ORAL ARGUMENT NOT YET SCHEDULED

No. 21-7097

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

KEREN KAYEMETH LEISRAEL - JEWISH NATIONAL FUND, et al.,

Plaintiffs-Appellants,

v.

EDUCATION FOR A JUST PEACE IN THE MIDDLE EAST, DOING BUSINESS AS US CAMPAIGN FOR PALESTINIAN RIGHTS,

Defendant-Appellee.

On Appeal from the United States District Court
for the District of Columbia
Case No. 1:19-cv-03425-RJL

BRIEF OF APPELLEE

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Appellee Education for a Just Peace in the Middle East, d/b/a US Campaign for Palestinian Rights, by and through undersigned counsel, and pursuant to D.C. Circuit Rule 28(a)(1), hereby states as follows:

A. Parties and Amici

Appellants (Plaintiffs in the District Court) are Keren Kayemeth LeIsrael-Jewish National Fund, Asher Goodman, Batsheva Goodman, Ephriam Rosenfeld, Bracha Vaknin, and minors identified as A.R., B.R., H.R., S.M.V., E.V., M.V., S.R.V., and A.V. Appellee (Defendant in the District Court) is Education for a Just Peace in the Middle East, doing business as the US Campaign for Palestinian Rights. There are presently no amici or intervenors before this Court or the District Court.

B. Rulings Under Review

The ruling under review is the District Court's Order of March 29, 2021, Dkt. No. 27, granting Defendant's Motion to Dismiss.

C. Related Cases

There are no known related cases.

APPELLEE'S RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Appellee Education for a Just Peace in the Middle East, d/b/a US Campaign for Palestinian Rights, by and through undersigned counsel, and pursuant to D.C. Circuit Rule 26.1 and Fed. R. App. P. 26.1, hereby certifies it does not have a parent company, and that no publicly-held company has a 10% or greater ownership interest in it.

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GLOSSARY

ATA	Anti-Terrorism Act
BNC	Boycott National Committee
FTO	Foreign Terrorist Organization
GRM or March	Great Return March
PNIF	Palestinian National and Islamic Forces
US Campaign or USCPR	Education for a Just Peace in the Middle East, d/b/a/ US Campaign for Palestinian Rights

STATUTES AND OTHER AUTHORITIES

Except for the following, all applicable statutes (18 U.S.C. § 2333(a) and 18 U.S.C. § 2333(d)(2)) are contained in Plaintiffs-Appellants' Brief.

18 U.S.C. § 2331(1) - Definitions:

As used in this chapter—
(1) the 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;

18 U.S.C. § 2339A(a) - Providing material support to terrorists:

(a) OFFENSE.—Whoever provides material support or resources or conceals or disguises the nature, location, source, or ownership of material support or resources, knowing or intending that they are to be used in preparation for, or in carrying out, a violation of Section 32, 37, 81, 175, 229, 351, 831, 842(m) or (n), 844(f) or (i), 930(c), 956, 1091, 1114, 1116, 1203, 1361, 1362, 1363, 1366, 1751, 1992, 2155, 2156, 2280, 2281, 2332, 2332a, 2332b, 2332f, 2340A, or 2442 of this title, Section 236 of the Atomic Energy Act of 1954 (42 U.S.C. § 2284), Section 46502 or 60123(b) of Title 49, or any offense listed in Section 2332b(g)(5)(B) (except for Sections 2339A and 2339B) or in preparation for, or in carrying out, the concealment of an escape from the commission of any such violation, or attempts or conspires to do such an act, shall be fined under this title, imprisoned not more than 15 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life. A violation of this section may be prosecuted in any Federal judicial

district in which the underlying offense was committed, or in any other Federal judicial district as provided by law.

18 U.S.C. § 2339B(a)(1) - Providing material support or resources to designated foreign terrorist organizations:

(a) PROHIBITED ACTIVITIES.—

> **(1) UNLAWFUL CONDUCT.**—Whoever knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined under this title or imprisoned not more than 20 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life. To violate this paragraph, a person must have knowledge that the organization is a designated terrorist organization (as defined in subsection (g)(6)), that the organization has engaged or engages in terrorist activity (as defined in Section 212(a)(3)(B) of the Immigration and Nationality Act), or that the organization has engaged or engages in terrorism (as defined in Section 140(d)(2) of the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989).

