IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

MEMORANDUM IN SUPPORT OF DEFENDANT
CHEMONICS INTERNATIONAL, INC.'S MOTION TO DISMISS

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INTRODUCTION

Chemonics honors Plaintiffs' service and respects the sacrifices they have made for our country. But Chemonics strenuously denies the baseless claim that it had any role in causing Plaintiffs' injuries. Since 2001, Chemonics has steadfastly supported the U.S. mission to create lasting peace and security in Afghanistan. Indeed, Chemonics employees have worked for decades in Afghanistan and dedicated themselves for nearly twenty years, at considerable personal risk, to helping the U.S. Government rebuild Afghanistan into a safer and more prosperous place in which the Taliban can no longer rule by oppression and violence. In carrying out that difficult work, Chemonics' own employees have been killed and injured in attacks committed by the Taliban.

Since shortly after the U.S.-led invasion in 2001, Chemonics has worked alongside the U.S. Agency for International Development ("USAID"), the U.S. Department of State, and the U.S. military to stabilize and improve Afghanistan. At the direction of USAID, Chemonics has carried out projects there to increase sustainable agricultural output, prevent hunger, increase the role of women in public life, and establish better local governments and institutions. Plaintiffs' notion that, all the while, Chemonics secretly funded the very militants who were fighting against the U.S. mission, killing Chemonics' own employees, and undermining Chemonics' own work is false and offensive.

Even affording the few well-pleaded allegations in the First Amended Complaint ("FAC") the presumption they are due on a motion to dismiss, Plaintiffs' claims against Chemonics fail for numerous reasons. *First*, all of Plaintiffs' claims against Chemonics are nonjusticiable under the political question doctrine. Plaintiffs claim that Chemonics is liable for the Taliban's acts of international terrorism on the theory that it was "impossible" for any "Western contractor" to perform U.S. Government contracts in furtherance of U.S. foreign policy without also being extorted by the Taliban. Such a theory is nonjusticiable and beyond Article III jurisdiction because

it would require the Court to decide whether the political branches' foreign policy and national security decisions to stabilize and rebuild Afghanistan, and to conduct that work through Chemonics, led unavoidably to support for the Taliban, *i.e.*, that the U.S. Government itself is to blame for putting its contractors in an impossible position.

Second, leaving aside the FAC's condemnation of U.S. policies, the FAC suffers from fatal pleading defects. Plaintiffs' allegations are too generic and generalized to state any claim against Chemonics. The FAC's extensive footnotes, irrelevant details, and length are no substitute for factual allegations relating to Chemonics. Nor can Plaintiffs rely on group pleading, guilt-by-association, or unfounded assumptions based on "operational geography," "project type," or alleged "industry practice." FAC ¶ 403. The mere fact that the U.S. Government required Chemonics to work in or near Taliban strongholds is not a basis to state a claim. And the only allegations specific to Chemonics are contradicted by documents that the FAC itself cites.

Third, Plaintiffs' claims that Chemonics is directly liable under the Anti-Terrorism Act ("ATA") for committing "acts of international terrorism" fail, as Plaintiffs do not and cannot plead all the elements of those claims. Plaintiffs do not and cannot allege that Chemonics' hiring of subcontractors to protect and house its personnel and property "appear[s] to be intended" to "intimidate" or "coerce" a civilian population or to influence government policy through intimidation or coercion, as required to constitute "international terrorism." 18 U.S.C. § 2331(1)(B). Nor do Plaintiffs make any non-conclusory allegations that Chemonics *knew* its alleged payments would materially support or fund terrorist attacks, as required to plead the *mens rea* element of the criminal predicates to Chemonics' alleged "acts of international terrorism." *See* 18 U.S.C. §§ 2339A, 2339C. Plaintiffs also have not adequately alleged the proximate causation element, as any alleged causal chain between Chemonics' hiring of subcontractors and attacks on

U.S. forces (most of which occurred years later) is both far too attenuated and interrupted by the actions of many third parties.

Fourth, Plaintiffs' aiding-and-abetting claims likewise fail. Plaintiffs do not and cannot allege conduct by Chemonics that could amount to "substantial" assistance to perpetrators of terrorist acts, as 18 U.S.C. § 2333(d) requires. They also fail to satisfy the requirement that Chemonics knew it was "*itself* assuming a 'role' in terrorist activities," *Linde v. Arab Bank, PLC*, 882 F.3d 314, 329 (2d Cir. 2018) (emphasis added). Moreover, although Congress carefully limited secondary ATA liability to claims arising from acts "committed, planned, or authorized" by an officially designated foreign terrorist organization ("FTO"), 18 U.S.C. § 2333(d)(2), Plaintiffs' claims arise from acts committed by the Afghan Taliban, which the U.S. Government never designated as an FTO. And Plaintiffs cannot plead around this defect using a non-sensical RICO theory or blanket allegations that al-Qaeda (an FTO) was involved in every attack.

Finally, numerous Plaintiffs' claims against Chemonics must be dismissed as time-barred because they arose more than ten years before Plaintiffs sued Chemonics.

All of Plaintiffs' claims against Chemonics should be dismissed in their entirety.

FACTUAL BACKGROUND

A. The U.S.-Led War In Afghanistan

Following the September 11 attacks, the United States invaded Afghanistan in October 2001. FAC ¶¶ 43-44. U.S. and allied forces quickly toppled the Taliban-controlled government in Kabul, *id.* ¶ 45, and in December 2001, the United Nations Security Council authorized the United States and the International Security Assistance Force ("Coalition") to help the newly formed Afghan government maintain security and rebuild the country. *Id.* ¶ 46.

In the nearly 20 years of armed conflict that followed, more than 1,500 U.S. service members were killed, and more than 20,000 were wounded, while serving in Afghanistan. *Id.*

¶ 51. Although the Afghan Taliban were responsible for many of those U.S. casualties, the United States declined to designate the Afghan Taliban an FTO, partly to allow for their inclusion in peace talks in which both Afghan and U.S. officials were involved.[1] The U.S. Government ultimately entered into a comprehensive peace agreement with the Taliban on February 29, 2020.[2]

B. USAID Engages Chemonics To Help Deliver Humanitarian And Reconstruction Assistance As Part Of U.S. Foreign Policy In Afghanistan

Shortly after the invasion, Congress determined both that "the United States should provide significant assistance to Afghanistan so that it is no longer a haven for terrorism" and that "[t]he delivery of humanitarian and reconstruction assistance … is critical to the future stability of Afghanistan." Afghanistan Freedom Support Act of 2002, Pub. L. No. 107-327, § 206(a)(1), (2). Congress thus authorized the President to provide assistance to meet the "urgent humanitarian needs of the people of Afghanistan." *Id.* § 103(a)(1). Congress further directed Executive departments and agencies to "rehabilitat[e]" Afghanistan's economy, including its "agricultural infrastructure," in part to "creat[e] jobs for former combatants"; "assist in the development of the capacity of the Government of Afghanistan to meet the needs of the people … through … support to increase the transparency, accountability, and participatory nature of governmental institutions"; and engage in counter-narcotics efforts by "assist[ing] in the eradication of poppy cultivation" and

[1] Mujib Mashal, *Haqqanis Steering Deadlier Taliban In Afghanistan, Officials Say*, N.Y. Times (May 7, 2016), ("*Haqqanis Steering Deadlier Taliban*"), https://tinyurl.com/nythaqqanisarticle (cited at FAC ¶ 446 n. 507). This Motion treats as true the FAC's non-conclusory factual allegations and relies only on materials that are either incorporated by reference in the FAC or subject to judicial notice. *See Stewart v. Nat'l Educ. Ass'n*, 471 F.3d 169, 173 (D.C. Cir. 2006); *Al-Aulaqi v. Panetta*, 35 F. Supp. 3d 56, 67-68 (D.D.C. 2014). All websites referenced were last visited Sept. 10, 2020. Unless otherwise specified, internal citations and quotation marks are omitted. All exhibits cited are attached to the Declaration of Patrick J. Carome, filed herewith.

[2] Agreement for Bringing Peace to Afghanistan (Feb. 29, 2020), https://www.state.gov/wp-content/uploads/2020/02/Agreement-For-Bringing-Peace-to-Afghanistan-02.29.20.pdf.

"purchas[ing] nonopium products … in opium-growing areas." *Id.* § 103(a)(3)-(5).

After 2002, Congress repeatedly authorized, and appropriated funds for, further aid to Afghanistan. Congress emphasized that the Secretary of State, "in consultation with the [USAID] Administrator … and the Secretary of Defense, should enhance [U.S.] reconstruction efforts in Afghanistan by emphasizing … support of Afghan entities and institutions," and by requiring USAID "to consult regularly with appropriate local Afghan leaders in their respective provinces and ensuring that … reconstruction and development activities support local needs." Consolidated Appropriations Act, 2010, Pub. L. No. 111-117, § 7076(a), (e), 123 Stat. 3034, 3394 (2009).[3]

Pursuant to Congressional and Executive policy decisions, USAID began to deliver U.S. humanitarian and reconstruction assistance soon after the U.S.-led invasion in October 2001. USAID implemented U.S. foreign policy to "support the process of recovery, rehabilitation and political development in post-conflict Afghanistan," including by supporting infrastructure, food security, economic development, and by strengthening democracy and governance.[4]

To help deliver this assistance in furtherance of U.S. foreign policy, USAID engages private sector organizations like Chemonics, an international development firm based in Washington, DC, with approximately 5,000 employees.[5] Having worked alongside the U.S. Government for decades, Chemonics first performed work in Afghanistan under USAID contracts in 1975, many years before the Taliban was founded. Chemonics has been continuously working with the U.S. Government in Afghanistan since early 2002—and remains an active USAID

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[3] *See generally Foreign Assistance in Afghanistan*, ForeignAssistance.gov, https://www.foreignassistance.gov/explore/country/Afghanistan (listing U.S. development assistance per year).

[4] *Afghanistan*, USAID (Dec. 1, 2017), https://www.usaid.gov/political-transition-initiatives/where-we-work/closed-programs/afghanistan.

[5] *Who We Are*, Chemonics, https://chemonics.com/who-we-are/.

"implementing partner" there today—fulfilling U.S. foreign policy priorities through USAID-sponsored projects.[6] Awarded nineteen USAID contracts in Afghanistan since 2001, Chemonics earned praise from USAID for "strengthening communities, linking [Afghans] to their government in new ways," "improving people's views of their government," and "laying a foundation for sustainable peace."[7] The FAC refers to seven of Chemonics' projects for USAID, which were focused on agricultural development, municipal government capacity-building, and providing Afghan farmers alternatives to cultivating poppies for the opium market. FAC ¶ 402.[8]

Since 2001, it has been difficult and dangerous to perform aid work in Afghanistan. As the country has been torn apart by armed conflict, FAC ¶¶ 50-52, Chemonics' offices and employees have repeatedly come under attack. On at least seven occasions, Chemonics employees or subcontractors paid with their lives. For instance, in May 2005, four Chemonics employees were ambushed and murdered in two separate Taliban attacks while working on the USAID-sponsored ALP/S project in southern Afghanistan.[9] And in April 2010, three guards employed by a Chemonics security subcontractor were killed, and three Chemonics employees working on the USAID-sponsored RAMP-UP South project were injured, when their worksite in Kandahar was targeted in a suicide bombing attack.[10]

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[6] *See Afghanistan: Implementing Partners*, USAID, https://www.usaid.gov/afghanistan/implementing-partners (last updated Sept. 10, 2019).

[7] Ex. A, Letter from Justin Sherman, OTI Country Representative, and Todd Diamond, Chemonics Chief of Party, to ASI South Team (May 30, 2012).

[8] The FAC refers to the projects by acronym and starting year, as follows: 2003 RAMP, 2005 ALP/S, 2006 ASAP, 2009 ASI, 2010 RAMP-UP South, 2013 RADP-S, and 2014 RADP-W.

[9] *Afghanistan: Killings Raise Concerns For Aid Workers' Safety*, Radio Free Europe/Radio Liberty (May 20, 2005), https://www.rferl.org/a/1058952.html; *6 Afghans killed in ambush*, N.Y. Times (May 20, 2005), https://tinyurl.com/nytchemonicsstory.

