09-4108-cv

United States Court of Appeals

for the

Second Circuit

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(For Continuation of Caption See Inside Cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLEE

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Plaintiffs-Appellants,

– v. –

UBS AG,

Defendant-Appellee.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, Defendant-Appellee UBS AG states that it is a publicly-owned corporation, it has no parent corporation, and no publicly-held corporation owns, directly or indirectly, 10% or more of UBS AG's stock.

Dated: New York, New York
May 21, 2010

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PRELIMINARY STATEMENT

Plaintiffs' injuries, caused by six Hizbollah and Hamas terrorist attacks in Israel between 1997 and 2006, are tragic, and the attacks that caused those injuries are deplorable. But the sole factual allegation supporting plaintiffs' attempt to hold UBS AG ("UBS") liable for the actions of Hizbollah and Hamas is that UBS allowed unspecified Iranian counterparties to exchange electronic funds for U.S. banknotes stored in a Zurich cash depot. Plaintiffs claim that this single allegation suffices to state a cause of action that UBS knowingly and intentionally assisted acts of international terrorism.

The district court properly dismissed this claim. In seeking reversal, plaintiffs ask this Court to endorse a truly remarkable legal principle: that *any* financial institution, international business, or other entity that transfers a "material" amount of U.S. or other currency to any Iranian counterparty in exchange for electronic funds already held by that Iranian counterparty would become liable for *all* terrorist activities conducted by Hizbollah and Hamas in Israel. This theory of liability is far too tenuous to demonstrate federal jurisdiction under Article III of the Constitution or to support a civil action under Section 2333 of the Antiterrorism Act ("ATA").

To meet Article III's standing requirement, a plaintiff must prove, among other things, that his or her injury is "fairly traceable" to the defendant's conduct.

As the district court explained, plaintiffs must plausibly allege "a proximate causal relationship" (SPA3); in other words, plaintiffs must demonstrate that UBS's exchange of banknotes *materially increased the probability* that Hamas and Hizbollah would launch the terrorist attacks in Israel that injured them. Plaintiffs have not alleged facts supporting plausible inferences that (a) UBS was a source (let alone a significant source) of U.S. banknotes for the Iranian government; (b) the Iranian government lacked legitimate needs for U.S. banknotes, (c) the terrorist groups needed U.S. currency from Iran to carry out their attacks, and (d) the Iranian government provided terrorist organizations with banknotes that it received from UBS. Thus, the district court properly dismissed the complaint because the plaintiffs' "extended chain of inferences * * * is far too attenuated to provide plaintiffs with sufficient standing to bring this action under federal law." SPA5.

Even if plaintiffs could properly invoke federal jurisdiction, the district court also correctly held that plaintiffs do not state a claim for relief under the ATA. That statute does not create aiding-and-abetting liability. And even if it did, plaintiffs' claims would fail because they do not plausibly allege the essential elements of such liability—knowledge, substantial assistance, and intent.

Plaintiffs also fail to allege a primary violation of the ATA, which creates a cause of action for individuals "injured * * * by reason of an act of international terrorism." 18 U.S.C. § 2333(a). The statutory formulation requires proof that the

defendant's conduct proximately caused the plaintiffs' injury, a standard plaintiffs' allegations do not even approach. Moreover, UBS's exchange of banknotes for electronic funds cannot qualify as "an act of international terrorism." Thus, the complaint falls far short of asserting an ATA violation.

Plaintiffs pepper their filings—including their First Amended Complaint and opening brief in this Court—with frequent reference to UBS's breach of its contractual agreement with the Federal Reserve Bank of New York ("FRBNY") governing UBS's participation in the Extended Custodial Inventory Program ("ECI"). That program created overseas depots for redemption and distribution of U.S. currency. Because UBS is not a U.S. person, Office of Foreign Asset Control ("OFAC") regulations generally do not apply to UBS's activities outside the United States. *See* 31 C.F.R. § 560.314 (defining a "United States person"). UBS nonetheless agreed in its contract with the FRBNY to abide by OFAC regulations in operating the ECI currency depot. UBS admitted to breaching this agreement and subsequently consented to a $100 million civil penalty as a result. But because UBS's conduct outside the United States is not controlled by the OFAC regulations, this was a *contractual* breach only—it was not a violation of the OFAC regulations (and therefore not criminal). Indeed, it is indisputable that if UBS had transferred to Iran U.S. banknotes that UBS received from any source

other than the FRBNY's ECI Program (that is, notes already circulating in the global economy), no breach or violation of any sort would have occurred.

More importantly, these references by plaintiffs are a complete red herring. Nothing in plaintiffs' theory of liability turns on UBS's breach of the ECI agreement. Rather, plaintiffs sue simply because UBS provided U.S. banknotes to Iranian counterparties in exchange for those entities' electronic funds.

Indeed, plaintiffs' theory is not even limited to the transfer of U.S. or other physical banknotes. Plaintiffs contend that, through the ATA, "Congress has determined as a matter of law that the provision of material support to a state sponsor of terrorism * * * always" will give rise to liability, "irrespective of how the material support is actually used." Br. 15. Taken to its conclusion, any entity anywhere that engages in business transactions with the Iranian government (by purchasing oil for example) or even with Iranian companies (buying a sufficient amount of pistachios, for example) would instantly become liable for all acts of Hizbollah and Hamas.

The district court's judgment dismissing this case should be affirmed.

ISSUES PRESENTED FOR REVIEW

1. Did the district court correctly dismiss the complaint for lack of standing because plaintiffs' non-conclusory allegations fall far short of supporting a plausible inference that plaintiffs' injuries are fairly traceable to UBS's conduct ?

2. Did the district court correctly determine that it had the power to render an alternative holding that—even if plaintiffs satisfied Article III's standing requirement—the complaint failed to state a claim under the ATA?

3. Did the district court correctly hold, in the alternative, that plaintiffs failed to state a claim under the ATA?

a. Did the district court correctly hold that plaintiffs cannot assert an aiding-and-abetting claim because:

i. The Supreme Court's decision in *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994), establishes that an aiding-and-abetting theory is not cognizable under the ATA?

ii. Plaintiffs have not plausibly alleged that UBS knew that that its banknote exchanges were providing material support to terrorists, that UBS's exchanges substantially assisted in the provision of that material support, that UBS knew that the exchanges provided that substantial assistance, or that UBS intended to aid terror attacks?

b. Did the district court correctly hold that plaintiffs failed to allege facts supporting a plausible inference that UBS is primarily liable under the ATA? That is, do plaintiffs fail to allege that they were injured

"by reason of" UBS's banknote transactions and that UBS's conduct constituted "acts of international terrorism?"

STATEMENT OF THE CASE

Plaintiffs commenced this action on May 9, 2008. A16 (Docket No. 1). The original nine-count Complaint included an ATA claim and various common law and Israeli-law torts. *Id.* ¶¶ 121-75. Plaintiffs claimed that UBS was "liable to plaintiffs for all their injuries pursuant to 18 U.S.C. § 2333" because UBS's alleged conduct "violated the criminal provisions of 18 U.S.C. §§ 2332d, 2339A and 2339C." *Id.* ¶¶ 121, 123.

After UBS filed a motion to dismiss on July 2, 2008 (A17 (Docket No. 7)), plaintiffs filed the five-count First Amended Complaint ("FAC") on August 7, 2008. A26. Instead of asserting that UBS was liable for committing terrorism directly, plaintiffs accused UBS of aiding and abetting acts of terrorism committed by others. The first claim remained an ATA violation (the "ATA Claim"), but the plaintiffs amended it to allege only an aiding and abetting claim. A58 ¶ 138 (alleging that UBS "aided and abetted acts of international terrorism * * * carried out by Iran"). Plaintiffs' second claim asserted that UBS aided and abetted terrorism in violation of international law, allegedly incorporated into federal common law (the "International Law Claim"). A58-61. The other three counts were Israeli-law tort claims. A58-66.

UBS moved to dismiss the FAC on September 4, 2008. A18 (Docket No. 12). After the motion was fully briefed, the Honorable Jed S. Rakoff heard oral argument on October 16, 2008. A20. That same day, plaintiffs voluntarily dismissed the three Israeli-law tort claims without prejudice. *Id.* (Docket No. 23). The only remaining counts were the ATA Claim and the International Law Claim, both of which were premised solely on aiding and abetting theories.

