international terrorism described below was committed by the Taliban, including the Haqqani Network, or jointly committed by the Taliban and al-Qaeda"), 413 ("Due to the mutually reinforcing ties between the Taliban and al-Qaeda in Afghanistan, support for the one benefited the other"). JASTA requires Plaintiffs to plausibly allege that ECC "knowingly provid[ed] substantial assistance" to an act of international terrorism "committed, planned, or authorized by an organization that had been designated as a foreign terrorist organization [FTO]." 18 U.S.C. § 2333(d). Having conceded that they cannot show that ECC provided "material support" to an FTO, Plaintiffs necessarily further concede that they cannot show that ECC provided "substantial assistance" to an FTO attack.

Further, with that conceded missing link between ECC and any FTO, Plaintiffs necessarily concede they cannot satisfy the "knowingly" element of an aiding and abetting claim, which

"requires the secondary actor to be 'aware' that, by assisting the principal, it is itself assuming a 'role' in terrorist activities" and to have been "aware that … it was playing a role in violent or life-endangering acts whose apparent intent was to intimidate or coerce civilians or to affect a government." *Linde*, 882 F.3d at 329-30.

The FAC plausibly alleges only that the Attacks were committed solely by the Taliban,[47] which is not an FTO as JASTA requires. Even so, the FAC does not plausibly allege either that ECC provided "substantial assistance" to any Attack waged by the Taliban, or that ECC knew that it was playing a role in any Taliban terrorist acts. Nor can Plaintiffs thread the needle by arguing that the Taliban committed the Attacks, but received support in doing so from FTOs. In JASTA, "Congress … circumscribe[ed] aiding-and-abetting liability to situations where an FTO *itself* had a significant role in a particular attack."). *Atchley*, 2020 U.S. Dist. LEXIS 126469, at *34-35 (emphasis in original). Accordingly, allegations of "[g]eneral support or encouragement [are] not enough" to satisfy JASTA's requirement that an FTO planned or authorized an attack. *Id*. at *34 (rejecting claims Hezbollah "authorized the attacks by exerting religious authority over JAM ... and through its role in recruiting, training, and indoctrinating JAM fighters") (internal quotation marks and citations omitted); *Crosby*, 921 F.3d at 626 (finding allegations that ISIS "virtually recruited" insufficient to satisfy JASTA's FTO requirement). Finally, Plaintiffs cannot escape JASTA's requirements by predicating secondary liability on RICO, because RICO does not require the same proof elements as JASTA. *Owens II*, 897 F.3d at 278 ("JASTA … confirms that Congress knows how to provide for aiding and abetting liability explicitly.").

[47] Plaintiffs' "syndicate" theory is factually implausible, which the FAC acknowledges by alleging that the Taliban was solely responsible for 132 of the Attacks. Further, the USG distinguishes al-Qaeda—a designated FTO since 1999—from the Taliban, an organization that still considers itself the rightful government of Afghanistan and a partner for peace with the United States.

1. The FAC Fails To Allege Plausible Facts To Show That ECC Substantially Assisted Attacks By A Designated FTO or By the Taliban.

ECC's payments to its subcontractors according to an arms-length contract do not equate to "substantial assistance" to terrorists who committed the Attacks that injured Plaintiffs. In *Halberstam v. Welch*, 705 F.2d 472 (D.C. Cir. 1983), the D.C. Circuit identified six factors relevant to "how much encouragement or assistance is substantial enough" to satisfy the *scienter* requirement that the defendant "must knowingly and substantially assist the principal violation." 705 F.2d at 477-78; *see also Siegel*, 933 F.3d at 225 (citing *Halberstam*, 705 F.2d at 483-88) (listing six factors). Plaintiffs' allegations of "substantial assistance" are insufficient because "there are insufficient allegations that Defendants played a role in any particular terrorist activities." *Taamneh*, 343 F. Supp. 3d at 918. ECC has demonstrated that its payments to subcontractors under USG contracts are too attenuated from the Attacks to constitute substantial assistance for purposes of proximate cause. With no plausible fact allegations to show a substantial connection to the attacks for primary-liability purposes, Plaintiffs likewise cannot demonstrate that ECC's subcontractor payments provided substantial assistance to an FTO in order to commit the attacks on Plaintiffs. In fact, a review of recent ATA case law by another district court revealed a general "trend in JASTA case law toward disallowing claims against defendants who did not deal directly with a terrorist organization or its proxy." *Averbach v. Cairo Amman Bank*, No. 19-cv-0004-GHW-KHP, 2020 U.S. Dist. LEXIS 10902, at *40 (E.D.N.Y. Sept. 16, 2019) (collecting cases and dismissing secondary liability claim against bank that serviced high ranking Hamas members but not Hamas itself), *aff'd by* No. 1:19-cv-00004-GHW, 2020 U.S. Dist. LEXIS 40430 (S.D.N.Y. Mar. 9, 2020).