[10] USAID OIG, F-306-12-001-P, Audit Of USAID/Afghanistan's Afghanistan Stabilization Initiative for the Southern Region, 2 (Nov. 13, 2011), https://oig.usaid.gov/sites/default/files/2018-06/f-306-12-001-p.pdf (cited at FAC ¶ 403 n.478);

Chemonics' work in Afghanistan was subject to a web of rigorous U.S. Government vetting, oversight, and reporting requirements.[11] For instance, USAID required contractors to submit non-U.S. subcontractors to the USAID Afghanistan Mission Counter-Terrorism Team for anti-terrorism vetting to ensure that U.S. funds were not paid to terrorists.[12] Pursuant to that policy, USAID vetted and approved one of the very few Chemonics transactions mentioned in the FAC: its leasing of facilities in Kandahar from a relative of Gul Agha Sherzai (whom Plaintiffs allege had an unspecified "relationship" with the Taliban, FAC ¶ 410) after the Taliban bombed Chemonics' prior quarters there.[13] And USAID's "Afghanization Strategy" required Chemonics to replace expatriate staff with Afghans and "empower [Afghan] municipal officials."[14]

C. Plaintiffs' Claims Concerning Defendants Generally

In December 2019, Plaintiffs filed this suit, claiming thirteen U.S. Government contractors were collectively responsible for the Taliban terrorist attacks that killed or injured Plaintiffs or their family members. *See* Compl., ECF No. 1. In June 2020, Plaintiffs filed the FAC, adding four new Defendants, including Chemonics.

The FAC is filled with generic allegations unrelated to any particular Defendant or even to the Defendants as a group. Entire sections, for instance, "describe the post-invasion Afghanistan contracting environment" and "survey the evidence" regarding extortion payments by unspecified

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Afghanistan war: Kandahar hit by two car bombs, Christian Science Monitor (Apr. 16, 2010), https://www.csmonitor.com/World/terrorism-security/2010/0416/Afghanistan-war-Kandahar-hit-by-two-car-bombs.

[11] *See* Ex. B, USAID, Fact Sheet on Accountable Assistance for Afghanistan (A3) (June 2011) (cited at FAC ¶ 72 n.35).

[12] Ex. C, USAID Afghanistan Mission Order 201.04, at 6 (May 9, 2011).

[13] Ex. D, Letter from Laura Mendelson, USAID Kabul Vetting Support Unit, to Sarmed Rashid, Chemonics International (Nov. 16, 2011).

[14] *See* Ex. E, USAID, Work Plan, Regional Afghan Municipalities Program for Urban Populations (RAMP UP) – South, at 5 (May 15, 2013).

"large Western contractors." FAC ¶ 54. The FAC alleges that "contractors spending Western aid" in Afghanistan "faced unusually high corruption risks," *id.* ¶ 56; that "Western contractors … knowingly structured their transactions to exploit that corrupt business environment," *id.* ¶ 57; that "contracting practices typically led to poor-quality work that undermined U.S. reconstruction objectives," *id.* ¶ 58; and that the "Taliban's Code of Conduct confirms the group's systematic practice of extracting protection payments from large firms," *id.* ¶ 86.

These generalized sections of the FAC use broad assertions, without citation or support, to claim Defendants collectively engaged in such alleged "typical[]" practices. The FAC alleges, for example, that "Defendants virtually always agreed to pay" extortion payments to the Taliban, *id.* ¶ 85; that "Defendants often (but not always) paid the Taliban through their local subcontractors," *id.* ¶ 5; and that "[m]any projects in Afghanistan involved chains of subcontractors—in which a prime contractor funneled both the work and the money through layers of additional corporate entities—and Defendants exploited that structure to facilitate payments to insurgents without detection," *id.* According to the FAC, all contractors in Afghanistan—including Defendants—allegedly paid "protection money" to persons or entities tied to the Taliban. *Id.* ¶¶ 1-17, 53, 57, 62, 96. The FAC alleges that some such payments went directly to Taliban "contracts officers," while others supposedly involved the hiring of security guards associated with the Taliban. *Id.* ¶¶ 84, 90, 91.

Painting with the broadest of brushes, the FAC alleges that all Defendants knew or recklessly disregarded that, one way or another, some money from such payments ultimately reached the Taliban. *Id.* ¶¶ 112-126. The FAC alleges such "knowledge" only circumstantially—such as from a Defendant or one of its subcontractors meeting with Taliban members, *id.* ¶ 113, or from mere reporting in the press of these alleged practices, *id.* ¶¶ 121, 123. Plaintiffs allege that

Defendants or their subcontractors made such payments to protect Defendants' personnel and projects from attacks while increasing Defendants' profits, theorizing that for Defendants to have met their security needs through "legitimate" means would have cost more and caused Defendants to win fewer awards of government contracts. *Id.* ¶¶ 65-66.

The FAC does not allege that any particular payments by Defendants were used to fund any particular attacks by the Taliban. The FAC instead claims that the alleged payments resulted in the Taliban having "fungible resources," *id.* ¶ 99, which allegedly were used to purchase weapons and explosives, *id.* ¶ 102. The FAC alleges that the Taliban and other groups (the "Haqqani Network" and the "Kabul Attack Network") carried out the hundreds of attacks at issue here. And it claims that every one of these same attacks was also "committed, planned, and authorized" by yet another group, Al Qaeda. *Id.* ¶ 464.

D. The FAC's Sparse Allegations About Chemonics

Only after the first 66 pages of generalized allegations and group pleading does the FAC begin to focus in on any individual Defendant. Of the 266 subsequent paragraphs that purport to pertain to particular Defendants, *id.* ¶¶ 145-411, only eleven pertain to Chemonics. One of those paragraphs alleges that, "[f]rom at least 2006 through at least 2015, Chemonics maintained a general policy of paying the Taliban to secure its projects." *Id.* ¶ 403. The FAC's only purported support for that allegation is that (1) "protection payments to the Taliban were pervasive and routine among USAID contractors," (2) Chemonics operated USAID-funded projects in areas of Afghanistan that "were under near-total Taliban control," (3) "Chemonics focused on agricultural and stabilization projects, which both were especially potent sources of insurgent finance," and (4) an audit performed by the Special Inspector General for Afghanistan Reconstruction ("SIGAR") concluded that Chemonics had insufficient documentation on one project. *Id.* Plaintiffs contend that the latter—the allegedly insufficient documentation—is a "strong indication of protection

payments." *Id.* They further contend based on what they claim was "standard practice" among "the largest development contractors" that Chemonics made payments to the Taliban that were, "on information and belief, worth at least 20 to 40 percent of its contracts' value." *Id.* ¶ 404.

In the entirety of their 499-page pleading, and across the entire time-span of their case, Plaintiffs purport to identify only two alleged circumstances in which Chemonics made payments that supposedly reached the Taliban, and even in those alleged instances Plaintiffs make no allegation of a direct payment from Chemonics to the Taliban or its members. First, the FAC alleges that, beginning in 2004, Chemonics hired security subcontractor U.S. Protection and Investigations ("USPI") as its "principal security provider" on two projects, that USPI made payments to the Taliban on Chemonics behalf, that a Chemonics employee had concerns about USPI's practices in 2005, and that those concerns were ignored. *Id.* ¶¶ 406-409. Second, the FAC alleges that, in connection with two other projects, Chemonics leased a compound in Kandahar in 2010 from former provincial governor Gul Agha Sherzai (whom Plaintiffs call a "General" and "a notorious insurgent-affiliated warlord"). *Id.* ¶ 410. The FAC does not allege that Sherzai was a member of the Taliban. Instead, it claims that he had an unspecified "relationship" to the Taliban that allegedly "was apparent from his living quarters: he lived in an expensive house, with no security, in the heart of a Taliban-controlled area—and yet was never attacked." *Id.* According to the FAC, a Chemonics employee's concerns about "paying General Sherzai for security" were "dismissed." *Id.* The FAC does not attempt to explain how the lease payments related to security.

LEGAL STANDARD

On a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), Plaintiffs bear the burden of establishing the Court's jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). Dismissal on the basis that Plaintiffs' claims present nonjusticiable

political questions constitutes a dismissal for lack of subject matter jurisdiction. *See Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 215, 216 n.5 (1974).

Under Rule 12(b)(6), Plaintiffs must plead facts sufficient to state a claim that is "plausible on its face," and cannot rest on mere "possibility." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Although well-pleaded allegations are accepted as true, the Court need not accept "a legal conclusion couched as a factual allegation." *Id.*

ARGUMENT

I. PLAINTIFFS' CLAIMS AGAINST CHEMONICS PRESENT NONJUSTICIABLE POLITICAL QUESTIONS

Although courts are equipped to resolve most claims, there are claims they have "no business entertaining … because the question is entrusted to one of the political branches." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2494 (2019). Plaintiffs' claims against Chemonics, which ask the Court to decide that U.S. foreign aid policy in Afghanistan necessarily entailed violations of the ATA, present such a question and must be dismissed for lack of subject matter jurisdiction.

As the D.C. Circuit has explained, "[d]isputes involving foreign relations … are 'quintessential sources of political questions,'" and therefore "'[m]atters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention.'" *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 841 (D.C. Cir. 2010) (en banc). The political question doctrine thus "bars … review of claims that, regardless of how they are styled, call into question the prudence of the political branches in matters of foreign policy or national security constitutionally committed to their discretion." *Id.* at 842.[15]

[15] The Supreme Court has identified six factors governing whether a lawsuit presents a nonjusticiable "political question":

> [1] [A] textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for

Plaintiffs' theory is that it was "*impossible*" for Chemonics to implement USAID-sponsored development projects without making "protection payments" to the Taliban. *See, e.g.*, FAC ¶¶ 402-403 (emphasis added). USAID directed Chemonics, as a matter of contractual obligation, to develop the agricultural sector and stabilize local government operations in certain parts of Afghanistan, including in Helmand and Herat. *See id.* ¶ 401. Plaintiffs point to that mandate from USAID as evidence that Chemonics "maintained a general policy of paying the Taliban." *Id.* ¶ 403. Specifically, they allege that Chemonics is liable under the ATA because "in both Helmand and Herat," it was "impossible to execute government … sponsored development projects without payments that end up in Taliban coffers," *id.*, and because in Helmand, "virtually any development project … involve[d] massive payments to the insurgents." *Id.* As further evidence of Chemonics' alleged unlawful payments, Plaintiffs point to the mere fact that Chemonics' USAID projects "focused on agricultural and stabilization projects," which Plaintiffs claim were "especially potent sources of insurgent finance" because they required travel to rural areas and exposed aid workers to greater risk of attack. *Id.*[16]

> resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker v. Carr, 369 U.S. 186, 217 (1962). Plaintiffs' claims against Chemonics implicate at a minimum the first, third, fourth, and sixth *Baker* factors.

[16] Similarly, although they are at pains to suggest they do not challenge decisions of the U.S. military or USAID, Plaintiffs rely heavily on materials that do just that. Those sources blame U.S. military leaders for employing a "counter-productive" strategy of focusing on "[q]uick impact stabilisation projects … in areas retaken from the Taliban," like those carried out by Chemonics in the first years after the invasion, which supposedly "failed to enhance public trust in government." International Crisis Group, Asia Report No. 210, Aid and Conflict in Afghanistan, (Aug. 4, 2011), https://www.crisisgroup.org/asia/south-asia/afghanistan/aid-and-conflict-afghanistan (cited at FAC ¶ 68 n.30). Likewise, one source accuses the United States of "support of warlords, reliance on logistics contracting, and [a] deluge of military and aid spending which

If, as Plaintiffs maintain, it was impossible to perform government contract work in certain economic sectors and geographic regions of Afghanistan without funneling money to the Taliban—a conclusion Chemonics rejects—then adjudicating Plaintiffs' ATA claims necessarily requires the Court to decide if liability flows from certain U.S. foreign policy decisions concerning which sectors and regions would receive U.S. humanitarian and reconstruction assistance through USAID contracts. *See Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 983 (9th Cir. 2007). USAID allocated funds for those projects in service of Congress's national security goals of "rehabilitati[ng] … [Afghanistan's] agricultural infrastructure," "assist[ing] in the development of the capacity of the Government of Afghanistan to meet the needs of the people of Afghanistan," and "assist[ing] in the eradication of poppy cultivation." Afghanistan Freedom Support Act of 2002, Pub. L. No. 107-327 § 103(a)(3)-(5). If Plaintiffs are correct, those policy decisions, and USAID's implementing directives, made it impossible for Chemonics not to commit or aid acts of international terrorism when performing U.S. Government contracts in sectors and regions where Chemonics *inevitably* and *necessarily* had to be among, and interact with, Afghan insurgents.