On December 17, 2008, UBS filed a Notice of Supplemental Authority. *Id.* (Docket No. 26). This notice called the district court's attention to the Seventh Circuit's December 3, 2008 *en banc* opinion in *Boim v. Holy Land Found. for Relief and Dev.*, 549 F.3d 685 (7th Cir. 2008) ("*Boim III*"), which held that an aiding-and-abetting theory is not available under ATA Section 2333. A20 (Docket No. 26). Plaintiffs filed a Response to this notice on January 6, 2009. A21 (Docket No. 28). Plaintiffs argued that in light of *Boim III*'s holding, their ATA Claim should be interpreted as a claim for primary liability under the ATA.

On March 6, 2009, the district court, having "carefully considered the parties' written and oral submissions and notice of supplemental authorities," dismissed Plaintiffs' two remaining claims. SPA1. The court's Opinion and Order, reported as *Rothstein v. UBS AG*, 647 F. Supp. 2d 292 (S.D.N.Y. 2009), was entered on August 24, 2009. SPA12.

The district court held that the FAC's "extended chain of inferences * * * is far too attenuated to provide plaintiffs with sufficient standing to bring this action under federal law." SPA5. The court noted certain "deficiencies in the causal chain" "[a]mong many other[s]:" (i) plaintiffs "do[] not allege that UBS is a primary or even relatively significant source of U.S. banknotes for the Iranian government"; (ii) "cash dollars have multiple legitimate uses besides funding terrorism"; and (iii) "there are no specific allegations showing that the terrorist groups in question raise their funds from monies transferred from Iran." SPA5-6. "Without multiplying examples," the court explained "the point is that plaintiffs' allegations here are far too speculative to provide the plausible indication of proximate causation necessary to establish plaintiffs' standing in this case." SPA6.

The court also dismissed the ATA Claim "for the independent reason that [it] fail[s] to state a claim." SPA6. The court noted that liability under ATA Section 2333(a) requires a showing of proximate cause, and "[i]f the allegations here are so speculative and attenuated as to deprive plaintiffs of standing, it follows *a fortiori* that they fail to adequately plead causation." SPA7-8.

The court also rejected the aiding-and-abetting claim under the ATA. "[A]ssuming *arguendo* that a defendant in a private action brought under the Antiterrorism Act can be held liable on an aiding and abetting theory," the court concluded that the plaintiffs fail to plead necessary elements of such a claim.

SPA8. The court explained that an aiding-and-abetting theory "would here require adequate allegations that the defendant not only knew that its funds would be used to sponsor terrorist acts by Hamas and Hezbollah, but also *intended to do so*." *Id.* (emphasis added). The court, however, concluded that "[n]o such allegations are remotely made here. In fact, the Court cannot discern *any* substantive allegation in the amended complaint that adequately alleges intent in *any* form." *Id.* (emphasis added).

Finally, the court dismissed the International Law Claim both on preemption grounds and because plaintiffs failed to adequately plead an aiding-and-abetting theory. SPA9. Regarding preemption, the court concluded that because "Congress has legislated on the subject" (*id.* (quoting *In re Oswego Barge Corp.*, 664 F.2d 327, 335 (2d Cir. 1981))), the ATA "swallow[s]" the International Law Claim. *Id.*

The court entered final judgment on September 8, 2009. SPA11. Plaintiffs' Notice of Appeal was filed on September 29, 2009. A610.[1]

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[1] On appeal, plaintiffs do not challenge either of the district court's grounds for dismissing the International Law Claim. Plaintiffs have thus conceded that the ATA preempts the International Law Claim. *FTC v. Verity Int'l, Ltd.*, 443 F.3d 48, 65 (2d Cir. 2006) ("Because the defendants-appellants did not contest the district court's . . . determination until their reply brief . . . we deem it waived on appeal.").

STATEMENT OF FACTS

UBS Banknote Transactions

UBS is a major international bank with branches around the world. One of the many services UBS provides is exchanging electronic funds for an equivalent amount of physical currency (including United States banknotes). A40 ¶ 62. That is, UBS debits the account of an existing customer or otherwise accepts a funds transfer and in return provides the counterparty with physical banknotes. *Id.* These transactions do not provide counterparties with any additional financial resources; they merely permit the counterparties to convert existing funds into physical cash. UBS also provides the converse service; that is, UBS accepts physical banknotes and then credits such funds to the account of the person submitting the banknotes.

UBS frequently performed this service without the formal participation of any government. If a counterparty wanted to exchange funds deposited on account for physical currency, UBS could execute the transaction using physical currency it already held or, alternatively, acquire physical currency. For example, in 2003, UBS supplied more than 100 different currencies to more than 2,000 counterparties (mainly other banks) in more than 60 countries. Monika Baumgartner, *A Peek into the Vault*, UBS Newsletter for Banks & Financial Institutions, Vol. II, 2003 at 9, *available at* http://www.ubs.com/1/ShowMedia/bank_for_banks/news/

archive?contentId=28344&name=N4B.pdf. At that time, UBS's total annual volume of currency transactions was approximately U.S. $140 billion. *Id.*

In 1996, the Federal Reserve Bank of New York introduced the Extended Custodial Inventory program ("ECI"). The ECI's primary purpose was to facilitate the international distribution and repatriation of U.S. banknotes by establishing overseas currency depots. A40 ¶ 62. Private-sector banks operated these depots and held U.S. banknotes on a custodial basis for the Federal Reserve. *Id.*

The FRBNY entered a contract with UBS (the "ECI Agreement") to operate a depot in Zurich, Switzerland. A41 ¶¶ 64-65. Plaintiffs allege that the ECI Agreement required UBS to comply with all OFAC regulations in operating the currency depot. *Id.* ¶ 64. The ECI Agreement apparently included this contractual provision because UBS is not a United States person and thus is not typically bound by OFAC regulations for its conduct outside the United States. *See* 18 U.S.C. § 2332d(b)(2).

In June 2003, in response to inquiries by the United States, UBS disclosed that several of its ECI-facility employees had exchanged U.S. banknotes for electronic fund balances with counterparties in Iran, in violation of the ECI Agreement. A42 ¶ 71. The FAC generally alleges that UBS "transferred millions of dollars to, among others, the Central Bank of Iran" according to information

provided by what the FAC describes as "congressional sources familiar with UBS's activities." A48 ¶ 101.

After the United States determined that UBS breached the ECI Agreement's OFAC-compliance provision, the FRBNY terminated UBS's participation in the ECI program. A43 ¶ 78. UBS's 2004 internal investigation found that UBS's ECI employees were motivated by the belief that they were creating "operational efficiencies"—*i.e.*, saving UBS money—by avoiding the duplicate structures necessary to run the ECI business separately from UBS's other banknote operations, which were not contractually bound by OFAC regulations. A379, 384. After UBS provided the United States with this confidential report, it consented to a $100 million civil penalty. A43-44 ¶¶ 80-83. On the day the civil penalty was announced, UBS issued a press release taking "full responsibility" and expressing regret for its employees' "very serious mistakes." A44 ¶ 84; A100.

Iran's Alleged Support of Terrorist Organizations

Plaintiffs contend that Iran supports Hamas and Hizbollah as a means of attacking Israel. A34-36. They assert that Iran provides these organizations with arms, training, and money, including U.S. banknotes. A35-37 ¶¶ 50, 52. Plaintiffs contend that the two groups needed these cash payments to fund various aspects of their terrorist operations. A38 ¶ 54.

Plaintiffs allege further that Iran went to great lengths to conceal its banks' involvement in many financial transactions (as well as the role such banks may have played in financing terrorism). For example, plaintiffs quote Treasury Department Under-Secretary Stuart Levey's April 1, 2008, congressional testimony about how Iran deceives financial institutions:

> We have * * * seen how Iranian banks request that other financial institutions take their names off of transactions when processing them in the international financial system. This practice is intended to evade the controls put in place by responsible financial institutions and has the effect of threatening to involve them in transactions they would never engage in if they knew who, or what, was really involved. This practice is even used by the Central Bank of Iran * * *.

A50 ¶ 104. Plaintiffs also quote Deputy Treasury Secretary Robert M. Kimmitt's similar remarks made on February 8, 2008:

> Iran's longtime integration into the international financial and commercial systems has aided the regime in supporting and carrying out its dangerous activities. The Iranian regime disguises its involvement in proliferation and terrorism activities through an array of deceptive practices specifically designed to evade detection from the international community * * *. These deceptive practices are *specifically designed to evade* the risk-management controls put in place by responsible financial institutions and have allowed actions by Iranian banks to remain undetected as they move funds through the international financial system to pay for the Iranian regime's illicit activities. Iran uses its state-owned banks to facilitate this conduct, and those banks engage *in a range of deceptive practices.* For example, some have requested that other financial institutions take their names off transaction documents when processing them globally.

> This practice, which makes it difficult, *if not impossible*, to determine the true parties in the transaction, is even used by Bank Markazi, Iran's Central Bank.