With regard to the Shindand Airbase project, ECC and ArmorGroup promptly terminated all security personnel hired by Mr. Pink and Mr. White II when reports surfaced in January 2008

and August 2008, respectively, alleging that the two men were affiliated with the Taliban. *See* Ex. 1 (Senate Report), at 18-19, 30; *supra* at Part II(A)(1)(a). The FAC contains no plausible fact allegations linking Mr. Pink and Mr. White to the Haqqani Network or any FTO. There are no plausible fact allegations that ArmorGroup was a mere pass-through to the Haqqani Network or any FTO, let alone that ECC had actual knowledge to that effect. Any alleged payments or support by ArmorGroup to Shindand Airbase security personnel purportedly affiliated with the Taliban ceased years before the Haqqani Network was designated as an FTO in September 2012; ECC's subcontract with ArmorGroup ended in December 2008. *See* FAC ¶ 1270; Ex. 1 (Senate Report), at 36.

The same deficiencies are dispositive of Plaintiffs' claims about ECC's work on the Kunduz Police contract. ECC demonstrated in Part II(A) that the FAC does not plausibly allege facts to show how or that ECC had actual knowledge that Arvin Kam had an affiliation with the Taliban, let alone an FTO, or that any ECC payments to Arvin Kam for legitimate construction work were supporting the Taliban or any other FTO. *See supra* at Part II(A)(1)(b). Plaintiffs' failure to allege plausible facts to show ECC had actual knowledge that it made payments to support the Haqqani Network or any other FTO warrants dismissal of the secondary liability claim against ECC.

The six-factor *Halberstam* test further demonstrates that the FAC fails to allege plausibly that ECC substantially assisted the attacks against Plaintiffs. First, in making payments required by arms-length and objectively commercial contracts, ECC cannot plausibly be said to have "encouraged" the third-party attacks that ultimately injured Plaintiffs. Plaintiffs must allege ECC acted in a manner that encouraged the specific act in question or, at a minimum, activities involving violence. *See Siegel*, 933 F.3d at 225; *Honickman v. Blom Bank SAL*, 432 F. Supp. 3d 253, 268-

270 (E.D.N.Y. 2020); *Averbach*, 2020 U.S. Dist. LEXIS 10902, at *52. There are no non-conclusory allegations in the FAC that ECC acted so as to encourage violent acts or the attacks in question.

Second, Plaintiffs do not identify the "amount of" assistance allegedly given by ECC to the entities that committed the attacks, beyond suggesting that, "ECC made payments to the Taliban worth at least several million dollars." FAC ¶ 219. Plaintiffs support this allegation, which is based on the notion that "on information and belief, . . . ECC made payments that were … worth at least 20 to 40 percent of its contracts value," by citation to a single statement from an anonymous Afghan construction contractor and a discussion of the National Solidarity Program, in which ECC did not take part. *Id.* (citing FAC ¶ 91 (citing Ex. 22 (Funding the Taliban, Global Post))). Although ECC employed Afghan construction firm Arvin Kam, a SIGAR audit of the Kunduz Police Project found no accounting irregularities that would support the argument that Arvin Kam had earmarked a percentage of its subcontracting costs for the Taliban. Ex. 14 (January 2013 SIGAR Audit). Plaintiffs do not identify any payments that flowed from ECC to an FTO, nor do they explain how such payments contributed to the attacks on Plaintiffs. *See Honickman*, 432 F. Supp. 3d at 268.

Third, Plaintiffs (correctly) do not and cannot allege that ECC or its employees were "presen[t]… at the time of the tort." *Siegel*, 933 F.3d at 225 (dismissing case where "HSBC was not 'present' at the time of the November 9 Attacks."). For example, the district court in *Atchley* recently dismissed claims of secondary liability on the basis that the Halberstam factors were not met because "Plaintiffs … do not allege that defendants directly assisted JAM itself … absent a link between [the] support and the principal violation, defendants' assistance is not substantial." 2020 U.S. Dist. LEXIS 126469, at *38-39.