STATEMENT OF THE CASE

Introduction

Defendant Education for a Just Peace in the Middle East, d/b/a/ US Campaign for Palestinian Rights ("US Campaign"), is a non-profit 501(c)(3) organization that, as its name indicates, engages in public education and outreach to promote Palestinian rights and peace in the Middle East. This work often involves issuing statements critical of the Israeli military's unlawful use of force and violations of international law, Compl. pp. 37-38 ¶ 132, ECF No. 1 (J.A. __); supporting the rights of Palestinian demonstrators, *id*.; urging supporters to contact their congressional representatives, *id*.; and participating in public advocacy campaigns in coordination with other activists and lawyers, *id*. at p. 40 ¶ 140 (J.A. __). None of these activities

is unlawful, although Plaintiffs may disagree with their content.

Plaintiffs assert that the US Campaign's advocacy and its relationship with the Boycott National Committee, an independent organization that also advocates for Palestinian rights**,** render it liable under the Anti-Terrorism Act ("ATA"). In both their Complaint and their Brief to this Court, Plaintiffs base their claim on conclusory assertions unsupported by factual allegations, misrepresentations of their own allegations, and on formulaic recitations of the elements of the ATA causes of action, all of which must be disregarded in ruling on a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 557 (2007)).

Applying the *Iqbal*/*Twombly* standard to this case, the Complaint's scant factual allegations are grossly insufficient to support the asserted claims for relief. Although their prolix Complaint runs to 62 pages, Plaintiffs base their ATA claims on two activities: that the US Campaign served for a time as "fiscal sponsor" for the Boycott National Committee ("BNC"), Compl. pp. 12, 35-36 ¶¶ 24, 123-126 (J.A. __), and referenced the Great Return March (the "March" or "GRM") in an email and on social media, Compl. pp. 37-38 ¶ 132 (J.A. __). Plaintiffs' Complaint is replete with suggestions of guilt by association. No allegations link the US Campaign to burning kites and balloons or rockets reportedly launched by Hamas or others.

The District Court dismissed Plaintiffs' Complaint because it failed to allege facts sufficient to support multiple elements of their claims. Although this Court recently rejected Judge Leon's interpretation of one of those elements in *Atchley v. AstraZeneca UK Ltd.*, 22 F.4th 204 (D.C. Cir. 2022), his reasoning as to the rest of the causes of action remains sound.[1] Dismissal of the Complaint for failure to state a claim should be affirmed.

Statement of the Facts

Viewed in the light most favorable to Plaintiffs, the factual allegations against the US Campaign boil down to three actions it took as part of its advocacy for Palestinian rights: the 501(c)(3) non-profit US Campaign served as the Boycott National Committee's fiscal sponsor in the United States as of November 2017, Compl. p. 35 ¶ 123 (J.A. __); the US Campaign posted comments on social media regarding the Great Return March and sent an email urging supporters to contact

[1] Plaintiffs request that this case be remanded to a different judge, arguing that Judge Leon appears to have "personal subjective hostility" to "plaintiffs who sue the financers of international terrorism." Appellants' Br. 4. This inflammatory accusation ignores Judge Leon's reliance on established D.C. Circuit precedent, and on Second Circuit case law in the absence of contrary authority in this jurisdiction. They also distort the high bar to reassignment of a case, reflected in the one case they cite, *Cobell v. Kempthorne*, 455 F.3d 317, 331-35 (D.C. Cir. 2006) (quoting *Liteky v. United States*, 510 U.S. 540, 551 (1994)) (noting removal for bias is appropriate only when it is "so extreme as to display clear inability to render fair judgment," and reassigning the case because the lower court had been reversed eight consecutive times in related cases, without a single dissent, and had exceeded its powers).