Plaintiffs' claims thus challenge not only Chemonics' alleged conduct in supposedly making payments that ultimately found their way to the Taliban, but also the *very idea* of carrying out the policy decisions of the political branches to fund and carry out humanitarian and reconstruction work in sectors and places gripped by insurgency and corruption. The political branches determined that, on balance, it was worthwhile to "provide significant assistance to Afghanistan so that it is no longer a haven for terrorism," and that "[t]he delivery of humanitarian

… created an environment that fostered corruption and impeded later [anti-corruption] efforts," and accuses USAID of "failing to account for its spending due to a lack of resources and the obscurity of subcontractor relationships." Ex. F, Joint and Coalition Operational Analysis (JCOA), Operationalizing Counter/Anti-Corruption Study at 9, 13 (Feb. 28, 2014) (cited at FAC ¶ 73 n.40).

and reconstruction assistance … is critical to the future stability of Afghanistan." *Id.* § 206(a)(1), (2). That determination is the very sort of "'integral policy choice[]' about this country's national security … polic[y]" that a court must not reevaluate. *Ctr. for Biological Diversity v. Trump*, 2020 WL 1643657, at *11 (D.D.C. Apr. 2, 2020) (quoting *Al-Tamimi v. Adelson*, 916 F.3d 1, 12 n.6 (D.C. Cir. 2019)). Plaintiffs claim not to challenge such choices, yet their entire case turns on the theory that no contractor could execute the political branches' policy decisions without funds getting into the wrong hands. It is thus a direct challenge to U.S. foreign policy decisions that are nonjusticiable in any U.S. court.

As courts have made clear, the decision of "[w]hether to grant … aid" to a foreign State "'is a political decision inherently entangled with the conduct of foreign relations.'" *Hmong 2 v. United States*, 799 F. App'x 508, 509 (9th Cir. 2020) (quoting *Corrie*, 503 F.3d at 983). The "determination of whether foreign aid … is necessary … is a 'question uniquely demand[ing] single-voiced statement of the Government's views' for which the Judiciary has neither aptitude, facilities nor responsibility." *Dickson v. Ford*, 521 F.2d 234, 236 (5th Cir. 1975); *see also Mahorner v. Bush*, 224 F. Supp. 2d 48, 53 (D.D.C. 2002) (same), *aff'd*, 2003 WL 349713 (D.C. Cir. Feb. 12, 2003). Indeed, the Fifth Circuit recently echoed that holding to reject challenges to U.S. foreign assistance to Afghanistan. *See Pool v. Trump*, 756 F. App'x 446, 447 (5th Cir. 2019).[17] Because this Court "could not find in favor of the plaintiffs without implicitly questioning, and even condemning, United States foreign policy" to rebuild Afghanistan, it should dismiss Plaintiffs' claims for lack of jurisdiction. *Corrie*, 503 F.3d at 984.

Even setting aside Plaintiffs' theory that USAID-sponsored development work necessarily

[17] Similarly, the Government's decision "to utilize civilian contractors" like Chemonics to deliver that foreign aid in service of U.S. national security policy in Afghanistan is unreviewable. *See Carmichael v. Kellogg, Brown & Root Servs., Inc.*, 572 F.3d 1271, 1281 (11th Cir. 2009).

funded the Taliban, Plaintiffs' claims against Chemonics also present nonjusticiable political questions because USAID vetted, directed, and approved Chemonics' work—including its collaboration with Afghans who might have had connections to Taliban members—the very work that Plaintiffs contend renders Chemonics liable under the ATA. For instance, Plaintiffs challenge Chemonics' work on a USAID project called Regional Afghan Municipalities Program for Urban Populations ("RAMP-UP South") in southern Afghanistan. According to USAID's own program guidance, that program required Chemonics to "[e]nhance the capacity of municipal officials to perform core municipal management activities" by "[w]ork[ing] with mayors," "[t]rain[ing] over 400 municipal officials," and "[c]ollaborat[ing] with local governments" on public construction projects in Kandahar.[18] According to Plaintiffs, Kandahar was, at that time, "the traditional seat of Taliban power that was under near-total Taliban control," and in which "protection payments were the norm"—and thus those municipal officials and local governments with whom USAID instructed Chemonics to "collaborate" must have been Taliban-affiliated. FAC ¶¶ 218, 384, 403.

Similarly, USAID directed Chemonics to provide farmers in Helmand with direct financial assistance to find alternatives to cultivating poppies for opium production.[19] This required Chemonics, at USAID's express instruction, to pay cash comprising U.S. foreign assistance to farmers in a province that Plaintiffs assert was under "de facto" Taliban control. FAC ¶ 47. Plaintiffs would have the Court condemn that U.S. Government policy choice and find Chemonics liable for implementing it. The political question doctrine forbids the adjudication of such claims. The Ninth Circuit's decision in *Corrie*, 503 F.3d at 974, is instructive. There, the plaintiffs sought

[18] Fact Sheet, Regional Afghan Municipalities Program for Urban Populations – Regional Command-South (RAMP UP South), USAID (Dec. 2012), https://tinyurl.com/usaidrampupfactsheet.

[19] Ex. G, USAID, Year Two Work Plan, Afghanistan Alternative Livelihoods Program South (ALP/S), at 24 (Feb. 26, 2006); *see also id.* at iii (defining CFW as "cash for work").

damages from a U.S. defense contractor that sold bulldozers to the Israel Defense Forces ("IDF"), which allegedly used them to kill or harm the plaintiffs. *Id.* at 977. The court dismissed the case as nonjusticiable because the claims "unavoidably" cast doubt on the U.S. policy of financing those contractors' sale of equipment to the Israeli government. *Id.* at 982-83. So, too, here: Plaintiffs' claims would expose Chemonics to liability merely for engaging in the very work the U.S. Government directed it to undertake.

Plaintiffs also accuse Chemonics of indirectly funding the Taliban by leasing a compound in Kandahar from "General" Gul Agha Sherzai, a former Governor of Kandahar province. FAC ¶ 410. Plaintiffs call Sherzai a "notorious insurgent-affiliated warlord" and assert that he had an unspecified "relationship to the Taliban," which was "apparent" because he "lived in an expensive house, with no security, in the heart of a Taliban-controlled area." *Id.* But Plaintiffs do not claim that Sherzai was a member of the Taliban and fail to mention that the U.S. Government *itself* routinely worked with him.[20] As the materials on which Plaintiffs rely confirm, Sherzai "gained control of four important southern provinces *with US support*," and was a "*CIA-recruited* former mujahideen warlord."[21] Leaving aside Sherzai's relationship with the U.S. Government, Plaintiffs also fail to mention that the property Chemonics leased belonged not to Sherzai but to one of his relatives, and that USAID, as part of its program to guard against U.S. funds reaching terrorists, vetted that lease and concluded it was permissible. *See supra* p. 7. Plaintiffs' claims, which seek to impose liability on Chemonics for engaging in that transaction, would "apply with equal force to [a] … national security determination[]" made by USAID and present a nonjusticiable political

[20] SIGAR, Record of Meeting with Ambassador R. Boucher, at 6 (Oct. 30, 2015), https://tinyurl.com/sigarboucherinterview (cited at FAC ¶ 74 n.46).

[21] Ex. H, Douglas Wissing, Funding The Enemy: How U.S. Taxpayers Bankroll The Taliban, at 44 (2012) (emphases added) (cited at FAC ¶ 55 n.10).

question. *Saldana v. Occidental Petroleum Corp.*, 774 F.3d 544, 550 (9th Cir. 2014).

Plaintiffs cannot avoid dismissal by asserting that the U.S. Government opposed "protection" payments to the Taliban. FAC ¶¶ 127-144. If, as they say, it was common knowledge that protection payments were unavoidable in certain sectors and regions, it would follow that USAID knowingly acquiesced in such payments when it directed Chemonics to deliver U.S. assistance in the face of that alleged reality. Moreover, because Plaintiffs rely on Chemonics' mere presence in certain provinces to establish liability, *id.* ¶ 403, it is no answer that Plaintiffs challenge only allegedly unlawful payments; by their own logic, any payment to or collaboration with Afghans in those areas would have been unlawful, because those regions were entirely controlled by the Taliban. Plaintiffs' contention that Chemonics nonetheless violated the ATA raises nonjusticiable political questions regarding U.S. foreign policy decisions that Chemonics merely helped to implement.[22]

II. STRIPPED OF IMPERMISSIBLE GROUP PLEADING AND GUILT-BY-ASSOCIATION GENERALIZATIONS, PLAINTIFFS' SPARSE ALLEGATIONS AGAINST CHEMONICS ARE INSUFFICIENT TO STATE A CLAIM

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

The FAC tells a story about the allegedly "standard" or "typical" practices of all "Western contractors" operating in Afghanistan over a two-decade long period, relying heavily on secondary sources and sweeping generalizations. Citing their own story, Plaintiffs contend that Chemonics must have engaged in the misconduct Plaintiffs attribute to Western contractors generally, simply because it, too, was a Western contractor.

Chemonics is not even the subject of any allegations until page 37 of the FAC—and even

[22] Dismissal is also required because the attacks at issue were acts of war excluded from ATA liability. Mot. of Black & Veatch, ECF No. 106-1 at 40-45; *see* 18 U.S.C. §§ 2331(4); 2336(a).

then, it is lumped in with a group of Defendants who operated in a province where the Taliban allegedly extracted payments from "construction work"—which Chemonics is not even alleged to have done. *See* FAC ¶ 90. Most of the materials on which Plaintiffs rely for these group-pleaded allegations do not even mention Chemonics, and many specifically address the conduct of other prime contractors, or security subcontractors whom Chemonics is not alleged to have used.[23] Other allegations purport to pertain to all "Defendants," but rely on sources that relate solely to contract work for the Department of Defense, which Chemonics also did not do.[24]

Although Plaintiffs acknowledge that "[t]he details varied by Defendant," FAC ¶ 6, they nonetheless fail throughout the FAC to include Defendant-specific details. Plaintiffs "cannot satisfy the minimum pleading requirements ... by 'lumping all the defendants together in each claim and providing no factual basis to distinguish their conduct.'" *Toumazou v. Turkish Republic of N. Cyprus*, 71 F. Supp. 3d 7, 21 (D.D.C. 2014); *see also Bates v. Northwest Human Servs., Inc.*, 466 F. Supp. 2d 69, 85 (D.D.C. 2006) (dismissing claim that "generally treats, and refers to, the defendant corporations as if they were a single, undifferentiated mass"); *Brett v. Att'y Gen. of U.S.*,

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[23] *See, e.g.*, Staff of S. Comm. on Foreign Relations, 112th Cong., Evaluating U.S. Foreign Assistance To Afghanistan 16 (Comm. Print 2011), https://tinyurl.com/senafghanreport (cited at FAC ¶ 60 n.19); Memorandum from Bruce N. Boyer, USAID Regional Inspector General, to Earl W. Gast, USAID Afghanistan Director, Review Of Security Costs Charged to USAID Projects In Afghanistan (Review Report No. 5-306-10-002-S) 11 (Sept. 29, 2010) ("2010 USAID OIG Report"), https://oig.usaid.gov/sites/default/files/2018-06/5-306-10-002-s.pdf (cited at FAC ¶ 133 n.173); SIGAR, Audit No. 12-11, Progress Made Toward Increased Stability Under USAID's Afghanistan Stabilization Initiative-East Program but Transition to Long Term Development Efforts Not Yet Achieved 9 (June 29, 2012), https://www.sigar.mil/pdf/audits/2012-06-29audit-12-11.pdf (cited at FAC ¶ 134 n.176); Jean MacKenzie, Watershed Of Waste: Afghanistan's Kajaki Dam & USAID, The World: GlobalPost (Oct. 11, 2011), https://tinyurl.com/kajakidam (cited at FAC ¶ 403 n.475).