A49 ¶ 103 (emphasis added). Mr. Kimmitt stated in that same speech that it was not until 2006—three years after the last UBS banknote transaction at issue here—that the U.S. began taking action against Iranian banks and warning central banks and financial institutions about the "inherent risks" of doing business with seemingly non-governmental Iranian entities. A107.[2] In fact, up until November 2008, OFAC regulations permitted U.S. persons to engage in certain transactions involving Iranian banks under the so-called U-Turn exception. 31 C.F.R. § 560.516 (permitting certain fund transfers involving Iranian parties where the transaction does not involve debiting or crediting an Iranian account).

Hamas and Hizbollah's Independent Funding

In other lawsuits that certain plaintiffs here have filed, they allege that Hamas and Hizbollah were funded not by Iran, but by a large and highly lucrative network of "charities." A184-85, 292. Plaintiffs similarly allege that insofar as Hamas needed banking services, it had its own banking relationships with a Jordanian bank. A291.

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[2] After it became known that Iranian banks routinely engaged in deceptive practices, and that UBS could not have confidence of the true identity of its Iranian counterparties, in 2006 UBS became the first major non-U.S. bank to sever all ties with entities in Iran. A102. The U.S. government acknowledged that UBS's action provided a catalyst for other non-U.S. banks to sever or severely limit their relationships with Iran. A399.

The Plaintiffs' Injuries

Plaintiffs' claims stem from six terrorist attacks in Israel—five by Hamas, one by Hizbollah. A53-55 ¶¶ 113, 115, 117, 119, 124, 126. Plaintiffs allege that Iran provided "financial support" for each of those attacks and that the UBS banknote transactions "enabled" Hamas and Hizbollah to carry out those attacks (*id.* ¶¶ 114, 116, 118, 120, 125-26).

SUMMARY OF ARGUMENT

The district court properly dismissed plaintiffs' ATA Claim on two alternative grounds. First, the district court correctly concluded that plaintiffs lack standing to sue UBS because they cannot demonstrate "a proximate causal relationship" between UBS's alleged conduct and their injuries. SPA3. Because the alleged chain of causation is so tenuous, plaintiffs have not plausibly alleged that UBS's transfer of banknotes materially increased the probability that plaintiffs would be injured by terrorist attacks in Israel. Thus, plaintiffs' injuries are not "fairly traceable" to UBS's conduct.

Alternatively, plaintiffs fail to state a claim for relief under ATA Section 2333. Plaintiffs' aiding-and-abetting theory must be rejected because the principle the Supreme Court announced in *Central Bank* establishes that the statute does not create that form of liability. And even if it did, plaintiffs' allegations fail to show that UBS had the requisite knowledge, provided substantial assistance, or intended

to aid the terror attacks—each of which is a necessary element of an aiding-and-abetting claim.

Nor may plaintiffs recover on a theory of primary liability under the ATA. The district court properly concluded that the ATA requires plaintiffs to establish that their injury is proximately caused by the defendant's conduct and that plaintiffs' allegations do not satisfy that standard. Separately, UBS's provision of banknotes does not fall within the statutory definition of an "act of international terrorism," also a prerequisite to liability. For these reasons, any claim for direct liability under the statute must fail.

STANDARD OF REVIEW

This Court reviews *de novo* dismissal for lack of standing or for failure to state a claim. *Selvan v. New York Thruway Auth.*, 584 F.3d 82, 88 (2d Cir. 2009). The complaint must contain "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Moreover, "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its face." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (internal quotations omitted). A court deciding a motion to dismiss should "begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth"; with respect to the complaint's "well-

pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Id.* at 1950. This same pleading standard applies to a plaintiff's burden to demonstrate standing. *See Selvan*, 584 F.3d at 88 (applying *Iqbal* and *Twombly* to motion to dismiss for lack of standing); *see also Fowler v. UPMC Shadyside*, 578 F.3d 203, 210 (3d Cir. 2009).

ARGUMENT

I. PLAINTIFFS LACK STANDING BECAUSE THEIR INJURIES ARE NOT "FAIRLY TRACEABLE" TO UBS'S ALLEGED CONDUCT.

Article III standing is a prerequisite to federal jurisdiction. As this Court has explained, "[t]he federal judicial power extends only to actual cases and controversies; federal courts are without jurisdiction to decide abstract or hypothetical questions of law." *E.I. Dupont de Nemours & Co. v. Invista B.V.*, 473 F.3d 44, 46 (2d Cir. 2006). A federal court therefore must first consider whether a plaintiff has properly asserted standing; standing "is the threshold question in every federal case, determining the power of the court to entertain the suit." *Denney v. Deutsche Bank AG,* 443 F.3d 253, 263 (2d Cir. 2006).

To establish necessary Article III standing, (1) "a plaintiff must have suffered an 'injury in fact' that is 'distinct and palpable'" (2) "the injury must be fairly traceable to the challenged action" and (3) "the injury must be likely

redressable by a favorable decision." *Denney,* 443 F.3d at 263 (quoting *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61 (1992)). Here, plaintiffs' allegations fall far short of alleging sufficiently that their injuries are "fairly traceable" to UBS's alleged conduct.

A. A Plaintiff's Alleged Injury Must Be "Fairly Traceable" To The Defendant's Conduct.

The "fairly traceable" requirement tests whether "the line of causation between [defendant's allegedly] illegal conduct and [plaintiff's] injury [is] too attenuated." *Allen v. Wright*, 468 U.S. 737, 752 (1984). As this Court has explained, "[t]o establish standing, a plaintiff must * * * demonstrate a causal nexus between the defendant's conduct and the injury." *Heldman v. Sobol*, 962 F.2d 148, 156 (2d Cir. 1992). Thus, dismissal is appropriate when the plaintiff's allegations reflect a "'missing link' scenario"—a gap in the chain of causation on which the plaintiff relies. *Id.*; *see also Pritikin v. Dep't of Energy*, 254 F.3d 791, 801 (9th Cir. 2001) (in light of "missing causal link," the plaintiff lacked standing). A court may not "assume missing links" in the causal chain. *Am. Chemistry Council v. Dep't of Trans.*, 468 F.3d 810, 819-20 (D.C. Cir. 2006) (holding that petitioners lacked standing).

Standing likewise is lacking where it is "purely speculative" that the injury can be fairly traced to "the challenged action of the defendant," as opposed to "the independent action of some third party not before the court." *Simon v. E. Ky.*

Welfare Rights Org., 426 U.S. 26, 41-42 (1976). Finally, where there exist an "endless number of diverse factors potentially contributing" to a particular injury, this "forecloses any reliable conclusion" that one act is "fairly traceable" to the injury. *Winpisinger v. Watson*, 628 F.2d 133, 139 (D.C. Cir. 1980) (holding that plaintiffs lacked standing). Thus, "'[a] causal relationship is insufficient if it is insubstantial, remote, tenuous, or speculative.'" *Pettus v. Morgenthau*, 554 F.3d 293, 299 (2d Cir. 2009) (quoting 3 Richard J. Pierce, Jr., *Administrative Law Treatise* § 16.5, at 1154 (4th ed. 2002)).

In other words, the "fairly traceable" prong of the standing inquiry demands—at bare minimum—that a defendant's alleged "actions materially increase[d] the probability of injury." *Huddy v. FCC*, 236 F.3d 720, 722 (D.C. Cir. 2001) (holding that petitioner who challenged FCC action lacked standing); *see also Florida Audubon Soc. v. Bentsen*, 94 F.3d 658, 669 (D.C. Cir. 1996) (*en banc*) (holding that "fairly traceable" prong requires plaintiff seeking an environmental impact statement to show "a substantial probability" that defendant's conduct "created a demonstrable risk, or caused a demonstrable increase in an existing risk"). As the Supreme Court has explained, the defendants conduct must "make an appreciable difference" in bringing about the plaintiffs' asserted injury. *Allen*, 468 U.S. at 758.

B. Plaintiffs Do Not Plausibly Allege That UBS's Conduct Increased The Probability That Plaintiffs Would Be Injured By Terror Attacks.

The district court correctly applied these settled legal principles in determining that "plaintiffs' allegations are far too speculative to provide the plausible indication of proximate causation necessary to establish plaintiffs' standing in this case." SPA6. The many "missing links" demonstrate that plaintiffs' injuries are not "fairly traceable" to UBS's conduct. And any claim that UBS's banknote transactions with Iranian counterparties materially increased the probability that terrorists would attack plaintiffs in Israel fails the plausibility standard of *Twombly* and *Iqbal*.