their Congressional representatives "to tell them that Palestinians have the right to protest without paying for it with their lives," Compl. p. 37 ¶ 132 (J.A. __); and the US Campaign participated in the Stop the JNF Campaign, an advocacy campaign to end support to Keren Kayemeth LeIsrael-Jewish National Fund ("KKL-JNF"), a foreign Plaintiff that brought only state law claims, Compl. pp. 39-41 ¶¶ 138-142 (J.A. __). The latter allegation is not related to the federal claims before this Court on appeal. Compl. pp. 50-56 ¶¶ 197-236 (J.A. __).[2]

The Complaint alleges that as a fiscal sponsor for the Boycott National Committee—described as the "broadest coalition in Palestinian civil society that leads the global BDS [boycott, divestment and sanctions] movement for Palestinian rights," Compl. p. 35 ¶ 124 (J.A. __)—the US Campaign collects donations from U.S. donors in the U.S. and transmits them "to the BNC." Compl. pp. 12, 35 ¶¶ 24, 123 (J.A. __). The Complaint does not allege that the US Campaign sent any money abroad, but it does allege that the US Campaign "sponsor[ed] the BNC representative in North America." Compl. pp. 57, 59 ¶¶ 244, 257 (J.A. __).

Plaintiffs do not allege how long the fiscal sponsorship continued or how much money was donated through it. The only allegation of a financial transaction

[2] Plaintiffs have not appealed from the District Court's dismissal of their state law claims for lack of supplemental jurisdiction. Mem. Op. 11-12, ECF No. 26 (J.A. __). Those claims and the facts alleged in support of them are therefore not addressed in this brief.

in the Complaint is a description of a donation of an unspecified amount that includes quotes from the email the unknown donor received upon making the donation. Compl. pp. 35-36 ¶¶ 124-126 (J.A. __). There is no factual allegation about how that donation or any other donations potentially obtained through the fiscal sponsorship were used.

The Complaint also alleges that the Boycott National Committee referred to the US Campaign as its most important strategic ally and partner in the United States. Compl. p. 36 ¶¶ 128, 130 (J.A. __). Apart from the allegations already noted, the only other allegations about the nature of the relationship between the BNC and the US Campaign are that they both (along with others) participated in the international Stop the JNF Campaign, Compl. p. 39 ¶ 139 (J.A. __), and that there is a family relationship between two individuals affiliated with each organization. Compl. p. 36 ¶ 129 (J.A. __).[3]

The Complaint alleges that the Boycott National Committee was established "as the Palestinian coordinating body for the BDS campaign worldwide," Compl. p. 23 ¶ 76 (J.A. __), after 170 groups representing Palestinians from multiple sectors "endorsed the Boycott[,] Divestment and Sanctions Call," Compl. p. 23 ¶ 73 (J.A.

[3] Plaintiffs' Brief incorrectly claims they alleged that "as early as 2008, USCPR began to . . . serve in the United States as the fiscal sponsor of BNC." Appellants' Br. 22. Plaintiffs' Complaint, however, alleges that the US Campaign served as the Boycott National Committee's "US-based fiscal sponsor" as of "at least November 2017." Compl. p. 35 ¶ 123 (J.A. __).

__); that one of the BNC's members is the Palestinian National and Islamic Forces ("PNIF"), Compl. p. 24 ¶¶ 77, 78 (J.A. __); and that the PNIF itself is a coalition of "all the political national and Islamic factions," Compl. p. 24 ¶ 78 (J.A. __), five of which are designated Foreign Terrorist Organizations ("FTOs"), including Hamas, Compl. p. 22 ¶ 66 (J.A. __). The Complaint does not allege that the Boycott National Committee or the PNIF are designated terrorist organizations.

The Complaint contains no factual allegations to support Plaintiffs' assertion that the US Campaign "funneled" or "channeled" funds to Hamas through the BNC. *See, e.g.,* Appellants' Br. 9, 13, 20. Although the Complaint makes conclusory assertions that money provided to the Boycott National Committee "directly and indirectly" benefits Hamas and other unidentified terrorist organizations, *see, e.g.*, Compl. p. 12 ¶ 24 (J.A. __), it contains no factual allegations in its 271 paragraphs pleading that any monies collected by the US Campaign on behalf of the Boycott National Committee went to Hamas or any other terrorist organization.