[24] *See* SIGAR, Audit No. 13-6, Contracting With The Enemy: DOD Has Limited Assurance that Contractors with Links to Enemy Groups Are Identified and their Contracts Terminated 3 (Apr. 2013), https://www.sigar.mil/pdf/audits/2013-04-10audit-13-6.pdf (cited at FAC ¶ 140 n.182).

2008 WL 3851555, at *1 (D.D.C. Aug. 19, 2008) (dismissing because there were "so many factual allegations against so many defendants" that court "cannot discern what … claims [were brought] against each defendant").

Instead, a plaintiff must allege defendant-specific facts sufficient to provide "fair notice of each claim and its basis." *Caldwell v. Argosy Univ.*, 797 F.Supp.2d 25, 27 (D.D.C. 2011) (quoting *Sparrow v. United Air Lines*, Inc., 216 F.3d 1111, 1118 (D.C. Cir. 2000)). Given that the FAC does not allege Defendants conspired or worked together to violate the ATA, but instead lodges similar claims "against unrelated defendants," Plaintiffs' "collective pleading is inadequate" to state a claim. *See Vantage Commodities Fin. Servs. I, LLC v. Assured Risk Transfer PCC, LLC*, 321 F. Supp. 3d 49, 61 (D.D.C. 2018).[25]

The Court should disregard Plaintiffs' guilt-by-association approach, and dismiss all claims against Chemonics on the ground that they are all fundamentally predicated on nonspecific, group allegations.

B. Plaintiffs' Chemonics-Specific Allegations Are Insufficient To State A Claim That Chemonics Either Committed Or Aided And Abetted Acts Of Terrorism

None of Plaintiffs' paltry Chemonics-specific allegations—comprising just eleven paragraphs of the FAC—even hints that Chemonics *actually committed or knowingly and substantially assisted* acts of terrorism. At most, some of these allegations speculate that Chemonics *could have* or *might have* made payments that wound up in the hands of the Taliban. Pleading ATA claims requires more.

Plaintiffs speculate that Chemonics must have made payments to the Taliban based on only

[25] Even worse, without any purported factual basis, Plaintiffs lump Chemonics in with other Defendants whom they accuse of serious wrongdoing, including through detailed allegations about systematic fraud resulting in criminal convictions, mass firings of culpable employees, and suspension from further federal contracting. FAC ¶ 12, 14, 213-215, 280-281, 379. Plaintiffs make no such claims about Chemonics, but nonetheless group Chemonics with those Defendants.

four, woefully insufficient allegations, *i.e.*, that: (1) USAID directed Chemonics to perform work in areas that "were under near-total Taliban control"; (2) "payments to the Taliban were pervasive and routine among USAID contractors operating in Afghanistan"; (3) USAID agriculture and stabilization projects like those performed by Chemonics "were especially potent sources of insurgent finance," and one other Defendant made a protection payment while performing work similar to that of Chemonics; and (4) "on information and belief," Chemonics must have paid the Taliban "20 to 40 percent of its contracts' value" because that allegedly was a "standard operating practice" among contractors. FAC ¶¶ 403-404.

But such speculative hypotheses and guilt-by-association assumptions are insufficient to state any kind of ATA claim. Even if Chemonics' work in certain geographic areas and development sectors were *consistent* with the *possibility* of committing or supporting acts of international terrorism, that would be insufficient to survive a motion to dismiss. "Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." *Iqbal*, 556 U.S. at 678; *see also Atherton v. Mayor of D.C.*, 567 F.3d 672, 688 (D.C. Cir. 2009) (allegations that plaintiff removed from grand jury was Mexican and had spoken Spanish in front of other jurors were insufficient to state Equal Protection claim because they "simply do 'not permit the court to infer more than the mere possibility of misconduct'"); *Tallbear v. Perry*, 318 F. Supp. 3d 255, 260 (D.D.C. 2018).

C. Plaintiffs' Allegations Concerning Chemonics Are Contradicted By Materials Plaintiffs Themselves Incorporate By Reference In The FAC

Once the FAC's impermissible group-pleading and unfounded speculation based on neutral facts about Chemonics are stripped away, the remaining allegations against Chemonics are gossamer-thin and contradicted by Plaintiffs' own sources.

First, Plaintiffs allege that a SIGAR audit of two projects Chemonics performed in

Kandahar during 2006-2011 and 2009-2012 "found more than $2 million in Chemonics expenditures that were 'not supported by sufficient documentation to allow [auditors] to determine their accuracy and allowability.'" FAC ¶ 403. Plaintiffs ask the Court to accept their *ipse dixit* that this lack of documentation is "a strong indication of protection payments," *id.*, but omit parts of the SIGAR report explaining that Chemonics' lack of documentation was itself "*a result of a terrorist attack.*"[26] Specifically, in April 2010, Chemonics' Kandahar compound and most of the property therein was destroyed by a Taliban attack that killed two Chemonics employees and injured others. *See supra* p. 6. The documents were missing, not because Chemonics had insufficient controls, but because Chemonics itself was a victim of terrorism. Plaintiffs' own sources thus belie their baseless and grossly false speculation.

Second, Plaintiffs allege that Chemonics hired USPI as its "principal security provider" on two projects in 2004 and 2005, that USPI made payments to the Taliban, and that a Chemonics employee had some awareness of, and expressed concerns about, unspecified "USPI[] practices." FAC ¶¶ 406-409. But Chemonics' use of USPI at that time is not evidence of Chemonics' knowing participation in schemes to pay protection money to the Taliban. In fact, USAID was then expressly "recommend[ing]" that its contractors work with USPI.[27] And as documents cited in the FAC also show, many other reputable companies and organizations—including the United Nations and the World Bank—also employed USPI for security services in those relatively early years,[28]

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[26] SIGAR, Audit No. 14-75-FA, USAID's Accelerated Sustainable Agriculture Program and Afghanistan Stabilization Initiative: Audit of Costs Incurred by Chemonics International, Inc. (July 2014) (emphasis added), https://www.sigar.mil/pdf/audits/Financial_Audits/SIGAR-14-75-FA.pdf.

[27] Ex. 1 to Mot. to Dismiss of Louis Berger Group, ECF No. 103-2, at 120.

[28] Fariba Nawa, *Afghanistan, Inc.: A CorpWatch Investigative Report* at 15 (Oct. 6, 2006), http://www.corpwatch.org/sites/default/files/Afghanistan%20Inc.pdf (cited at FAC ¶ 255 n.315); Daniel Schulman, *The Cowboys of Kabul*, Mother Jones (July 27, 2009),

and even as late as 2009.[29] Although USPI executives were indicted in 2008 and debarred in 2009, FAC ¶¶ 258-259, Plaintiffs' suggestion that Chemonics, alone, should have known *years earlier* of the USPI executives' misconduct is both implausible and insufficient to state a claim.

Third, Plaintiffs allege that Chemonics' leasing of a compound in Kandahar from "General Sherzai, a notorious insurgent-affiliated warlord," amounts to engagement in terrorism. *Id.* ¶ 410. In fact, this lawful leasing of a facility owned by a different member of the Sherzai family cannot plausibly prop up Plaintiffs' claims. Moreover, Plaintiffs' own sources establish that both the U.S. and Canadian governments also worked openly and even more extensively with Sherzai. *See supra* p. 7. To the extent Plaintiffs' allegation condemns that policy judgment of the U.S. Government, it cannot support—and indeed, further undercuts—their claims.

Try as they might to weave an expansive narrative about a culture of corruption and indifference to the financing of terror, Plaintiffs' scant claims against *Chemonics* unravel at the slightest tug. The Court therefore need not even consider that Plaintiffs have failed to allege many of the necessary elements of any ATA claim against Chemonics, as explained below. Plaintiffs' claims are simply too conclusory to "plausibly suggest an entitlement to relief," and must be dismissed on that basis alone. *See Iqbal*, 556 U.S. at 681.

III. PLAINTIFFS FAIL TO ALLEGE MULTIPLE ESSENTIAL ELEMENTS OF THEIR DIRECT-LIABILITY CLAIMS AGAINST CHEMONICS

Plaintiffs' allegations against Chemonics fail to state an actionable ATA claim for a host of reasons. To plead direct liability under the ATA, Plaintiffs must allege injuries "by reason of

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https://www.motherjones.com/politics/2009/07/cowboys-of-kabul/ (cited at FAC ¶ 253 n.314).

[29] Jake Sherman & Victoria DiDomenico, The Public Cost of Private Security in Afghanistan at 7, NYU Ctr. on Int'l Cooperation Briefing Paper (Sept. 2009), https://cic.nyu.edu/sites/default/files/publication_public_cost_of_private_security.pdf (cited at FAC ¶ 92 n.91).

an act of international terrorism" committed by the defendant. 18 U.S.C. § 2333(a). To allege that Chemonics committed such an "act of international terrorism," Plaintiffs would have to identify particular conduct *by Chemonics* that both violates criminal law and appears to have been intended to achieve terroristic objectives. *Id.* § 2331(1)(A), (B). And to satisfy the "by reason of" requirement, Plaintiffs would have to allege facts to show that Chemonics' *own conduct* proximately caused their injuries. *Owens v. BNP Paribas, SA*, 897 F.3d 266, 273 (D.C. Cir. 2018); *Atchley v. AstraZeneca UK Ltd.*, 2020 WL 4040345, at *8 (D.D.C. July 17, 2020). Plaintiffs' allegations do not satisfy *any* of these elements.

A. Chemonics' Alleged Actions Fall Far Short Of The Intentional Conduct Necessary To Constitute Acts Of International Terrorism

Plaintiffs have not adequately pleaded that Chemonics had the requisite intent for direct ATA liability. To constitute an act of international terrorism, a defendant's own actions must "appear to be intended" to "intimidate or coerce a civilian population," "influence … a government by intimidation or coercion," or "affect … a government by mass destruction, assassination, or kidnapping." 18 U.S.C. § 2331(1)(B). The defendant's actions must *also* be "violent" or "dangerous to human life." *Id.* § 2331(1)(A). In other words, Plaintiffs must allege facts that would lead an "objective observer" to conclude that Chemonics—through its USAID-related conduct—committed violent or dangerous acts intended to intimidate and coerce. *Kemper v. Deutsche Bank AG*, 911 F.3d 383, 390 (7th Cir. 2018). That notion is patently absurd, and Plaintiffs allege no such facts.

To the contrary, the FAC asserts that Chemonics sought to protect itself from *violent attacks* when it allegedly acceded to extortionate demands that it lease certain property or hire certain subcontractors, FAC ¶ 401, not that it committed violence with an intent to intimidate or coerce. That Plaintiffs are asserting a theory of liability that hinges on Chemonics having

terroristic intent is dumbfounding and offensive—not to mention implausible, given Chemonics' commitment to the U.S. mission of stabilizing and rebuilding Afghanistan. In any case, Plaintiffs fail to allege this element except in the most boilerplate fashion, *see* FAC ¶ 2573, 2587, 2593, which is fatal to their direct liability claims.