1. As the district court explained, plaintiffs' "extended chain of inferences * * * is far too attenuated to provide plaintiffs with sufficient standing to bring this action under federal law." SPA5. The court reasoned:

> Specifically, plaintiffs, to establish standing here, must at a minimum allege facts that show a proximate causal relationship between UBS's transfers of funds to Iran and Hamas' and Hezbollah's commission of the terrorist acts that caused plaintiffs' injuries. This they have entirely failed to do.
>
> Among many other deficiencies in the causal chain, the First Amended Complaint ("Am. Compl.") does not allege that UBS is a primary or even relatively significant source of U.S. banknotes for the Iranian government. Moreover, cash dollars have multiple legitimate uses besides funding terrorism, and, as the amended complaint itself states, "[U.S.] cash dollars are a universally accepted currency and means of payment." Am. Compl. ¶ 55. Further still, there are no

> specific allegations showing that the terrorist groups here in question raise their funds from monies transferred from Iran.

SPA5-6. And the district court made clear that it was identifying just some of the problems in plaintiffs' case in order to avoid "multiplying examples." SPA6.

At the very least, the following "missing links" demonstrate that plaintiffs' allegations do not plausibly indicate a link between UBS's banknote transfers and the terrorist attacks in Israel:

- Plaintiffs fail to allege that UBS was a source of U.S. banknotes *to the Iranian government*, let alone a significant source. Indeed, Iran had several billion in U.S. dollar reserves.
- Plaintiffs fail to account for Iran's substantial, legitimate uses for U.S. banknotes.
- Plaintiffs fail to allege plausibly that Hamas and Hizbollah relied on U.S. banknotes, much less U.S. banknotes transferred from Iran.
- Plaintiffs fail to allege plausibly that U.S. banknotes from UBS were transferred to the terrorist organizations.

Each of these gaps by itself is sufficient to break the causal chain on which plaintiffs' claim depends. Taken together, plaintiffs' contentions are much too speculative to support Article III standing.

a. Plaintiffs do not plausibly show that UBS supplied U.S. banknotes *to the Iranian government*. The only support for the FAC's conclusory allegation that UBS actually exchanged U.S. banknotes directly for so-called "Iranian Government Organs"—rather than to private businesses or individuals—is a

reference to unidentified "congressional sources." A48 ¶ 101. But this allegation alone cannot support plaintiffs' entire theory of liability; indeed, plaintiffs fail to plead any specific facts demonstrating that this allegation is plausible.

Even if plaintiffs' bald allegation were accepted, plaintiffs certainly cannot show that UBS was a *significant* source of U.S. banknotes—which would be essential to begin to establish a link between the UBS-supplied banknotes and the alleged Iranian support of terrorist groups. To the contrary, Iran was consistently receiving U.S. dollars from a variety of sources.

First, Iran had substantial opportunity to amass U.S. dollars. The United States has never prohibited *all* Iranian trade. From 2000 to 2004, Iran legally sold an average of $156 million per year in goods to United States businesses. A319-23. Thus, U.S. dollars regularly flowed to Iran during the period of time relevant here.

And businesses in other countries have had good reason to engage in U.S.-dollar business with Iran. Iran has long been a leading oil exporter and is a founding OPEC member. A337. From 1996-2003, Iran averaged more than $23.5 billion in annual oil exports, most of which was paid for with U.S. dollars. A338, A345. This enabled Iran to amass huge dollar-denominated reserves. For example, in 2007, Iran itself estimated that even after reducing dollar-denominated reserves to just 20% of its total foreign currency reserves, it still had $10-20 billion

in U.S. dollar reserves, including substantial physical banknote reserves. A346. Thus, oil transactions provided Iran with more than ample cash to fund the "tens of millions of dollars in cash annually" that Iran is alleged to have given Hamas and Hizbollah. A37 ¶ 52.

Second, "as much as two-thirds of the value of all Federal Reserve notes in circulation * * * is held abroad." A94, A80. Non-U.S. banks are not subject to OFAC's Iran-sanctions regulations for activities conducted outside the United States, and Switzerland and other financial centers do not prohibit banks from doing business with Iran. A81-82, 86-87. Accordingly, Iran could readily convert its dollar-denominated electronic funds and other resources to U.S. banknotes through a wide variety of non-U.S. banks. Without any plausible basis for establishing that UBS's alleged currency transactions played a significant role with respect to Iran's currency reserves, plaintiffs cannot establish the requisite link between UBS's alleged acts and plaintiffs' injury.

b. Moreover, plaintiffs are unable to link the U.S. banknotes sold by UBS to Iran's alleged support of terrorism because there were many legitimate uses of U.S. currency in Iran. The FRBNY routinely provides U.S. banknotes to foreign central banks throughout the world, precisely because non-U.S. governments have a

legitimate need for such banknotes. A80, 94.[3] Indeed, in March 2004, "as much as two-thirds of the value of all Federal Reserve notes in circulation, or over $400 billion of the $680 billion now in circulation, is held abroad." A94. The U.S. dollar's popularity as a secondary currency for commercial and consumer transactions is well known. As the Federal Reserve's Thomas Baxter testified, "[t]he U.S. dollar is the most desired form of money in the world * * * because it is a stable, always reliable medium of exchange and store of value." A80.

Plaintiffs themselves acknowledge that "cash dollars are a universally accepted currency and means of payment." A38 ¶ 55. Like other countries, Iranian banks utilize U.S. banknotes to service their private customers. Without any plausible basis for asserting that UBS's alleged currency transactions played a significant role with respect to Iran's alleged *illegitimate* use of its cash reserves, plaintiffs cannot establish the requisite link between UBS's alleged acts and plaintiffs' injury.

c. Plaintiffs baldly assert that banknotes provided by Iran were essential funding for terrorist activities. But this conclusory assertion is contradicted by

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[3] Indeed, providing U.S. banknotes to foreign banks is one of the core services the Federal Reserve provides. "Should other central banks need U.S. currency, the New York Fed will arrange the shipment of banknotes or make the currency available for pickup at the Bank." Federal Reserve Bank of New York, New York Fed Services for Central Banks and International Institutions, http://www.newyorkfed.org/aboutthefed/fedpoint/fed20.html (November 2008).

certain plaintiffs' own allegations in other cases that Hamas (which plaintiffs allege committed five of the six attacks) obtains the majority of its financing from Islamic charities. In *Coulter, et al. v. Arab Bank, PLC*, No. CV-05-0365 (NG) (E.D.N.Y.), certain plaintiffs[4] allege that "[b]oth HAMAS and PIJ raise funds to support their terrorist acts through charitable front organizations which they control." A292 ¶ 550. They also allege that a Jordanian bank, Arab Bank PLC, facilitates the transfer of these funds to the West Bank: "Saudi currency, which cannot be conveniently converted into Israeli currency (most commonly used in Palestinian controlled areas) * * * are converted into U.S. dollars through the New York branch of Arab Bank and then routed to the local branches of Arab Bank in the West Bank." A291 ¶ 546. These allegations undermine the plaintiffs' conclusory assertions here that anti-Israeli terrorist activity "would have been severely crippled and limited" without U.S. banknotes from Iran. A39 ¶ 59.

In their opening brief, plaintiffs repeat their allegation that "Iran provides arms, training, and money to Lebanese Hizballah * * *." Br. 12. But "money" is not the same as "U.S. banknotes." Indeed, plaintiffs' reliance on their allegations that Iran merely funded Hamas and Hizbollah (Br. 15-16) demonstrates that their theory, if accepted, would mean that any entity that conducts business with Iran or

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[4] The plaintiffs prosecuting both suits are David and Sara Nachenberg; Bennett, Paula and Zev Finer and Shoshana Finer Ohana; Howard and Mina Green; and Netanel, Martin and Pearl Herskovitz.

Iranian counterparties (and thereby increases the financial resources available to Iran), would become liable for all subsequent acts of terrorism in Israel.

Plaintiffs' reliance on their default judgments is similarly misguided. Br. 12-13. Plaintiffs contend that "the chain of causation between Iran and the harm *has already been established*, and all that remained was to adequately allege UBS' causal role." Br. 12. But this generalization glosses over the crucial inquiry. The issue is not whether Iran has supported terrorist organizations; rather, a key link in the causal chain is whether Iran supported terrorist organizations *with U.S. banknotes provided by UBS*. Plaintiffs generalized allegations of Iranian support to Hamas and Hizbollah cannot establish this fundamental link that Article III demands.