Fourth, the FAC does not allege facts to show that ECC has a "relationship" with an FTO that committed the attacks on Plaintiffs. *See Siegel*, 933 F.3d at 225 (dismissing secondary liability claim where "plaintiffs do not plead any non-conclusory allegations that HSBC had a relationship with [an FTO]."). '"[A]rms-length'… relationship[s]," like those ECC had with its subcontractors, cannot form the basis for substantial assistance. *Taamneh*, 343 F. Supp. 3d at 918. Fifth, Plaintiffs do not, and cannot, allege plausible facts that ECC knowingly and intentionally assumed a role in or supported the terror attacks by an FTO. Instead, the FAC alleges only that ECC's payments went to its subcontractors for construction and security services pursuant to the parties' contracts. *See Siegel*, 933 F.3d at 225; *Kaplan*, 405 F. Supp. 3d at 536. Sixth, *Halberstam* instructs that "[t]he length of time an alleged aider-abettor has been involved with a tortfeasor . . . may afford evidence of the defendant's state of mind." 705 F.2d at 484. None of ECC's arms-length relationships with its subcontractors or their employees evidences that ECC was "involved with a tortfeasor" engaged in terrorist activity, including the attacks at issue here. *Id*. With only those attenuated allegations, Plaintiffs fail to plausibly allege "substantial assistance" under JASTA. Plaintiffs' secondary liability claim must be dismissed.

2. The FAC Does Not Sufficiently Plead That ECC Was "Aware" It Was Assuming A "Role" In Terrorist Activities.

JASTA provides that federal courts should look to *Halberstam* for guidance regarding ATA aiding and abetting liability. *Halberstam* requires that "the defendant must be generally aware of his role as part of an overall illegal or tortious activity at the time that he provides the assistance" and "must knowingly and substantially assist the principal violation." 705 F.2d at 477. The defendant must have been "generally aware that, [by providing [] services] it was thereby playing a role in … violent or life-endangering activities." *Siegel*, 933 F.3d at 224 (internal quotation marks and citations omitted); *see also Owens II*, 897 F.3d at 277 (holding when

defendant provides assistance, it must be '"generally aware' of its role as part of [an FTO's] illegal activities").

"In other words, it is not enough for a defendant … to be aware that its conduct violates the law … or that the organization or entity [with which it is commercially engaged] supports terrorist organizations; the [defendant] must be aware that through its own conduct, whether legal or illegal, it is assuming a role in actual terrorist activity." *Freeman v. HSBC Holdings PLC*, No. 18-CV-7359, 2020 U.S. Dist. LEXIS 99370, at *21-22 (E.D.N.Y. June 5, 2020). This *scienter* requirement is no less strict than that of primary ATA liability, which requires actual knowledge. *See Siegel*, 933 F.3d at 224. Plaintiffs fail to make out a valid aiding and abetting claim because they cannot satisfy the strict *scienter* requirement of "awareness", because the FAC alleges only that ECC made payments to its subcontractors pursuant to arms-length subcontracts for construction and security services on USG project sites. Plaintiffs nowhere allege facts to demonstrate that ECC was aware it had assumed a role in an FTO's terrorist activities. *See also Linde*, 882 F.3d at 329 ("[A]iding and abetting an act of international terrorism requires more than the provision of material support to a designated terrorist *organization*. Aiding and abetting requires the secondary actor to be 'aware' that, by assisting the principal, it is itself assuming a 'role' in terrorist activities.") (emphasis in original); *Siegel*, 933 F.3d at 224-26; *Honickman*, 432 F. Supp. 3d at 269.

Plaintiffs also rely largely on allegations about "Defendants" knowledge as a whole, particularly with regard to the operations of the alleged Taliban-Al Qaeda "syndicate." *See* FAC ¶¶ 476, 521. This is not only impermissible group pleading, but it is fatal to Plaintiffs' claims, because Plaintiffs do not allege that ECC knew it was playing a "role" in a terrorist group's activities. Courts consistently reject generalized knowledge allegations like these. In *Siegel*, 933

F.3d at 224, for example, the FAC alleged the defendant "was aware that [a third party] was believed by some to have links to … terrorist organizations." To plead a valid aiding and abetting claim, however, the plaintiff needed to make "further allegations that would support a conclusion that [the defendant] knowingly played a role in the terrorist activities." *Id.*; s*ee also Taamneh,* 343 F. Supp. 3d at 917. Even in cases where there are plausible allegations that the defendant provided material support directly to a designated FTO, courts require that plaintiffs allege specific knowledge that defendant was playing a "role" in terrorist activity, over and above support for a terrorist organization itself. *Linde*, 882 F.3d at 329-30; *Strauss*, 379 F. Supp. 3d at 164.