Plaintiffs also allege that Chemonics' motivation was purely commercial and economic, *see, e.g.,* FAC ¶ 66, but that too negates Plaintiffs' ability to satisfy the ATA's objective intent element. *Kemper* illustrates this dispositive flaw. There, the plaintiff sued Deutsche Bank under the ATA, claiming that it helped Iranian state-owned banks "evade" U.S. sanctions and thus appeared to share Iran's terroristic objectives in Iraq. 911 F.3d at 390, 393. But the Seventh Circuit rejected that claim for lack of alleged intent, explaining that, "[t]o the objective observer, [the bank's] interactions with Iranian entities were motivated by economics, not by a desire to 'intimidate or coerce.'" *Id.* at 390. The same logic destroys Plaintiffs' claims here, too. Chemonics allegedly intended to "maximiz[e] profits" and "secure its projects." FAC ¶ 411, *see also, e.g., id.* ¶¶ 1, 8. As courts have consistently recognized, such self-interested actions are not even allegedly motivated by any terroristic purpose and thus do not give rise to liability under the ATA. *Kemper*, 911 F.3d at 394 ("Deutsche Bank's sanctions-avoiding actions, while wrongful, were designed to increase its profits," not to fund terrorism).[30]

[30] *See Freeman v. HSBC Holdings PLC*, 413 F. Supp. 3d 67, 92 (E.D.N.Y. 2019) (dismissing claims against banks that "'appear' to have been purely motivated by the opportunity to make money" (citation omitted)); *Zapata v. HSBC Holdings PLC*, 414 F. Supp. 3d 342, 359 (E.D.N.Y. 2019) (fact that defendant's "conduct appeared to be motivated by economics, not by a desire to intimidate or coerce" is "fatal to [p]laintiffs' claims"); *Stansell v. BGP, Inc.*, 2011 WL 1296881, at *9 (M.D. Fla. Mar. 31, 2011) (finding allegation that defendant petroleum company's payments were "in exchange for the [terrorists'] agreement to allow [defendants] to conduct [their] oil exploration activities without fear of terrorist acts" is insufficient and dismissing claim (citation omitted)); *see also Brill v. Chevron Corp.*, 804 F. App'x 630, 632 (9th Cir. 2020) ("The mere fact that oil purchases allegedly included kickbacks that violated United Nations-imposed sanctions did not make the purchases terrorist acts.").

Plaintiffs also fail to allege conduct by Chemonics that was "violent" or "dangerous to human life," as is also required to constitute any act of international terrorism. 18 U.S.C. § 2331(1)(A). Although making "direct donations to a known terrorist organization" may be "'dangerous to human life,' doing business with companies … that have significant legitimate operations" is generally *not*, even if the transactions at issue were themselves unlawful. *Kemper*, 911 F.3d at 390. Plaintiffs here make generalized allegations about all Defendants, but they do not allege that *Chemonics* ever paid even one dollar directly to a terrorist organization. *See supra* p. 20. At most, the FAC alleges that Chemonics (1) used a subcontractor in 2004 and 2005 to provide guards to escort Chemonics employees that it allegedly knew made payments to the Taliban, and (2) years later leased a compound in Kandahar from a local "warlord" who, in turn, allegedly had a "relationship" with the Taliban. FAC ¶¶ 406-407, 410. As a matter of law, "[g]iven the many legitimate activities that these entities engage[d] in"—including, foremost, those for which Chemonics was transacting with them (*i.e.* the provision of armed security guards and leasing real property to house Chemonics' personnel and property)—"the mere act of [transacting with] them cannot be violent or dangerous." *Freeman*, 413 F. Supp. 3d at 91.

B. Plaintiffs Do Not Adequately Plead That Chemonics Had The Mental State Necessary To Commit Two Of The Alleged Predicate Crimes On Which Their Direct Liability Claims Depend

Plaintiffs also fail to plead the *mens rea* elements of two of the three alleged criminal offenses that underlie their direct liability claims. To plead that Chemonics committed an act of "international terrorism," Plaintiffs must allege that Chemonics itself violated a federal or state criminal law. 18 U.S.C. § 2331(1)(A). Plaintiffs invoke three criminal provisions prohibiting terrorist financing—18 U.S.C. § 2339A (Count One) and § 2339C (Count Three), and 50 U.S.C.

§ 1705(a) (Count Four)—but do not allege facts that could establish that Chemonics had the requisite "inten[t]" or "know[ledge]" to violate the first two of these statutes.[31]

As to intent, Plaintiffs themselves contend that Chemonics was motivated by "profit" and intended to protect itself, *not* to support terrorist attacks. *See* FAC ¶¶ 1, 3, 8, 404, 411; *see supra* p. 9. Moreover, Plaintiffs' "knowledge" theory consists of little more than speculation that it was "common knowledge" among contractors and Defendants generally that "Western contracting dollars were flowing to the Taliban in the form of protection money." *Id.* ¶ 121. To try to establish this "common knowledge" among all Defendants, Plaintiffs point only to the availability of cherry-picked media reports, *id.* ¶ 122-126, which suggest at most that Defendants *should have known*, based on the cited reports, that their alleged payments to certain subcontractors might ultimately end up in the hands of the Taliban and might somehow be used later to fund attacks. But even stretching the allegations that far falls well short of the mental state necessary to violate Sections 2339A and 2339C, both of which require *actual* knowledge or "willful[ness]." 18 U.S.C. §§ 2339A, 2339C. Plaintiffs repeatedly fall back on allegations that, even if they cannot establish knowledge, Defendants at least "recklessly disregarded" that the funds they allegedly paid were funneled to the Taliban. FAC ¶ 113; *see also id.* ¶¶ 9-10, 72, 112, 2585-2586. But such claims do not meet a "knowing" *mens rea* requirement for a federal crime, and cannot establish that Defendants violated these criminal statutes on which Plaintiffs' ATA primary liability depends. *See, e.g.,* FAC ¶¶ 9, 10, 112, 405; *cf. Backpage.com, LLC v. Lynch*, 216 F. Supp. 3d 96, 109 (D.D.C. 2016).

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[31] *See* 18 U.S.C. § 2339A (making it an offense to provide "material support or resources ... *knowing or intending* that they are to be used in preparation for, or in carrying out" certain federal terrorism offenses (emphasis added)); 18 U.S.C. § 2339C (criminalizing "unlawfully and willfully provid[ing] or collect[ing] funds with the *intention* that such funds be used, or with the *knowledge* that such funds are to be used" to carry out certain terrorist acts (emphasis added)).

Regarding Chemonics in particular, the FAC makes a boilerplate assertion that "Chemonics knew (or recklessly disregarded) that its money was funding attacks on U.S. personnel in Afghanistan," FAC ¶ 405, but that assertion is far too conclusory to survive a motion to dismiss. *See Stevens v. Sodexo, Inc.*, 846 F. Supp. 2d 119, 128 (D.D.C. 2012) ("[B]are, conclusory assertions, in the form of unenlightening legal-speak, that [defendant] 'knew or should have known' are insufficient to survive [a] Motion to Dismiss."). Plaintiffs' only other allegations concerning Chemonics' knowledge are that an unnamed "senior Chemonics official … understood that USPI was able to provide security so cheaply because it bought the loyalty of the local warlords," including the Taliban, FAC ¶ 408, and that Chemonics leased a compound from "General Sherzai," "whose … relationship to the Taliban was apparent from his living quarters," *id.* ¶ 410. These allegations do not come close to pleading what §§ 2339A and 2339C require: namely, that Chemonics "act[ed] with the knowledge or intent that the support would be used in preparation for, or in carrying out, *specific terror-related crimes*." *In re Chiquita Brands Int'l, Inc.*, 284 F. Supp. 3d 1284, 1309 (S.D. Fla. 2018) (emphasis added) (citing *United States v. Mehanna*, 735 F.3d 32 (1st Cir. 2013)). The FAC is completely bereft of such allegations concerning Chemonics.

C. Plaintiffs Do Not Adequately Plead Proximate Causation

Plaintiffs' direct liability claims fail for the additional, independent reason that they do not plead that their injuries—which arose as much as a decade after some of Chemonics' alleged conduct and which are also attributed to conduct of numerous other actors—were "by reason of" a terrorist act committed by Chemonics. 18 U.S.C. § 2333(a). To satisfy the "by reason" element, Plaintiffs must plead that Chemonics committed an act that proximately caused their injuries. *Owens*, 897 F.3d at 273; *Atchley*, 2020 WL 4040345, at *8. That they have not done and cannot do; their allegations amount to a chain of causation between Chemonics and Plaintiffs' injuries

that is far too long, attenuated, and indirect to satisfy the ATA's "traditionally rigorous proximate cause requirement." *See Shatsky v. PLO*, 2017 WL 2666111, at *7 (D.D.C. June 20, 2017), *rev'd on other grounds*, 955 F.3d 1016 (D.C. Cir. 2020).

To satisfy this standard, each Plaintiff would have to plausibly allege both that Chemonics' conduct was a "substantial factor" in causing his or her injuries *and* that those injuries were "reasonably foreseeable" from Chemonics' perspective at the time of the conduct in question.[32] *Owens*, 897 F.3d at 273; *Atchley*, 2020 WL 4040345, at *8; *see also Bank of Am. Corp. v. City of Miami*, 137 S. Ct. 1296, 1305 (2017). In turn, to meet the substantial-factor requirement, each Plaintiff would have to plead "some direct relation between the injury asserted and the injurious conduct alleged." *Owens*, 897 F.3d at 273 n.8. The "central question" in analyzing this issue is whether Chemonics' allegedly wrongful conduct "led directly" to the plaintiff's injury. *Id.* (quoting *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 461 (2006)).

Plaintiffs do not come close to meeting these requirements. Instead, they make conclusory, generalized allegations about all Defendants collectively, and about direct or indirect connections of unspecified Defendants to persons affiliated with the Taliban. The FAC alleges, for example, that "Defendants' conduct aided the Taliban's terrorist enterprise," FAC ¶ 98, and that "Defendants' protection payments supplied the Taliban with an important stream of revenue it used to finance terrorist attacks," *id.* ¶ 99. Yet it does not set forth a single allegation that connects those assertions to Chemonics, and so they are too conclusory to be well-pleaded or presumed true. *See Iqbal*, 556 U.S. at 681. Plaintiffs' allegations that in 2004 and 2005 Chemonics used a USAID-recommended security subcontractor that allegedly made payments to the Taliban and that at some

[32] Recent case law also suggests that the ATA's "by reason of" language may impose a requirement of *but-for* causation. *See, e.g.*, *Burrage v. United States*, 571 U.S. 204, 213 (2014) ("[T]he phrase, 'by reason of,' requires at least a showing of 'but for' causation.").

point in or before 2010 Chemonics leased a compound from someone with an alleged "relationship to the Taliban" also do not suffice. FAC ¶¶ 406, 410. Those allegations are far too attenuated, and too removed in time, to claim that any Plaintiff was injured "by reason of" an act of Chemonics.

First, even assuming that some money spent by Chemonics somehow reached someone affiliated with the Taliban, a host of other intermediate steps would have been required before the occurrence, as much as a decade later, of any terrorist attack that both injured a Plaintiff and was somehow funded with any of that money. For example, the steps that would have been theoretically necessary between Chemonics' alleged usage of security contractor USPI and any injury to a Plaintiff would, at a minimum, have to have included: (1) Chemonics' payment of money to USPI for security services; (2) USPI's payment of some of that money to a "local" Taliban affiliate (FAC ¶ 90); (3) subsequent "flow[]" of that money "up to … the Taliban's central leadership" (FAC ¶ 100); (4) Taliban leadership's use of the money to purchase weapons; (5) distribution of those weapons to Taliban fighters; and (6) a Taliban fighter's eventual use of such weapons in an attack that killed or injured a Plaintiff, years after the start of this alleged chain. This does not—and cannot—establish the "direct relation between the injury asserted and the injurious conduct alleged" that proximate cause requires. *Holmes v. Sec. Inv'r Prot. Corp.*, 503 U.S. 258, 268 (1992). A "theory of causation" that "stretche[s] the causal chain" linking defendant's allegedly unlawful conduct to plaintiffs' injury "well beyond the first step" in that chain cannot satisfy the "direct relationship requirement." *Hemi Grp., LLC v. City of N.Y.*, 559 U.S. 1, 10-11 (2010); *see also Kemper*, 911 F.3d at 393; *In re Terrorist Attacks on Sept. 11, 2001*, 714 F.3d 118, 124 (2d Cir. 2013). Moreover, more than one hundred Plaintiffs were injured in

attacks allegedly carried out by groups *other than* the Taliban; *see infra* pp. 41-42, and Plaintiffs fail to link any act of Chemonics to those groups at all.