Plaintiffs complain that the district court seemingly "ignored" their cash-smuggling allegations. Br. at 14. But the two Iranian cash smuggling stories plaintiffs reference were published in 2006 and 2007, several years after the last UBS banknote transaction, and do not involve cash smuggling during the relevant period. A39 ¶ 58. Those references, therefore, cannot make plaintiffs' claims plausible.

d. Even if Iran did provide U.S. banknotes to Palestinian terrorist groups, plaintiffs still must establish a link to the banknotes provided by UBS. As demonstrated above, Iran had numerous potential U.S. banknote sources, billions

in U.S. dollar reserves, and myriad legitimate uses for U.S. banknotes. Thus, only by pure speculation can the UBS transactions be connected with any terrorist attack, much less the attacks that injured plaintiffs. As the district court held, any such connection would be "far too attenuated to provide plaintiffs with sufficient standing to bring this action under federal law." SPA5.

2. These claims are particularly deficient in light of *Twombly* and *Iqbal*. In *Twombly*, the Court explained that "[f]actual allegations must be enough to raise a right to relief above the speculative level." 550 U.S. at 555. That is, a complaint must "'nudge[] [the] claims * * * across the line from conceivable to plausible.'" *Iqbal*, 129 S. Ct. at 1950-51 (quoting *Twombly*, 550 U.S. at 570). Determining whether allegations are "plausible" is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 1949. And as this Court has held, *Twombly* and *Iqbal* apply with full force in the context of a party's allegations necessary to demonstrate standing. *See Selvan*, 584 F.3d at 88; *see also Fowler*, 578 F.3d at 210.

Accordingly, it is not enough for plaintiffs to allege a standing theory that rests on conclusory statements; the complaint must allege facts supporting a *plausible* theory. This plaintiffs cannot do. Their core allegation—that UBS's transfer of U.S. banknotes to Iran made it *materially more probable* that plaintiffs would be injured in attacks conducted by Hamas and Hizbollah in Israel—is

simply not plausible. Nothing UBS allegedly did increased the probability these organizations would commit the acts of terrorism at issue.

The radical nature of plaintiffs' theory is proven by its overly broad sweep. UBS's alleged conduct is ultimately indistinguishable from that of *any* party that supplies a U.S. banknote to Iran. Under plaintiffs' view, any individual, business, or bank that gives a material amount of U.S. banknotes to an Iranian-owned bank or currency exchange (either to hold as a deposit or for exchange into Iranian Rials) would be liable for *all* subsequent terrorist activities that occur in Israel. There is simply no limit to this expansive theory. Consistent with the district court's approach below, this Court should adopt the sensible limitation on standing that Article III principles require: victims of terrorism have standing to sue only those entities that can plausibly be shown to have increased the probability of the terror attacks that injured them. Common sense dictates that UBS is not such an entity.

3. Plaintiffs find no support in *Mastafa v. Australian Wheat Bd. Ltd*, 2008 WL 4378443, at *1-2 (S.D.N.Y. Sept. 25, 2008). There, the defendants were alleged to have provided cash kickbacks directly to Saddam Hussein's regime, which allegedly tortured and killed plaintiff's husband. *Id.* Here, to the contrary, there is no allegation that Iran committed or planned any of the terrorist attacks that injured plaintiffs. Thus the causal chain is substantially more attenuated.

Furthermore, *Mastafa* ultimately reached the conclusion that plaintiffs' injury was too remote from defendants' alleged conduct to support a claim:

> As a preliminary matter, it must be noted that aiding the Hussein regime is not the same thing as aiding and abetting its alleged human rights abuses. * * * An example from criminal law makes the point clear: A mother who knows that her son deals drugs on the street may provide him with substantial financial benefit by letting him live in her house rent-free, but to become an accessory to his crimes, her assistance must facilitate the criminal acts themselves (as, for example, if she allowed him to use the house as a secure place in which to store or sell drugs). Similarly, providing the Hussein regime with funds—even substantial funds—does not aid and abet its human rights abuses if the money did not advance the commission of the alleged human rights abuses.

Mastafa, 2008 WL 4378443, at *4. Although the court may have reached this conclusion under the rubric of failure to state a claim, the fact remains that the decision was animated by the same concerns that Judge Rakoff expressed in holding that plaintiffs lacked standing.

Plaintiffs' arguments about the fungibility of money and the UBS banknote transactions' supposed importance (Br. at 14-17) are simply a failed attempt to shoehorn their allegations into the same factual framework as *Boim III*, where defendants gave terrorist organizations funds that those organizations did not previously possess. Here, however, there is no allegation that UBS donated or otherwise provided any funds to the Iranian government (much less any entity in Iran). Rather, UBS is simply alleged to have exchanged physical currency for assets that Iranian counterparties already possessed. In that regard, UBS provided

an even lesser benefit than the U.S. businesses that bought an average of $156 million per year in goods from Iran between 2000-2004—businesses that plaintiffs likewise would have standing to sue for aiding terrorism under their unduly expansive theory.

II. THE DISTRICT COURT DID NOT ERR IN IDENTIFYING AN ALTERNATIVE GROUND TO DISMISS THE COMPLAINT.

Plaintiffs' argument that the district court erred in providing an alternative basis for its holding is irrelevant. Br. 17-18. This Court can affirm dismissal of the complaint on any ground contained in the record. *See ACEquip Ltd. v. Am. Engineering Corp.*, 315 F.3d 151, 155 (2d Cir. 2003) ("Our court may, of course, affirm the district court's judgment on any ground appearing in the record, even if the ground is different from the one relied on by the district court."). Whether plaintiffs state a claim for relief under the ATA is an issue plainly raised below. Thus, should the Court reverse on standing, the question of whether plaintiffs properly state an ATA claim is ripe here, regardless of whether it was correct for the district court to issue an alternative holding below (a practice in which courts routinely engage). Plaintiffs' suggestion to the contrary is misguided and would waste judicial resources.

III. PLAINTIFFS FAIL TO STATE AN ATA CLAIM.

Even if plaintiffs could demonstrate standing, they fail to state a claim for relief cognizable under the ATA. Because *Iqbal* and *Twombly* apply to this

analysis, plaintiffs must allege non-conclusory facts sufficient to state a claim that itself is "plausible." *See*, *supra*, at 16-17, 27.

Plaintiffs' complaint asserts a claim for aiding-and-abetting a Section 2333 violation, but there is no aiding-and-abetting liability under the statute. And even if there were, the district court was correct (when it assumed existence of such a claim *arguendo*) to conclude that plaintiffs' allegations fall far short of pleading the necessary elements of an aiding-and-abetting claim.

Perhaps recognizing these shortfalls, plaintiffs appear to have largely jettisoned their aiding-and-abetting theory and now seek to recast their claim as one for primary liability under the statute. Br. 25. But plaintiffs have not adequately alleged that they were injured "by reason of" any UBS act or that UBS's alleged conduct constitutes an "act of international terrorism." Thus, plaintiffs fail to plead the elements required to state a primary violation of Section 2333.

A. Plaintiffs Aiding-and-Abetting Theory Fails.

1. There is no aiding-and-abetting liability under Section 2333.

Section 2333(a) states that "[a]ny national of the United States injured in his or her person, property, or business by reason of an act of international terrorism, or his or her estate, survivors, or heirs, may sue therefor * * *. 18 U.S.C. § 2333(a). Where Congress has crafted a precise civil remedy that does not include

aiding-and-abetting liability, a court may not read such liability into the statute. *See Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 182 (1994) ("Congress has not enacted a general civil aiding and abetting statute * * * for suits by private parties. Thus, when Congress enacts a statute under which a person may sue and recover damages from a private defendant for the defendant's violation of some statutory norm, there is no general presumption that the plaintiff may also sue aiders and abettors."). Here, as in *Central Bank*, "it is not plausible to interpret the statutory silence as tantamount to an implicit congressional intent" to create liability for aiding and abetting another person's violation of Section 2333 violation. *Id.* at 185.[5]

As the *en banc* Seventh Circuit explained, the text of the statute "does not say that someone who assists in an act of terrorism is liable; * * * [s]o statutory silence on the subject of secondary liability means there is none." *Boim v. Holy Land Found. for Relief & Dev.*, 549 F.3d 685, 689 (7th Cir. 2008) (en banc) ("*Boim III*").

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[5] Analogous statutes provide additional support. Section 2333 is modeled after the private cause of action available under RICO and the federal antitrust statutes. *Compare* 18 U.S.C. § 2333 *with* 18 U.S.C. § 1964(c) & 15 U.S.C. § 15. Courts have routinely found that there is no private cause of action for aiding-and-abetting under the nearly-identical RICO text. *See, e.g., Penn. Ass'n of Edwards Heirs v. Rightenour*, 235 F.3d 839, 844 (3d Cir. 2000).