Plaintiffs' Brief claims, without factual support, that their Complaint alleged that the "BNC's 'real purpose' is 'the elimination of Israel as a sovereign nation-state.'" Appellants' Br. 4, 13. Plaintiffs' Complaint actually alleges (without any citation or factual support) that that is the "real purpose" of the entire "Boycott movement," which is a "global [] movement for Palestinian rights," Compl. pp. 24, 35 ¶¶ 76, 124 (J.A. __)—not the purpose of the Boycott National Committee, the

organization at issue in their Complaint. Regardless, the promotion of boycotts to pursue social or political change, or "as a central form of civil resistance," Compl. p. 24 ¶ 76 (J.A. __), is a lawful goal that does not suggest a purpose to eliminate Israel, and support of boycotts certainly does not constitute a plausible allegation of material support to terrorism.

Factual allegations about the relationship between the US Campaign and the Great Return March are just as inadequate. The Complaint only states that the US Campaign, in an email and in social media posts, described the Great Return March as "sit-ins and demonstrations to demand [Palestinians'] internationally recognized right of return to the villages they were displaced from in 1948," highlighting the marchers' demands for refugee rights, Compl. pp. 37-38 ¶ 132 (J.A. __), and made statements criticizing the Israeli military's lethal use of force in response to the Great Return March, Compl. pp. 37-38 ¶ 132 (J.A. __), supporting the rights of Palestinian demonstrators, *id.*, and urging supporters to contact their Congressional representatives, *id.*

Although the Complaint alleges that the Boycott National Committee "is integrally involved in" the Great Return March, Compl. p. 32 ¶ 112 (J.A. __), its factual allegations do not support that conclusory statement. The Complaint reproduces a Facebook post describing the Great Return March, and alleges that three individuals with various links to the Boycott National Committee "attended"

or "support[ed]" it. Compl. pp. 32-33 ¶ 116 (J.A. __). Another allegation notes that one of the marches would be dedicated to boycotting Israel. Compl. p. 32 ¶ 113 (J.A. __). There are no factual allegations that either the Boycott National Committee or the US Campaign had any other relationship with the Great Return March or that either of them supported the use of burning kites or balloons launched during the Great Return March or from Gaza.

Moreover, the Complaint states repeatedly that the rockets, incendiary terror balloons and kites that allegedly injured Plaintiffs were launched by one or another group, most of them unidentified. That is, the Complaint **repeats** that the incendiary devices were launched by "Hamas *and/or others*," Compl. pp. 6-11, 20 ¶¶ 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 55 (J.A. __); by "Hamas *and others*," *id.* at p. 17 ¶¶ 49, 51, 52 (J.A. __); by "Hamas *and other militant groups in Gaza*," *id.* at p. 19 ¶ 53 (J.A. __); by "*Palestinian youths*, *id.* at p. 19 ¶ 52 (J.A. __); and by "*several terrorist organizations*," *id*. at p. 27 ¶ 99 (J.A. __) (emphases added). One conclusory allegation states that a "Hamas rocket" hit the Rosenfelds' home, without factual support indicating how to distinguish that rocket from those launched by the unidentified other groups. Compl. p. 47 ¶ 173 (J.A. __) (referring to a "Hamas rocket").

Finally, none of the Plaintiffs who brought ATA claims are alleged to have suffered any injury to their property from incendiary kites and balloons, although

they are alleged to have suffered "severe mental anguish and extreme emotional pain and suffering" due to the "fear and terror" brought on by the "threat of, and exposure to" rockets and incendiary balloons and kites. Compl. pp. 6-11 ¶¶ 10-21 (J.A. __).

Plaintiffs' Statement of the Case begins with the erroneous claim that their Complaint's 196 "detailed paragraphs" show that the US Campaign provided "financial assistance and material support" for a "terrorist strategy." Appellants' Br. 2. With the exception of the allegations set forth above, none of the Complaint's allegations describe conduct of the US Campaign except in conclusory terms. There are numerous allegations that describe the conduct of other entities but not the conduct of the US Campaign. There are no factual allegations that describe ties between the US Campaign to any entity other than the Boycott National Committee. No factual allegation links the US Campaign to Hamas or to any act of terrorism.