Plaintiffs' causal theory also fails because the intervening third party who was closest to Chemonics in the alleged chain provided legitimate and lawful security services for leased property in exchange for contractual payments from Chemonics. *See, e.g.,* FAC ¶¶ 406, 410. Indeed, Plaintiffs do not allege that these transactions were illegitimate or that even one dime that Chemonics paid to either USPI or Sherzai found its way to the Taliban, much less that any Chemonics money was passed further down any long, attenuated chain that ultimately led to a Plaintiff's injury. Instead, Plaintiffs simply rely on their own speculative conclusion in the form of impermissible group pleading, *i.e.*, that some money from every contractor eventually wound up in the hands of the Taliban. That is plainly insufficient to plead the requisite causation for direct liability under the ATA. As the "[D.C.] Circuit Court and others have recognized, because 'the presence of an independent intermediary' makes a defendant 'more than one step removed from a terrorist act or organization,' it 'create[s] a more attenuated chain of causation ... than one in which a supporter of terrorism provides funds directly to a terrorist organization.'" *Atchley*, 2020 WL 4040345, at *8.

Plaintiffs' claims also fail because they do not allege that Chemonics controlled the conduct of any of the third parties necessarily involved in the lengthy causal chains that Plaintiffs' theory requires. Plaintiffs do not even allege that either of those intermediaries (USPI or Sherzai) was an agent of Chemonics. Instead, they merely allege that Chemonics knew generally that USPI was paying some funds (but not necessarily any funds received from Chemonics) to the Taliban and that circumstances should have suggested that Sherzai had a "relationship to the Taliban," FAC ¶¶ 408, 410, notwithstanding his public interactions with U.S. and Canadian government forces

and USAID's vetting of the lease transaction. Nowhere do Plaintiffs offer any allegations that Chemonics had "the right to control the conduct of [USPI or Sherzai] with respect to matters entrusted to them," which further breaks any alleged chain of causation connecting Chemonics with the attacks. *See Acosta Orellana v. CropLife Int'l*, 711 F. Supp. 2d. 81, 110 (D.D.C. 2010).

Further negating proximate causation between Chemonics' alleged conduct and Plaintiffs' injuries is the fact that materials cited in the FAC contradict the notion—essential to Plaintiffs' theory—that "the Taliban" was a monolithic entity, such that any funds reaching one member or affiliate of the Taliban automatically furthered every attack attributed to that entity. Plaintiffs' cited materials describe the Taliban instead as a disjointed, free-flowing network of various groups and individuals, such that making a payment to someone loosely identified with "the Taliban" in one region at one point in time did not mean those funds would or could be used to commit attacks by a Taliban-affiliated group elsewhere in another region at another point in time.[33] Moreover, as the FAC obliquely acknowledges, the Taliban was a sprawling network that sought to supplant Afghanistan's government and performed a wide range of lawful, non-violent activities, such as operating courts and other institutions not engaged in armed attacks.[34]

Enormous gaps in time between the allegations concerning Chemonics and the attacks that injured Plaintiffs also underscore Plaintiffs' failure to plead proximate causation. *See, e.g., In re*

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[33] *See, e.g.,* Ex. I, A. Baker, *How the Taliban Thrives*, Time Magazine (Sept. 7, 2009) ("Provincial rebel leaders are left largely to make their own plans and find their own funding ... [Local commanders] raise their own funds through criminal activities to pay for food, IEDs, weapons and salaries.") (cited at FAC ¶ 65 n.27); Ex. J, DOD, Report on Progress Toward Security & Stability in Afghanistan at 31 (Jan. 2009) ("constantly evolving insurgency ... comprised of diverse and often competing insurgent elements") (cited at FAC ¶ 50 n.6).

[34] *See, e.g.*, FAC ¶ 63 ("Taliban had achieved control of wide swaths of [Afghanistan and] . . . installed 'shadow' governments"); Gretchen Peters, *Crime & Insurgency in the Tribal Areas of Afghanistan and Pakistan,* at 11, Combatting Terrorism Ctr. (Oct. 15, 2010) ("[Taliban] broadened its shadow government and its *Sharia* court system that settles local disputes"), https://tinyurl.com/crimeinsurgencyarticle (cited at FAC ¶ 49 n.5).

Chiquita Brands, 284 F. Supp. 3d at 1313 ("the greater the time between the payments and the attack, ... the weaker the likelihood that the support played a significant role in facilitating the attacks"). The earliest attacks alleged in the FAC occurred in 2009, and the majority were committed in 2010 and 2011. Thus, Plaintiffs were injured a minimum of *four to five years* after Chemonics' alleged hiring of USPI in 2004-2005. FAC ¶¶ 406, 409. Plaintiffs make no effort to explain how alleged payments in those years, even if made, could plausibly be connected to attacks that injured them so many years later, especially given that the Taliban was at the time fighting for its survival and allegedly was able to "raise[] money effectively, and … spen[d] the money efficiently in service of its Islamic terrorist agenda." *Id.* ¶ 49.

Finally, yet another critical defect in Plaintiffs' theory is their failure and inability to allege that Chemonics' actions were "necessary for [the Taliban] to fund [the attacks]" at issue. *Owens*, 897 F.3d at 276; *see also Rothstein v. UBS AG*, 708 F.3d 82, 92-97 (2d Cir. 2013); *O'Sullivan v. Deutsche Bank AG*, 2020 WL 906153, at *5 (S.D.N.Y. Feb. 25, 2020). Plaintiffs speculate "on information and belief" that Chemonics must have followed an allegedly "standard practice" of large contractors that paid "at least 20 to 40 percent" of their contract funds to the Taliban, FAC ¶ 404, but even that conclusory allegation—based on nothing more than Plaintiffs' speculation—does not show that Chemonics' alleged payments were somehow necessary to any particular attacks. Additionally, several of the sources cited in the FAC make clear that the Taliban had other, much more significant, sources of funding.[35] As such, not only have Plaintiffs failed to adequately plead some "direct relationship" between any act of Chemonics and any injury to any

[35] *See, e.g.*, U. N. Security Council, S/2012/683, First Report of the Analytical Support and Sanctions Monitoring Team, at 14-15 ¶¶ 36-38 (Sept. 5, 2012), https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2012_683.pdf (cited at FAC ¶ 84 n. 75).

Plaintiff, *Fields v. Twitter, Inc.*, 881 F.3d 739, 744 (9th Cir. 2018), but there also is not even a plausible claim that Chemonics "*substantially* contributed to Plaintiffs' injuries" by providing assistance that "actually ... aided in [the attacks]" that injured Plaintiffs. *Owens,* 897 F.3d at 276 (emphasis in original); *see also Rothstein*, 708 F.3d at 91.

IV. PLAINTIFFS FAIL TO ALLEGE MULTIPLE ESSENTIAL ELEMENTS OF THEIR AIDING-AND-ABETTING CLAIMS AGAINST CHEMONICS

Plaintiffs' aiding-and-abetting claims against Chemonics likewise fail as a matter of law, for multiple independent reasons. FAC ¶¶ 2597-2615 (Counts 5 & 6). Congress limited ATA aiding-and-abetting liability to cases in which (1) the defendant provided "substantial assistance" to "the person who committed" the "act of international terrorism" from which the plaintiff's injury arose; (2) that act of international terrorism was "committed, planned, or authorized" by an entity designated by the Secretary of State as an FTO; and (3) the defendant knew both that it was substantially assisting that act and that a designated FTO had the requisite involvement. *See* 18 U.S.C. § 2333(d); Justice Against Sponsors of Terrorism Act ("JASTA"), Pub. L. No. 114-222, 130 Stat. 852 (2016). Plaintiffs do not sufficiently allege *any* of these essential elements.

A. Plaintiffs Do Not Plead That Chemonics "Substantially Assisted" The Perpetrators Of The Attacks Or The Attacks Themselves

To be liable for aiding and abetting under the ATA, a defendant must "knowingly provid[e] substantial assistance [to] … the person who committed ... [the] act of international terrorism" from which the plaintiffs' claim arose. 18 U.S.C. § 2333(d). Plaintiffs do not, and cannot, allege that Chemonics provided such substantial assistance to any of the perpetrators of any the attacks alleged in the FAC, or to any such attacks themselves.

First, Plaintiffs' theory of secondary liability suffers from the same core flaw that prevents them from pleading proximate causation. Even as alleged, a series of intervening acts and independent third-party conduct necessarily stands between Chemonics' alleged payments and

both the Taliban perpetrators and the attacks. *See supra* pp. 29-30. Stripped of its conclusory allegations that *all* Defendants generally provided funds to the Taliban, *see supra* pp. 17-19, the FAC pleads only that Chemonics made payments to subcontractors, which in turn allegedly "funneled" money (though not money alleged to have come from Chemonics) to the Taliban, FAC ¶ 405, through a "web" of other subcontractors, *id.* ¶ 57. Such allegations do not establish that Chemonics provided *any* assistance to any Taliban members or entities, much less any of the groups or attackers who carried out any of the attacks that injured any of the Plaintiffs.

As Judge Leon recently observed, "numerous courts have held [that] plaintiffs[']' fail[ure] to allege a *direct link* between the defendants and the individual perpetrator' warrants dismissal of their aiding-and-abetting liability claims." *Atchley*, 2020 WL 4040345, at *11 (citing *Crosby v. Twitter, Inc.*, 921 F.3d 617, 627 n.6 (6th Cir. 2019)) (emphasis added); *see also, e.g.*, *O'Sullivan v. Deutsche Bank AG*, 2019 WL 1409446, at *10 (S.D.N.Y. Mar. 28, 2019); *Siegel v. HSBC Bank USA, N.A.*, 2018 WL 3611967, at *4-5 (S.D.N.Y. 2018); *Averbach v. Cairo Amman Bank*, 2020 WL 486860, at *12 (S.D.N.Y. Jan. 21, 2020), R&R adopted, 2020 WL 1130733 (S.D.N.Y. Mar. 9, 2020).[36] This, by itself, is sufficient to dismiss Plaintiffs' aiding-and-abetting claims. *See Atchley*, 2020 WL 4040345, at *11; *Ofisi v. BNP Paribas, S.A.*, 278 F. Supp. 3d 84, 109 (D.D.C. 2017), *vacated in part on other grounds*, 285 F. Supp. 3d 240 (D.D.C. 2018); *Siegel*, 2018 WL 3611967, at *4-5 (S.D.N.Y. 2018). Moreover, even if Plaintiffs had alleged a sufficiently direct link between Chemonics' alleged conduct and the perpetrators of the attacks or the attacks themselves, "Plaintiffs have not plausibly shown that the terrorist attacks … 'probably would not

[36] This requirement of the ATA's aiding-and-abetting provision resembles the proximate cause inquiry for direct liability, under which the intermediation of one or more third-party actors between the defendant's alleged support and the principal tortfeasor is dispositive. *See Linde*, 882 F.3d at 331 (acknowledging that "some evidence … bear[s] on both questions."); *see also National R.R. Passenger Corp. v. Veolia Transp. Serv., Inc.*, 791 F. Supp. 2d 33, 53-54 (D.D.C. 2011).

have occurred' absent [Chemonics'] conduct." *Ofisi*, 278 F. Supp. 3d at 109. *See supra* pp. 32-33.

Second, Plaintiffs' aiding-and-abetting claims fail because they do not allege that Chemonics "substantially assisted" any act of terrorism that injured a Plaintiff. In analyzing the "substantial assistance" element of an ATA aiding-and-abetting claim, Congress directed courts to apply the multi-factor framework set forth in *Halberstam v. Welch*, 705 F.2d 472 (D.C. Cir. 1983). *See* JASTA, Pub. L. No. 114-222, § 2(a)(5).[37] Here, those factors compel dismissal.