2. Plaintiffs' allegations are inadequate to establish an aiding-and-abetting claim.

Even if there could be a Section 2333(a) aiding-and-abetting claim, plaintiffs' allegations would fail to state such a claim. Because plaintiffs do not plausibly allege that (i) UBS knew that the Iranian government was using U.S. banknotes to support terrorism, (ii) UBS knew U.S. banknotes that it provided in transactions with Iranian counterparties would assist Iran in that regard, (iii) UBS actually did substantially assist Iran's alleged support of terrorism, or (iv) UBS intended to assist terrorist activities, the allegations fall far short of a properly pleaded aiding-and-abetting theory. *See Stutts v. De Dietrich Group*, 2006 WL 1867060, at *3 (E.D.N.Y. June 30, 2006) (without deciding whether aiding-and-abetting is available under the statute, holding that plaintiffs failed to prove knowledge, substantial assistance, and intent); *accord Boim v. Quaranic Literacy Inst.*, 291 F.3d 1000, 1023 (7th Cir. 2002) ("*Boim I*"), *overruled by Boim III*, 549 F.3d at 689.

Knowledge. Plaintiffs fail to plead adequately that UBS knowingly provided assistance for Iran's support for Palestinian terrorism. Plaintiffs do not adequately allege that UBS knew that its Iranian counterparties were providing U.S. banknotes to Hamas and Hezbollah. Plaintiffs' assertion that it was "a matter of open public record" that Iran might use hard currency to fund terrorist attacks is based entirely on third-party public statements that either post-date the UBS

banknote transactions or refer only to Iran's general support for terrorism. A57 ¶ 135.

Second, even if plaintiffs could show that UBS knew Iran was engaging in illicit conduct, plaintiffs do not allege that UBS knew that its own actions would assist Iran in so doing. Plaintiffs do not plausibly allege that UBS knew the identities of its Iranian counterparties. As plaintiffs explain in their pleadings, Iranian banks employed "deceptive practices specifically designed to evade the risk-management controls put in place by responsible financial institutions." A49 ¶ 103. In addition, knowing that Iran supports terrorism generally is not the same as knowing that Iran will use U.S. banknotes to support terrorists. *See Stutts*, 2006 WL 1867060, at *3-4 (rejecting claim that banks knowingly aided and abetted Iraq's chemical weapons attacks on Kurdish citizens, holding that "general publicity [about Iraq's chemical weapons use]" does not "demonstrate that it was reasonably foreseeable" that issuing letters of credit would result in Iraq manufacturing chemical weapons).

The district court's holding in *Mastafa*, issued in the context of the Alien Tort Claims Act, is instructive. Judge Lynch found that claims that a bank aided and abetted human rights claims by the Saddam Hussein regime failed to state a cause of action because the "knowledge element of aiding and abetting requires that a defendant have actual knowledge that it is assisting in the tortious conduct."

Id. at *5 (quotation omitted). Accordingly, "[t]his means that allegations of 'negligence,' i.e., that a bank 'should have known,' will not suffice." *Id.* (quoting *Aetna Cas. & Sur. Co. v. Leahey Const. Co*, 219 F.3d 519, 536 (6th Cir. 2000)). Therefore, when an entity took steps to "hide the payments it was making to Iraq," there was no basis to contend that plaintiffs had sufficient knowledge of the allegedly impermissible payments. *Id.* A "formulaic recitation" that a party knew it was providing practical assistance "is not sufficient by itself to make the claim for relief 'plausible.'" *Id.* (quoting *Twombly*, 550 U.S. at 570).

Substantial Assistance. Plaintiffs also fail to allege adequately that UBS substantially assisted Iran's terrorist activities. Plaintiffs make no attempt to allege that the 1996-2003 UBS banknote transactions were a substantial factor in Iran's alleged 30-year history of supporting terrorism in Israel, which has allegedly included arms, training, and hundreds of millions of dollars in financing. A34-37 ¶¶ 50-51. Plaintiffs' conclusory allegations that the UBS banknote transactions "enabled" Hamas and Hizbollah to carry out the attacks that injured plaintiffs are the very sort of conclusory allegations that must be disregarded under *Iqbal*. And there are no factual allegations whatever in the FAC to make such an inference plausible.

Intent. The district court also properly concluded that plaintiffs failed to plead that UBS intended to aid the acts of terrorism; "[n]o such allegations are

remotely made here. In fact, the Court cannot discern any substantive allegation in the amended complaint that adequately alleges intent in any form." SPA8. It is well established that specific intent is a necessary element of an aiding-and-abetting claim. *See, e.g., United States v. Frampton*, 382 F.3d 213, 223 (2d Cir. 2004) ("The intent necessary to support a conviction for aiding and abetting goes beyond the mere knowledge that the defendant's action would tend to advance some nefarious purpose of the principal."). *Cf. Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 258 (2d Cir. 2009) (adopting intent requirement for aiding-and-abetting claim brought under the Alien Tort Claims Act).[6] The failure even to allege intent bars plaintiffs' claims.

B. Plaintiffs' Primary Liability Theory Fails.

Plaintiffs also cannot state a claim for primary liability under Section 2333. This statute provides:

> Any national of the United States injured in his or her person, property, or business by reason of an act of international terrorism, or his or her estate, survivors, or heirs, may sue therefor in any appropriate district court of the United States and shall recover threefold the damages he or she sustains and the cost of the suit, including attorney's fees.

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[6] *Halberstam v. Welch*, 705 F.2d 472, 477 (D.C. Cir. 1983), is not to the contrary. *Halberstam* does not dispense with an intent requirement. Indeed, *Halberstam* approves of cases that it candidly explains do adopt intent requirements. *See, e.g., id.* at 478 n.8 (quoting *Payton v. Abbott Labs*, 512 F. Supp. 1031, 1035 (D. Mass. 1981) (requiring that party show "unlawful intent—'knowledge that the other party is breaching a duty and the intent to assist that party's actions").

18 U.S.C. § 2333(a). Under the statute's plain terms, a plaintiff must prove: (1) that he or she was injured by "by reason of" the defendant's conduct, *i.e.*, proximate cause, and (2) that the defendant's conduct constituted "an act of international terrorism." If either element is missing, an ATA claim must fail. Here, plaintiffs' allegations fall short on both counts.[7]

1. UBS's acts did not proximately cause plaintiffs' injuries.

The district court correctly concluded that Section 2333(a)'s "by reason of" element is "synonymous with 'proximate cause.'" SPA7. Because plaintiffs cannot show that UBS's alleged activity proximately caused their injuries, the claim must fail.

a. The phrase "by reason of" is a standard term of art that Congress uses to impose a proximate cause requirement. The term originated in the Clayton Act, 15 U.S.C. § 15, which creates a private cause of action for "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws." In *Brunswick Corp.* v. *Pueblo Bowl-O-Mat Inc.*, 429 U.S. 477 (1977), the

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[7] In *Boim III*, the Seventh Circuit stated that "[p]rimary liability in the form of material support to terrorism has the character of secondary liability. Through a chain of incorporations by reference, Congress has expressly imposed liability on a class of aiders and abettors." *Boim III*, 549 F.3d at 691-92. This observation simply means that Congress has defined certain acts that are colloquially referred to as "aiding and abetting" terrorism—*e.g.*, knowingly donating funds to terrorist organizations—as themselves "acts of international terrorism." This does not alter a Section 2333 plaintiff's obligation to prove each of the statutory elements to demonstrate that a defendant has committed an "act of international terrorism."

Court held that the "by reason of" language required plaintiffs to establish a link akin to proximate causation between the antitrust violation and the injury for which they seek compensation. See *id.* at 489 ("injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful").

The very same phrase appears in the provision of the RICO statute authorizing damages actions:

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

18 U.S.C. § 1964(c). In *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 268 (1992), the Court determined that because the RICO statute was itself modeled after federal antitrust law, the Court could "fairly credit" Congress "with knowing the interpretation federal courts had given the words earlier Congresses had used" in the construction of the antitrust laws. "It used the same words, and we can only assume it intended them to have the same meaning that courts had already given them." *Id.* The Court concluded that when Congress uses the words "by reason of" in a civil statute, "[p]roximate cause is thus required." *Id.*

Because Section 2333 is plainly modeled on both RICO and antitrust law, there can be no doubt that Congress intended to impose a proximate cause

requirement.[8] Numerous courts have agreed with the district here that Section 2333 requires proof that the defendant's conduct proximately caused plaintiff's injury. *See Goldberg v. UBS AG*, 660 F. Supp. 2d 410, 429 (E.D.N.Y. 2009) ("The words 'by reason of' have been interpreted to express Congress's intent to require a showing of proximate causation."); *Weiss v. Nat'l Westminister Bank PLC*, 453 F. Supp. 2d 609, 631 (E.D.N.Y. 2006) (same).