Plaintiffs fail to include "further allegations that would support a conclusion that [ECC] knowingly played a role in the terrorist activities" in this case. *Siegel*, 933 F.3d at 224. The FAC instead rests on allegations that all "Defendants" made subcontractor payments that provided "fungible resources" to a terrorist group or insurgency. FAC ¶ 99. There are no plausible allegations that ECC was aware that, by paying Arvin Kam or ArmorGroup, ECC was playing a "role" in terrorist activity, including the attacks that harmed Plaintiffs.

3. RICO Cannot Supplant JASTA's Secondary Liability Requirements.

Plaintiffs allege that hundreds of multiple-individual terror attacks over a decade constituted a "Taliban al-Qaeda Campaign", an alleged enterprise for purposes of RICO, which Plaintiffs claim suffices for secondary ATA liability. FAC ¶¶ 2606-615. *Owens II* confirmed that Section 2333(d)'s requirements are the only route by which the ATA permits secondary liability. 897 F.3d at 278. Plaintiffs cannot use RICO (and its less stringent requirements) as an ATA predicate, because an FTO must commit the act of international terrorism. *See Atchley*, 2020 U.S. Dist. LEXIS 126469, at *25*; Halberstam,* 705 F.2d at 477; *see also supra* Part II(C)(1).

JASTA secondary liability requires both that a defendant "knowingly and substantially assist the principal violation", and that a designated FTO commit, plan, or authorize the act of terrorism that injures the plaintiff. *Halberstam*, 705 F.2d at 477; 18 U.S.C. § 2333(d)(2). JASTA requires "an act" and a "connect[ion] with a specific crime," and not "an organization's general course of conduct." *Taamneh*, 343 F. Supp. 3d at 916. Plaintiffs ignore that an ATA defendant must be "generally aware" it is playing a "role" in a specific course of violent conduct—they first use the word "act" to mean numerous individual Taliban attacks for purposes of the RICO predicate, *see* FAC ¶ 2609, but then claim that the "Taliban-al-Qaeda Campaign was an act of international terrorism." *Id.* ¶ 2610.

RICO requires that specific entities or individuals—as distinct from the enterprise—commit the RICO violations. *See* 18 U.S.C. § 1962(c). It is a "basic principle that to establish liability under § 1962 one must allege and prove the existence of two distinct entities "(1) a 'person'; and (2) an 'enterprise' that is not simply the same 'person' referred to by a difference name." *Cedric Kushner Promotions Ltd. v. King*, 533 U.S. 158, 161 (2001) (emphasis added). Liability "depends on showing that the defendants conducted or participated in the conduct of the enterprise's affairs, not just their own affairs." *Id.* at 163 (internal quotation marks and citation omitted). Plaintiffs maintain that the "Taliban" is both the enterprise through which al-Qaeda and the Haqqani Network operated, *see* FAC ¶ 2608, and the perpetrator of the attacks against Plaintiffs.

III. CONCLUSION

Plaintiffs' claims against ECC should be dismissed with prejudice.

Dated: September 10, 2020

Respectfully submitted,

SQUIRE PATTON BOGGS (US) LLP

/s/ Mitchell R. Berger

Mitchell R. Berger (D.C. Bar No. 385467)
Alexandra E. Chopin (D.C. Bar No. 490736)
2550 M Street, NW
Washington, DC 20037
mitchell.berger@squirepb.com
alexandra.chopin@squirepb.com

Counsel for Defendant
Environmental Chemical Corporation

CERTIFICATE OF SERVICE

I hereby certify that on September 10, 2020, I caused to be filed a copy of the foregoing Motion to Dismiss to be served through the Court's CM/ECF system, and service was effected electronically to all counsel of record.

/s/ Mitchell R. Berger
Mitchell R. Berger (D.C. Bar No. 385467)
Counsel for Defendant
Environmental Chemical Corporation