ARGUMENT

Summary of Argument

The Complaint must be dismissed because it fails to plausibly allege that the US Campaign committed an act of international terrorism that proximately caused Plaintiffs' injuries, or knowingly provided substantial assistance to an act of international terrorism from which Plaintiffs' injuries arose, as required under the Anti-Terrorism Act ("ATA"), 18 U.S.C. § 2333.

(1) Plaintiffs base their claim on conclusory assertions unsupported by factual

allegations and on formulaic recitations of the elements of the ATA causes of action, all of which must be disregarded in ruling on a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). Applying this standard, the Complaint reduces to only two relevant factual allegations: that the US Campaign served as the U.S. fiscal sponsor of the Boycott National Committee, Compl. pp. 35-37 ¶¶ 120-131 (J.A. __), and that it referenced the Great Return March in an email and on social media, Compl. pp. 37-38 ¶ 132 (J.A. __). Under *Atchley v. AstraZeneca UK Ltd.*, 22 F.4th 204 (D.C. Cir. 2022), these facts are insufficient to support Plaintiffs' claims. No factual allegations link the US Campaign to the burning kites and balloons or rockets that allegedly caused Plaintiffs' injuries.

(2) Plaintiffs fail to state a direct liability claim for material support to terrorists (Second Claim for Relief, citing 18 U.S.C. § 2339A) or to a foreign terrorist organization (Third Claim for Relief, citing 18 U.S.C. § 2339B). Compl. pp. 52, 54 (J.A. __). First, the allegations of the Complaint do not show that the US Campaign's actions were a proximate cause of Plaintiffs' injuries, as required for civil liability under the ATA, 18 U.S.C. § 2333(a). None of the Complaint's factual allegations support the claim that injuries caused by rockets, incendiary kites and balloons launched by unidentified third parties were the reasonably foreseeable result of the US Campaign's fiscal sponsorship of the Boycott National Committee or its statements regarding the Great Return March, or that these acts were a substantial

factor leading to Plaintiffs' injuries. Second, the Complaint fails because the only alleged acts by the US Campaign are not acts of international terrorism, as required by the governing statutes. Third, Plaintiffs failed to plead that 18 U.S.C. Sections 2339A or 2339B were otherwise violated.

(3) Plaintiffs' aiding and abetting liability claim under Section 2333(d)(2) of the ATA (Plaintiffs' First Claim for Relief), Compl. p. 50 (J.A. __), also fails, first, because the Complaint does not plausibly allege that the US Campaign provided knowing, substantial assistance to the acts that caused Plaintiffs' injuries. No facts plausibly allege that the US Campaign provided any assistance at all to those acts, that any such assistance (if it existed) was knowing or substantial, or that the US Campaign was "generally aware" of its role (if it played any role at all) in such acts. Second, the Complaint fails to allege that the acts that caused Plaintiffs' injuries were "committed, planned, or authorized" by a designated FTO, as required by the statute. 18 U.S.C. § 2333(d)(2).

I. Standard of Review

The appellate court reviews *de novo* a district court's order granting a motion to dismiss. *Atchley*, 22 F.4th at 214 (citing *Owens v. BNP Paribas, S.A.*, 897 F.3d 266, 272 (D.C. Cir. 2018) (*Owens IV*)). "To survive a motion to dismiss" for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), a plaintiff must allege facts that state a plausible claim for relief. *Iqbal*, 556 U.S. at 678. In evaluating