The first and second *Halberstam* factors—the nature of the act allegedly encouraged, and the amount and kind of assistance given—"dictate[] what aid might matter, *i.e.*, be substantial." *Halberstam*, 705 F.2d at 484. Plaintiffs do not allege that Chemonics "encouraged" any of the attacks that injured Plaintiffs, *see Siegel v. HSBC N. Am. Holdings, Inc.*, 933 F.3d 217, 225 (2d Cir. 2019), nor is Chemonics alleged to have provided the weapons or other materials that were used to carry out those attacks, *see Crosby v. Twitter, Inc.*, 303 F. Supp. 3d 564, 574 (E.D. Mich. 2018). Instead, Chemonics is merely alleged to have hired the subcontractor USPI, during a time when USPI allegedly "paid the Taliban," FAC ¶ 407, and Chemonics is alleged to have leased a compound from General Sherzai, who Plaintiffs speculate had an unspecified "relationship to the Taliban," FAC ¶ 410. Even taken as true, those allegations are plainly deficient, because indirect assistance to a terrorist organization's "general course of conduct" does not amount to "substantial assistance" to a particular terrorist act. *Taamneh v. Twitter, Inc.*, 343 F. Supp. 3d 904, 916 (N.D. Cal. 2018). Instead, pleading secondary liability "requires more than the provision of material

[37] Those factors are: (1) the nature of the act encouraged; (2) the amount and kind of assistance given; (3) whether the defendant is absent or present at the time of the tort; (4) the defendant's relation to the tortious actor; (5) the defendant's state of mind; and (6) the duration of the assistance provided. *Halberstam*, 705 F.2d at 483-84.

support to a designated terrorist *organization*"—it requires "aiding and abetting an *act* of international terrorism." *Linde*, 882 F.3d at 329 (emphasis in original); *see also Acosta*, 711 F. Supp. 2d at 109-10 (allegations that defendant "generally provided aid to a third party, who in turn purportedly engaged in tortious activity," do not amount to substantial assistance).

And while Plaintiffs allege, "on information and belief," that several million dollars that passed through Chemonics' hands was ultimately used by third parties to pay the Taliban, FAC ¶ 404, they fail to connect any of that alleged aid to any of the attacks that injured Plaintiffs. *See Averbach*, 2020 WL 486860, at *16 (recommending dismissal of ATA aiding-and-abetting claim where plaintiffs "have not pleaded any facts to indicate that [defendant's] services contributed to the [a]ttacks"). Further undercutting their allegations, some of these same Plaintiffs have alleged in *different* lawsuits, not referenced in the FAC, that *other* tortfeasors aided the Taliban in committing *the very same attacks*. *See* First Am. Compl, *Cabrera v. Iran*, No. 19-cv-03835-JDG (D.D.C. Feb. 18, 2020) at ¶ 143 (alleging that "large cash payments" by *Iran* "caused Plaintiffs' injuries"); Am. Compl., *Bernhardt v. Islamic Republic of Iran*, No. 18-cv-02739-TJK (D.D.C. Nov. 26, 2018) (alleging Iran and HSBC Bank caused injuries); *see also* Compl., *King v. Habib Bank Ltd.*, No. 20-cv-04322-LGS (S.D.N.Y. June 5, 2020); Am. Compl., *Brown v. Nat'l Bank of Pakistan*, No. 19-cv-11876-AKH (S.D.N.Y. June 5, 2020) (alleging banks caused injuries). The allegations in those other cases plainly undercut Plaintiffs' claims against Chemonics, as they illustrate that the attacks at issue were not "heavily dependent" on Chemonics' aid, *Halberstam*, 705 F.2d at 488, and that any such aid was not "integral" to the attacks' commission, *id.* at 484.

The third and fourth *Halberstam* factors—the defendant's presence at the principal violation, and the defendant's relationship to the principal wrongdoer, 705 F.2d at 478, 484—also demonstrate Plaintiffs' failure, and inability, to allege substantial assistance. Plaintiffs do not

allege that Chemonics was present at any attack that injured any Plaintiff (although, tragically, Chemonics personnel were present for *other* Taliban attacks that killed or injured Chemonics' personnel). Nor do (or can) they allege that Chemonics had any special "relationship," such as a "position of authority," vis-à-vis the Taliban or any perpetrator of an attack, s*ee id.* at 484; *Taamneh*, 343 F. Supp. 3d at 917-18.

Halberstam's fifth factor, state of mind, is also plainly lacking from the FAC's allegations against Chemonics. This factor requires a showing that the defendant "was one in spirit with the [principal wrongdoer]." 705 F.2d at 484; *see also In re Temporomandibular Joint (TMJ) Implants Prods. Liab. Litig.*, 113 F.3d 1484, 1496 (8th Cir. 1997). This means not just that the defendant *knew* of the principal wrongdoer's illegal activities, but also that it *desired* to help those activities succeed. *See Crosby*, 303 F. Supp. 3d at 574-75; *Atchley*, 2020 WL 4040345 at *12. It would be false and offensive to suggest that Chemonics, which itself suffered tragic losses inflicted by the Taliban (*see supra* p. 6), was "one in spirit" with the Taliban and "desired" to help the terrorist attacks carried out on Americans and their allies in Afghanistan. Precisely the opposite is true. Chemonics opposed the Taliban and instead supported U.S., Afghan, and Coalition forces aligned against the Taliban, and Plaintiffs' futile attempt to obscure this reality through unfounded group pleading rings hollow. Moreover, the FAC alleges that protection payments were made to *avoid* having employees and property attacked (and supposedly for commercial reasons), *see, e.g.*, FAC ¶ 406, not to *support* the commission of terrorist attacks.

The sixth *Halberstam* factor—duration of any assistance provided—also favors Chemonics. The only allegations specific to Chemonics relate to payments to USPI and the leasing of a compound from General Sherzai. But the USPI payments allegedly occurred in 2004 and 2005, FAC ¶¶ 408-409, more than four years before the earliest attacks alleged in the FAC, and

more than 12 years before the latest. And the FAC fails to specify when the alleged lease payments were made to General Sherzai or how long they lasted.[38] Such allegations of aid "well before" the attacks at issue are insufficient to plead that Chemonics substantially assisted any (much less all) of the attacks. *Averbach*, 2020 WL 486860, at *17; *see Siegel*, 933 F.3d at 225 (ten-month gap favored defendant).

B. Plaintiffs Fail To Allege That Chemonics Had The Requisite Knowledge For ATA Aiding-And-Abetting Liability

Plaintiffs also fail to plead facts sufficient to meet § 2333(d)'s requirement that the defendant's alleged substantial assistance have been provided "knowingly." To possess this requisite scienter, the defendant must have known that "by assisting the principal, it [was] itself assuming a 'role' in terrorist activities." *Linde*, 882 F.3d at 329 (citing *Halberstam*, 705 F.2d at 477); *see also O'Sullivan*, 2020 WL 906153, at *6. This is a higher standard than mere knowledge that the organization being aided is "connect[ed] to terrorism," *Siegel*, 933 F.3d at 224, and is distinct from the "state of mind" factor considered when analyzing substantial assistance, *Halberstam* 705 F.2d at 488.

While the FAC blithely asserts that Chemonics maintained a "general policy" of paying the Taliban (FAC ¶ 403), the only factual allegations that it offers to suggest such a policy are (1) that *other* contractors made extortion payments to the Taliban, *see* FAC ¶ 403—a generalized guilt-by-association claim that cannot survive this motion, *supra* pp. 17-19—and (2) Chemonics allegedly "lack[ed] financial controls," as supposedly revealed by a SIGAR audit, *id.* ¶ 403. As explained above, *supra* p. 21, that audit did not come close to concluding, as Plaintiffs insinuate, that Chemonics made "unexplained expenditures" that are "indicat[ive] of protection payments."

[38] The FAC alludes to payments being made at some point in 2010, FAC ¶ 411, but even that is seven years earlier than several of the attacks at issue, *e.g.*, FAC ¶¶ 614, 647, 1528, 2543.

FAC ¶ 403. And even if Chemonics did "lack … financial controls" (which it did not), that would not plausibly show that it knowingly assumed a role in a terrorist act. Even assertions of "non-routine or illegal" payments in violation of "laws that were designed principally to prevent terrorist activity" are insufficient to "allege plausibly ... that Defendants ... assumed a role in a foreign terrorist organization's act of international terrorism," as a need to meet the scienter element. *Freeman v. HSBC Holdings PLC*, 2020 WL 3035067, at *7 (E.D.N.Y. June 5, 2020); *see also Siegel*, 933 F.3d at 225-26.

Plaintiffs fare no better with their allegations that Chemonics knew that USPI "was paying the Taliban on Chemonics' behalf," FAC ¶ 408, and that firms like Chemonics did business with Sherzai "in part as a way of buying peace with the Taliban," *id.* ¶ 410. At most, those allegations establish that Chemonics made payments to two third parties, which in turn allegedly made payments to the Taliban. But allegations concerning a defendant's "willingness to do business with [a third party entity] despite [its] knowledge of [the entity's] links to terrorism" do not amount to allegations that the defendant "knowingly played a role" in terrorist attacks or "provided substantial assistance" to the terrorist organization that perpetrated them. *Siegel*, 933 F.3d at 219. Indeed, even "knowingly provid[ing] [routine commercial] services to an [FTO], without more, is insufficient to satisfy JASTA's scienter requirement." *Weiss v. Nat'l Westminster Bank PLC*, 381 F. Supp. 3d 223, 239 (E.D.N.Y. Mar. 31, 2019); *see also Taamneh*, 343 F. Supp. 3d at 916. To satisfy § 2333(d)'s "knowingly" element, the FAC would have to plausibly allege that when Chemonics provided "aid" to USPI or General Sherzai, it knew that it was "playing a role" in the Taliban's "violent or life-endangering activities" that killed or injured Plaintiffs. *Freeman*, 2020 WL 3035067, at *7-8. The FAC contains no such allegations.[39]

[39] Even if Plaintiffs' group-pleaded claims against all Defendants were considered, *but see*

The FAC also fails to allege that Chemonics knew that it was providing "assistance" to an FTO, which is also essential to satisfy section 2333(d)'s "knowingly" element. *See* 162 Cong. Rec. H5240 (daily ed. Sept. 9, 2016) (statement of Rep. Goodlatte) ("Secondary liability should only attach to persons who have actual knowledge that they are directly providing substantial assistance to a designated foreign terrorist organization."). ATA aiding-and-abetting liability is limited to any person "who aids and abets, by knowingly providing substantial assistance, … [to] the person who committed *such* an act of international terrorism." 18 U.S.C. § 2333(d)(2) (emphasis added). The final clause refers not to "terrorism" generally, but the specific act of terrorism described earlier in section 2333(d)(2)—one committed, planned, or authorized by an FTO. *See King v. Burwell*, 576 U.S. 473, 487 (2015) ("such" refers to something that has "just been mentioned."). Plaintiffs attempt to satisfy this requirement with a conclusory, group-pleaded allegation that "Defendants" generally "knew about or recklessly disregarded al-Qaeda's role in Taliban attacks in Afghanistan." FAC ¶ 521. But allegations of recklessness do not meet the "knowingly" element, *see Brill v. Chevron Corp.*, 2018 WL 3861659, at *3 (N.D. Cal. 2018), and, as is true for the FAC's allegations concerning Chemonics' knowledge of Taliban attacks, the FAC does not plead that Chemonics knew it was "assuming a role" in al-Qaeda's acts of terrorism.

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supra pp. 17-19, they suffer from the same defects. Plaintiffs allege that Defendants knew that "local intermediaries" for some "Western contractors" were making protection payments to the Taliban, *see* FAC ¶¶ 118-126, and either knew or recklessly disregarded that their subcontractors were making protection payments to the Taliban, *see id.* ¶ 72. That is a far cry from establishing that the Defendants knew that they themselves were "assuming a role" in terrorist attacks. *Linde*, 882 F.3d at 329 (citing *Halberstam*, 705 F.2d at 477). Indeed, as one source cited in the FAC acknowledges, some "private security contractors" … "operat[ed] ethically," and only "a few" had "close ties to insurgent groups." SIGAR, Interview with Gert Berthold, Lessons Learned Record of Interview, at 2 (Oct. 6, 2015), https://tinyurl.com/sigarbertholdinterview (cited at FAC ¶ 74 n.43).