The Supreme Court has specified the bedrock requirement for proximate causation under these federal statutes: there must be "*some direct relation* between the injury asserted and the injurious conduct alleged." *Holmes*, 503 U.S. at 268 (emphasis added). And the Supreme Court recently reiterated that "[w]hen a court evaluates a RICO claim for proximate causation, the central question it must ask is whether the alleged violation *led directly* to the plaintiff's injuries." *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 461 (2006) (emphasis added). Moreover, this Court has explained that this proximate causation standard also requires a showing of foreseeability; "the plaintiff must have suffered a direct injury that was foreseeable." *Baisch v. Gallina*, 346 F.3d 366, 373 (2d Cir. 2003).

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[8] Indeed, *Holmes* was decided on March 24, 1992, and Section 2333 was enacted a mere seven months later on October 29, 1992. *See* Pub. L. 102-572, Tit. X, § 1003(a)(4), 106 Stat. 4522. Given the recent reminder contained in *Holmes*, it is clear that Congress was well aware of the import of its language.

b. Plaintiffs cannot establish the requisite degree of proximate causation. In no way do plaintiffs allege that UBS's activity "led directly to the plaintiffs" injuries. *Anza*, 547 U.S. at 461. Plaintiffs' chain of causation is merely speculation built on speculation—there is nothing at all direct about it. *See*, *supra*, at 27. Indeed, as one court in this circuit has concluded, mere publicity that a government engages in unlawful conduct "does not provide a causal link" between a bank's conduct and victims of the regime. *See Stutts*, 2006 WL 1867060, at *4 ("Plaintiffs allege no facts, nor can they, to demonstrate that it was reasonably foreseeable to the Bank Defendants that issuing letters of credit to manufacturers would in any way contribute to Saddam Hussein's use of chemical weapons or a *fortiorari* the manufacture of chemical weapons *in Iraq*." (internal quotation omitted)).

Nor can plaintiffs demonstrate that plaintiffs' injuries are a foreseeable result of UBS's alleged actions here. It simply is not plausible to contend that UBS could foresee that transferring U.S. banknotes to Iranian counterparties would cause, or even increase, the risk U.S. citizens faced from terrorist attacks by Hamas and Hizbollah.

c. Plaintiffs' attempted reliance on *Boim III* and *Julin*—cases involving defendants who provided direct and material support to terrorist organizations—is substantially misplaced. In *Boim III* (a case where the defendants donated

significant amounts of money to Hamas), the Seventh Circuit applied an erroneously lax causation standard. Members of the court dissented expressly on this issue. *Boim III*, 549 F.3d at 709 (Rovner, J., concurring in part, dissenting in part) ("This is judicial activism at its most plain."); *id.* at 724 (Wood, J., concurring in part, dissenting in part) ("At some point, the harm is simply too remote from the original tortious act to justify holding the actor responsible for it * * *. The *en banc* majority freely concedes that there are no limits at all to its [causation] rule, and that a donor who gave funds to an organization affiliated with Hamas in 1995 might still be liable under § 2333 half a century later, 2045.").

The dissenters have the better of this argument because, as explained above, the proximate causation standards developed in the RICO and antitrust context apply with full force here. *See Anza*, 547 U.S. at 457. Given Congress's use of the specialized term "by reason of," and the Supreme Court's consistent interpretation of that phrase, a court is compelled to interpret Section 2333 as requiring "*some direct relation* between the injury asserted and the injurious conduct alleged." *Holmes*, 503 U.S. at 268. We submit that the Seventh Circuit lost sight of the clear statutory language.

But in any event, *Boim III's* dubious causation standard provides no support to plaintiffs here. That court did not eliminate causation, it simply held that any individual who knowingly donates material amounts of money to a terrorist

organization is liable for all subsequent acts of that organization. *Boim III*, 549 F.3d at 698-700. In that case, defendants were "knowing donor[s] to Hamas—that is, a donor who knew the aims and activities of the organization [and] would know that Hamas was gunning for Israelis and that donations to Hamas, by augmenting Hamas's resources, would enable Hamas to kill or wound, or try to kill, or conspire to kill more people in Israel." *Id.* at 693-94. The court's holding—expressly driven by desire to impose liability upon terrorists' "financial angels" *id.* at 690—does not support the causation theory plaintiffs assert in this case: that exchanging U.S. banknotes with Iranian counterparties, who may (or may not) be the Iranian government, who may (or may not) at some later date transfer U.S. banknotes to Hamas and Hizbollah, who may (or may not) need or use U.S. banknotes, makes UBS liable for *all* subsequent terrorist acts by these groups.

Julin v. Chiquita Brands Int'l, Inc., 2010 WL 432426 (S.D. Fla. Feb. 4, 2010), is likewise inapposite. There, plaintiffs alleged that the defendant gave direct and substantial support in the form of material amounts of money and arms to a terrorist organization; "[p]laintiffs allege that Chiquita knowingly and intentionally supplied secret monthly payments of between $20,000 and $100,000 to FARC over an eight-year period beginning in 1989 (four years before the first kidnaping at issue), and *continuing* through at least 1997, knowing, or consciously avoiding, the fact that FARC was a violent terrorist organization. * * * Plaintiffs

also allege that Chiquita supplied FARC with weapons, ammunition and other supplies through its transportation contractors." *Id.* at *16. The direct and knowing provision of money or supplies to a terrorist organization—the circumstances at issue in *Boim III* and *Julin*—is a far cry from conducting currency exchanges for Iranian counterparties.

d. Plaintiffs also incorrectly rely on certain "wire transfer" cases (like *Goldberg*, *Strauss*, and *Weiss*) where individuals generally contend that the defendant banks acting on client instructions executed wire transfers to charities in the West Bank allegedly connected to terrorist organizations. These cases properly recognize that Section 2333 contains a proximate causation requirement. *See Goldberg*, 660 F. Supp. 2d at 429-30; *Strauss v. Credit Lyonnais, S.A.*, 2006 WL 2862704, at *17-18 (E.D.N.Y. Oct. 5, 2006); *Weiss*, 453 F. Supp. 2d at 631-32. We believe, however, that these decisions erred in, among other things, concluding that fund transfers (which, of course, involved no donation of funds by the bank) in any amount, whether significant to the recipient or not, establish "some direct relationship" between the defendant banks and the injuries suffered by the plaintiffs in those respective cases.

That aside, the district court below was correct to find these holdings irrelevant to this case. *See* SPA4. Here, the connection between UBS's alleged actions and plaintiffs' injuries is far more attenuated than even the dubious theories

asserted in *Goldberg*, *Strauss*, and *Weiss*. The Supreme Court's vigorous proximate causation standard cannot possibly tolerate the tenuous and speculative links on which plaintiffs rely.

e. Plaintiffs' novel suggestion that causation may be presumed in the face of a violation of a statute or regulation (Br. 21-23) is woefully misguided. As we have explained (*see*, *supra*, 31-41) and as we will further discuss below (*see*, *infra*, 44-51), UBS did not violate any statute or regulation. Thus, plaintiffs' premise is incorrect.

Moreover, plaintiffs' legal theory is wrong. Indeed, this argument is belied by the structure of Section 2333. The statute creates a cause of action for one who is injured "by reason of" an "act of international terrorism." But "international terrorism" is defined to require proof that the defendant violated some federal or state law. *See* 18 U.S.C. § 2331(1)(A). If plaintiffs were correct, causation could be presumed in *every* case arising under Section 2333. This, however, would render the phrase "by reason of"—and Congress's clear creation of a proximate causation standard—meaningless. *See Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 112 (1991) ("[W]e construe statutes, where possible, so as to avoid rendering superfluous any parts thereof.").

Plaintiffs fail to identify a single case interpreting a federal statute that supports their novel contention; their cases all involve burden shifting in the

context of common law negligence claims.[9] Indeed, plaintiffs' theory is inconsistent with precedent developed in the RICO context, which also requires a plaintiff to prove violations of federal or state criminal laws in order to establish an entitlement to damages. *See* 18 U.S.C. § 1964(c) (requiring a violation of 18 U.S.C. § 1962(c), which in turn requires violations of enumerated predicate offenses). Plaintiffs' outlandish theory cannot be squared with the Supreme Court's decisions in *Holmes* and *Anza*. Thus, plaintiffs' theory must be rejected.