C. The Claims Of At Least A Majority Of The Plaintiffs Fail To Satisfy Section 2333(d)'s FTO Element

1. *The FAC Fails To Plausibly Allege That Many Of The Attacks At Issue Were "Committed, Planned, Or Authorized" By A Designated FTO*

The ATA permits imposition of aiding-and-abetting liability only for acts of international terrorism "committed, planned, or authorized by an organization that had been designated as an [FTO] … as of the date on which such act of international terrorism was committed, planned, or authorized." 18 U.S.C. § 2333(d). The FAC primarily concerns attacks carried out by the Afghan Taliban, *see, e.g.*, FAC ¶ 15, which has never been designated as an FTO.[40] Plaintiffs try to skirt the FTO requirement by alleging that al-Qaeda, which was designated an FTO in 1999, and the Haqqani Network, which was designated an FTO on September 19, 2012, jointly "committed, planned, and/or authorized" the attacks. FAC ¶¶ 405, 2603. With limited exceptions, however, Plaintiffs' allegations about FTO involvement are insufficient as a matter of law.

For 459 of the 702 Plaintiffs, the FAC does not even attempt to allege that any FTO "committed" the attacks from which their injuries arose,[41] and its attempt to allege that those

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[40] *See* U.S. Dept. of State, Bureau of Counterterrorism, "Foreign Terrorist Organizations," https://www.state.gov/foreign-terrorist-organizations/. It is worth noting that a specific *Pakistani* Taliban group, Tehrik-e Taliban Pakistan (TTP) has been designated as an FTO since September 2010. But Plaintiffs do not allege that any of the attacks in the FAC were carried out by TTP, or that Chemonics "assisted" TTP.

[41] For 366 of these Plaintiffs, the FAC alleges that the relevant attacks were committed by the Taliban. *See* FAC ¶¶ 567, 576, 589, 596, 606, 625, 633, 664, 708, 753, 778, 794, 803, 812, 819, 826, 839, 848, 872, 879, 896, 904, 914, 925, 936, 951, 968, 976, 984, 990, 997, 1009, 1029, 1039, 1043, 1052, 1059, 1066, 1072, 1103, 1113, 1128, 1135, 1156, 1163, 1180, 1196, 1203, 1221, 1254, 1264, 1273, 1297, 1315, 1333, 1358, 1365, 1380, 1388, 1397, 1405, 1413, 1425, 1438, 1455, 1467, 1476, 1484, 1501, 1507, 1515, 1528, 1546, 1570, 1593, 1618, 1631, 1654, 1668, 1691, 1719, 1757, 1764, 1776, 1783, 1790, 1824, 1833, 1840, 1857, 1865, 1912, 1947, 1966, 1970, 1979, 1989, 2008, 2015, 2024, 2033, 2063, 2078, 2114, 2122, 2129, 2177, 2191, 2200, 2207, 2227, 2259, 2278, 2295, 2326, 2340, 2348, 2355, 2384, 2406, 2420, 2424, 2442, 2446, 2450, 2467, 2486, 2518, 2536, 2543, 2553. For the remaining 93 of these Plaintiffs, the FAC alleges that the relevant attacks were committed by the Haqqani Network before its designation as an FTO. *See* FAC ¶¶ 550, 640, 674, 699, 1187, 1245, 1343, 1429, 1538, 1658, 1676, 1701, 1768, 1808, 1815, 1937, 2054, 2085,

attacks were "planned" or "authorized" by an FTO plainly fails. That attempt is confined to generic allegations that al-Qaeda either "planned" or "authorized" those attacks, based not on any alleged al-Qaeda involvement in any particular attack, but only on generic allegations that al-Qaeda—for some unspecified time period—trained the Taliban (*see* FAC ¶¶ 466, 489, 490, 492, 496, 508), paid the Taliban (FAC ¶ 466), declared loyalty to the Taliban (FAC ¶¶ 469, 471), provided spiritual guidance and religious authorization to the Taliban (FAC ¶¶ 478, 482), generally advised the Taliban on the form of its attacks and on their geographies (FAC ¶¶ 480, 483-487), distributed terrorist propaganda (FAC ¶ 495), and provided the Taliban with "operational and tactical cooperation" (FAC ¶¶ 481, 493, 495).

Even assuming al-Qaeda did all of that during some relevant time period, it would not amount to al-Qaeda having "planned" or "authorized" the particular attacks at issue, as the statute demands. To "plan" something is to "design" it or to "decide on and arrange [it] in advance." Ex. K, *Plan*, New Oxford American Dictionary (3d ed. 2010). And to "authorize" it means to give it "official permission" or "approval" in the context of a relationship of control or authority. Ex. L, *Authorize*, New Oxford American Dictionary (3d ed. 2010). Plaintiffs' allegations concerning al-Qaeda's general support and encouragement do not amount to "plan[ning]" or "authoriz[ing]" attacks. In adopting the requirement that an FTO "committed, planned, or authorized" the act of international terrorism from which a plaintiff's injury arose, Congress "circumscribe[ed] aiding-and-abetting liability to situations where an FTO *itself* had a significant role in a particular attack." *Atchley*, 2020 WL 4040345, at *11; *see also Clayborn v. Twitter, Inc.*, 2018 WL 6839754, at *8

2095, 2106, 2166, 2184, 2218, 2236, 2286, 2333, 2435, 2476, 2508. The claims of this latter set of Plaintiffs also fail for yet another reason: the FAC alleges that Chemonics "assisted" only the Taliban, not the Haqqani Network, *see* FAC ¶¶ 401-411, and the Haqqani Network was "largely autonomous" from the Taliban until 2015. *Haqqanis Steering Deadlier Taliban*, *supra* note 1.

(N.D. Cal. Dec. 31, 2018) (allegations "that [an FTO] sought to 'generally radicalize' individuals and promoted terrorist[] attacks … are insufficient.").

For 211 of the remaining 243 Plaintiffs, the FAC alleges that the relevant attacks were carried out by al-Qaeda in conjunction with either the Taliban or the Haqqani Network (before it was designated as an FTO).[42] But here too, Plaintiffs' allegations about al-Qaeda's involvement are too conclusory and boilerplate to credit. For example, for 165 of these Plaintiffs, the FAC alleges—solely "on information and belief"—either that joint al-Qaeda/Taliban cells carried out the attacks or that cells operating under the command of "dual hatted" terrorists carried out the attacks.[43] But pleading on information and belief is permissible only "where facts are peculiarly within the possession and control of the defendant, or where the belief is based on factual information that makes the inference … plausible." *Evangelou v. District of Columbia*, 901 F. Supp. 2d 159, 170 (D.D.C. 2012). Plaintiffs do not meet that standard: facts relating to the perpetrators of specific attacks are plainly not peculiarly within *Defendants'* knowledge, and the FAC does not plead any facts supporting the inference that particular individuals or cells within an FTO carried out particular attacks. For 19 other Plaintiffs, the FAC alleges merely that al-Qaeda "exported its suicide-bombing expertise to the Taliban," and thus "every suicide bombing alleged in this case was jointly planned and committed by al-Qaeda and the Taliban." FAC ¶ 498. But sharing "suicide-bombing expertise" is not the same as committing, planning or authorizing a

[42] FAC ¶¶ 524, 541, 559, 614, 647, 683, 692, 716, 724, 735, 743, 760, 785, 830, 858, 864, 889, 960, 1020, 1081, 1091, 1121, 1146, 1173, 1210, 1229, 1286, 1305, 1372, 1448, 1550, 1562, 1581, 1604, 1642, 1646, 1683, 1711, 1727, 1739, 1750, 1797, 1875, 1886, 1895, 1904, 1922, 1929, 1954, 1997, 2040, 2047, 2138, 2148, 2152, 2248, 2268, 2303, 2314, 2372, 2391, 2398, 2413, 2526.

[43] FAC ¶¶ 516, 518, 520.

particular attack. And Plaintiffs fail to plead that al-Qaeda (or any FTO) was engaged in the type of conduct that amounted to committing, planning, or authorizing the specific attacks at issue.[44]

While 15 Plaintiffs' claims arise from attacks that Plaintiffs allege were carried out by the Haqqani Network after it was designated as an FTO,[45] all but two[46] of those Plaintiffs claim injuries that occurred before 2015, when the Haqqani Network was "largely autonomous" from the Taliban.[47] Claims against Chemonics based on those attacks necessarily fail, in any event, as Chemonics is not alleged to have provided *any* aid to the Haqqani Network.[48]

2. *Plaintiffs' Attempt To Plead Around The FTO Requirement Through RICO Should Be Rejected*

Plaintiffs cannot plead around the FTO requirement by arguing that terrorists from al-Qaeda and the Taliban were engaged in a RICO conspiracy to "conduct and maintain the Taliban" as a "terrorist enterprise," through a "pattern of racketeering activity" amounting to a "campaign" that was both itself an "act of international terrorism," FAC ¶¶ 2607, 2610, and the cause of Plaintiffs' injuries, *id.* ¶ 2612. This same pleading ruse was rejected in *Atchley* because it is contrary to the plain language of the ATA, which imposes aiding-and-abetting liability for injuries only if they arose from "an act" of international terrorism that was committed, planned, or authorized by an FTO. 18 U.S.C. § 2333(d)(2). A nine-year long alleged RICO "campaign" does

[44] Two of the attacks (which Plaintiffs allege give rise to the claims of 27 Plaintiffs) are alleged to have been committed by al-Qaeda operatives. FAC ¶¶ 491, 513. The present motion does not argue those Plaintiffs cannot show the involvement of an FTO in the relevant attacks, but their aiding-and-abetting claims fail for other reasons. *See supra* pp. 33-40.

[45] FAC ¶¶ 768, 1238, 1522, 2159, 2458, 2498.

[46] *See* FAC ¶¶ 1522, 1525, 1526 (concerning Plaintiffs K. King and S.A. Miller).

[47] *See Haqqanis Steering Deadlier Taliban*, *supra* note 1.

[48] The same is true for the 17 Plaintiffs bringing claims based on attacks that they allege were jointly committed by al-Qaeda and the Haqqani Network, after the Haqqani Network was designated as an FTO. FAC ¶¶ 657, 1324, 1488, 1558, 2071, 2365, 2561.

not constitute such singular "act" of terrorism. *Atchley*, 2020 WL 4040345, at *11; *see also Taamneh*, 343 F. Supp. 3d at 916 (use of the singular "act" in § 2333(d)(2) requires a "connec[tion] with a specific crime," not a terrorist group's "general course of conduct."). Nor is "planning" or "authorizing" an ill-defined and years-long "campaign" the same as planning or authorizing an "act" of international terrorism, so as to give rise to liability under the ATA.

V. MANY PLAINTIFFS' CLAIMS AGAINST CHEMONICS ARE TIME-BARRED

Finally, the ATA's statute of limitations bars the claims brought against Chemonics by 85 of the Plaintiffs. Any suit for recovery of damages under the ATA "shall not be maintained unless commenced within 10 years after the date the cause of action accrued." 18 U.S.C. § 2335(a). An ATA cause of action accrues on the date of the act that injured the Plaintiff. *E.g.*, *In re Chiquita Brands*, 284 F. Supp. 3d at 1320; *Abecassis v. Wyatt*, 902 F. Supp. 2d 881, 896 (S.D. Tex. 2012) (applying prior four-year limitation period). Twenty-four of the attacks alleged in the FAC (from which 85 Plaintiffs claim injury)[49] occurred more than ten years before the June 5, 2020 FAC, in which Chemonics was first named as a Defendant. The "relation-back" doctrine does not save these claims because, "[u]nder Federal Rule of Civil Procedure 15(c), an amended complaint adding a new defendant 'relates back' to the original complaint only when … the newly added defendant … 'knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity.'" *Johnson v. Paragon Sys., Inc.*, 305 F. Supp. 3d 139, 146 (D.D.C. 2018). Plaintiffs make no such allegation.

CONCLUSION

The FAC should be dismissed entirely, with prejudice.

[49] *See* FAC ¶¶ 576; 596; 633; 743; 753; 803; 819; 839; 872; 1009; 1135; 1156; 1187; 1315; 1476; 1538; 1618; 1631; 1954; 2236; 2398; 2466; 2526; 2543.

Dated: September 10, 2020

Respectfully submitted,

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