2. UBS did not commit an "act of international terrorism."

Quite apart from plaintiffs' failure to demonstrate that UBS proximately caused plaintiffs' injuries, plaintiffs have failed plausibly to allege an even more fundamental element of Section 2333: that UBS actually committed an act of "international terrorism."[10] As the Seventh Circuit explained, the "first link in the

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[9] *See Liriano v. Hobart Corp.*, 170 F.3d 264 (2d Cir. 1999) (personal injury claim under New York law); *Zuchowicz v. United States*, 140 F.3d 381 (2d Cir. 1998) (Federal Tort Claims Act wrongful death action applying Connecticut law); *Elliott v. Michael James, Inc.*, 559 F.2d 759 (D.C. Cir 1977) (wrongful death action under D.C. law); *Owens v. Republic of Sudan*, 412 F. Supp. 2d 99, 113 n.20 (D.D.C. 2006) (*dicta* discussing burden shifting in common law negligence cases).

[10] Section 2333(a) makes it clear that the *defendant* must be the one who commits the "act of international terrorism." The highly analogous RICO and antitrust civil statutes (which use the same language) both permit suits only against the individual who committed the proscribed act. *See Beck v. Prupis*, 529 U.S. 494, 505 (2000) ("[I]njury caused by an overt act that is not an act of racketeering or otherwise wrongful under RICO * * * is not sufficient to give rise to a cause of action under § 1964(c)."); *see also Holmes*, 503 U.S. at 265 (explaining that a RICO civil claim must demonstrate that *the defendant* actually violated RICO);

chain" of a Section 2333 claim is the "statutory definition of 'international terrorism.'" *Boim III*, 549 F.3d at 690. Section 2331(1), enacted concurrently with Section 2333, provides a precise definition of "international terrorism:"

> [T]he term "international terrorism" means activities that—
>
> (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State;
>
> (B) appear to be intended—
>
> (i) to intimidate or coerce a civilian population;
>
> (ii) to influence the policy of a government by intimidation or coercion; or
>
> (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; *and*
>
> (C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum.

Thus, to demonstrate that a party has committed "an act of international terrorism" as used in Section 2333, a plaintiff must show (1) that a defendant committed a violent or dangerous act in violation of federal or state law, (2) that the defendant did so for a "terrorism purpose," and (3) there is an international nexus. *See Boim III*, 549 F.3d at 690-91 (explaining the "chain of incorporations" in that Section

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Associated Gen. Contractors v. California State Counsel of Carpenters, 459 U.S. 519, 535 (1983) (same in antitrust context).

2333 incorporates Section 2331(1), which in turn incorporates the substantive terrorism violations). Here, the first two elements are missing.

a. Plaintiffs do not plead facts plausibly demonstrating a "terrorism purpose."

Section 2331(1) limits acts that qualify as "international terrorism" to conduct carrying objective indicia that the defendant held terrorist goals. That is to say, it is not enough for plaintiffs to demonstrate that UBS's banknote transfers amount to a violation of some particular statute. Rather, they must also show that this conduct "appear[s] to be intended" to (1) "intimidate or coerce a civilian population," (2) "influence the policy of a government by intimidation or coercion," or (3) "affect the conduct of a government by mass destruction, assassination, or kidnapping." 18 U.S.C. § 2331(1)(B). This requirement is essential "to distinguish terrorist acts from other violent crimes." *Boim III*, 549 F.3d at 694. Indeed, "it is not a state-of-mind requirement; it is a matter of external appearance rather than subjective intent, which is internal to the intender." *Id.*

Here, plaintiffs do not allege any facts that suggest UBS banknote transactions "appear to be intended" to intimidate civilians, influence a government's policy via intimidation or coercion or affect its conduct through mass destruction or the like. Plaintiffs do not allege that these banking transactions evidence any of the objective indicia that the statute requires.

Section 2331(1)(B) plays a vital role in determining the scope of civil liability under Section 2333(a), separating terrorist conduct from that which is merely unlawful. Thus, where a plaintiff fails to prove these objective indicia of terrorism, a Section 2333 claim fails for this reason alone. *See Stutts*, 2006 WL 1867060, at *2 (dismissing Section 2333(a) claim against foreign banks for issuing letters of credit to companies doing business with Iraq where no allegations "their actions [were] designed to coerce civilians or government entities as *required* under § 2331" (emphasis added)).

b. Plaintiffs fail to plead a predicate offense.

Additionally, for an act to qualify as "international terrorism" under Section 2331(1), it must constitute conduct that is "violent" or "dangerous to human life" and also in violation of federal or state law. The most common predicate offenses invoked in ATA cases are the substantive federal terrorism offenses, such as 18 U.S.C. § 2339A. *See Boim III*, 549 F.3d at 690-91. Indeed, Congress made clear that Section 2333 only adds civil liability to cases in which the United States already imposed a criminal prohibition; "[t]his section extends the same jurisdictional structure that undergirds the reach of American criminal law to the civil remedies that it defines." S. Rep. No. 102-342 at 45 (1992), 1992 WL 187372.

Acknowledging this requirement, plaintiffs contend that UBS violated 18 U.S.C. §§ 2332d, 2339A, 2339B, & 2339C. *See* A46-51 ¶¶ 94, 96-99, 105-08. But plaintiffs do not explain how UBS violated any one of these statutes, and upon examination, each of these proffered predicate violations falls flat. Plaintiffs simply fail to properly allege the substantive violation of law that is a necessary component of a Section 2333 claim.

Section 2332d—financing transactions. Section 2332d applies only to a "United States person." 18 U.S.C. § 2332d(a). As a Swiss corporation (A33 ¶ 44), UBS is not a "United States person" and, thus, cannot violate Section 2332d. Indeed, the statute expressly defines a "United States person" as (1) a "United States citizen or national," (2) a "permanent resident alien," (3) a "juridical person organized under the laws of the United States," or (4) "any person in the United States." 18 U.S.C. § 2332d(b)(2). Because UBS is a "juridical person," it is only subject to liability if it is organized under the laws of the United States. *Id.* UBS is not. *See United States v. Chalmers,* 474 F. Supp. 2d 555, 565-66 (S.D.N.Y. 2007) (foreign corporation is not a "United States person" under Section 2332d, even when controlled by U.S. citizen and alleged wrongdoing occurs in the United States).

Section 2339A—material support to terrorists. Section 2339A only "appl[ies] to those persons who provide material support to the *primary*

perpetrators of violent acts of terrorism." *Boim I*, 291 F.3d at 1014. Plaintiffs do not, however, allege that Iran itself planned or executed any attack. Moreover, to violate the statute, one must provide the material support "knowing or intending" that it will support terrorist actions. 18 U.S.C. § 2339A(a). There are no allegations to support a plausible inference that UBS had such knowledge or intent.

Section 2339B—material support to foreign terrorist organization. Section 2339B is inapposite because it only prohibits material support for a "foreign terrorist organization" ("FTO"), a defined term. 18 U.S.C. §§ 2339B(a)(1), 2339B(g)(6). Plaintiffs allege only that Iran is a "state sponsor of terrorism" under 50 U.S.C. App. § 2405(j), not an FTO. A36 ¶ 51.

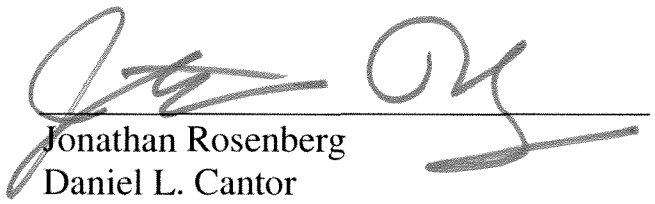
Section 2339C—financing terrorism. UBS did not violate Section 2339C because it did not "unlawfully * * * provide[] or collect[] funds" for Iran. 18 U.S.C. § 2339C(a)(1). Rather, it is only alleged to have converted existing funds into U.S. banknotes. There is also no basis to conclude that UBS acted "willfully" or with "knowledge," as the statute requires. *Id.*

CONCLUSION

Because plaintiffs attempt to stretch Article III standing well past its breaking point and because plaintiffs seek to impose vastly greater liability under the ATA than Congress intended, this Court should affirm the district court's judgment dismissing the complaint with prejudice.

Dated: New York, New York
May 21, 2010

Respectfully submitted:



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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitations under Fed. R. App. P. 28.1(e)(2)(A)(i) in that it contains 11,862 words of Times New Roman (14-point) proportional type. The word-processing software used to prepare this brief was Microsoft Word 2003.

Jonathan Rosenberg

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I, , being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at the address shown above or at

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the attorney(s) in this action by delivering **2** true copy(ies) thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Attorney(s) herein. The Brief was also served electronically.

Sworn to before me on May 21, 2010

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