a complaint, the court must disregard "labels and conclusions," "formulaic recitation of the elements of a cause of action," "legal conclusion[s] couched as . . . factual allegation[s]" and "'naked assertion[s]' devoid of 'further factual enhancement.'" *Id.* (quoting *Twombly*, 550 U.S. at 555, 557). The Court "need not accept inferences unsupported by facts or legal conclusions cast in the form of factual allegations." *Owens IV*, 897 F.3d at 272 (quoting *City of Harper Woods Emps.' Ret. Sys. v. Olver*, 589 F.3d 1292, 1298 (D.C. Cir. 2009)). "[W]here some allegations in the complaint contradict other allegations, the conflicting allegations become 'naked assertions devoid of further factual enhancement . . . [, which therefore] cannot be presumed true.'") *Acosta Orellana v. CropLife Int'l*, 711 F. Supp. 2d 81, 109 (D.D.C. 2010) (citations omitted). *See also Aguirre v. SEC*, 671 F. Supp. 2d 113, 118 (D.D.C. 2009) (citations omitted) (courts need not accept as true "'naked assertion[s]' devoid of 'further factual enhancement'"); *Stewart v. Nat'l Educ. Ass'n*, 471 F.3d 169, 173 (D.C. Cir. 2006) (citations omitted) (court need not "accept legal conclusions cast in the form of factual allegations.").

Atchley did not, of course, exempt Anti-Terrorism Act claims from the requirement that pleadings must rely on factual allegations, not conclusory statements. *See Atchley,* 22 F.4th at 220-21 (requiring that plaintiff plead "allegations of the facts or events they claim give rise to an inference") (quoting with approval *Kaplan v. Lebanese Canadian Bank, SAL*, 999 F.3d 842, 864 (2d Cir.

2021)). Likewise, *Owens IV* quotes *Iqbal* for the controlling rule: "A complaint can establish a facially plausible claim only if it sets forth 'factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Owens IV,* 897 F.3d at 272 (quoting *Iqbal,* 556 U.S. at 678). Plaintiffs simply ignore these pleading requirements.

The post-*Twombly* cases Plaintiffs cite are in accord and, therefore, support dismissal of their action. *Ralls Corp. v. Committee on Foreign Investment in the United States*, 758 F.3d 296, 314-15 (D.C. Cir. 2014), holds that the Court does "not accept as true . . . legal conclusions or inferences that are unsupported by the facts alleged." *Atherton v. District of Columbia Office of the Mayor* cautioned against reliance on non-factual allegations, reiterating that a "claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." 567 F.3d 672, 681 (D.C. Cir. 2009) (quoting *Iqbal*, 556 U.S. at 678) (internal quotation marks and citations omitted). The Complaint fails to plead plausible facts, and instead relies on legal conclusions and inferences unsupported by the facts alleged.

II. The Complaint Does Not Plausibly Allege Direct Liability Under the ATA (Plaintiffs' Second and Third Claims for Relief).

Plaintiffs' Second and Third Claims for Relief assert that the US Campaign is directly liable for Plaintiffs' injuries under 18 U.S.C. § 2333(a), the civil remedies provision of the ATA, because it provided "material support to terrorists" (Second

Claim for Relief, citing 18 U.S.C. § 2339A) or to a designated foreign terrorist organization (Third Claim for Relief, citing 18 U.S.C. § 2339B). Compl. pp. 52, 54 (J.A. __). Section 2333(a) permits suit by any U.S. national "injured in his or her person, property, or business by reason of an act of international terrorism . . . ." 18 U.S.C. § 2333(a). Civil liability under Section 2333(a) requires that 1) "a U.S. national must have suffered an injury"; 2) defendant must have committed "an act of international terrorism"; and 3) "the U.S. national's injury must have occurred 'by reason of' the act of international terrorism. That is, there must be some causal connection between the act of international terrorism and the US national's injury." *Owens IV*, 897 F.3d at 270. Plaintiffs' Complaint fails to plausibly allege that they were injured "by reason of" the US Campaign's actions, that the US Campaign committed an "act of international terrorism," or that Sections 2339A or 2339B were otherwise violated.

A. The Complaint does not plausibly allege that Plaintiffs were injured "by reason of" the US Campaign's actions.

In order to establish direct liability, Plaintiffs must show that they were "injured in [their] person, property, or business by reason of an act of international terrorism." 18 U.S.C. § 2333(a). The "by reason of" standard of causation requires establishing that a defendant's actions proximately caused the plaintiff's injuries. *Owens IV*, 897 F.3d at 273; *Atchley*, 22 F.4th at 215. To establish proximate causation, Plaintiffs must plausibly allege that the US Campaign's acts were 1) a

"substantial factor in the sequence of events" that led to their injuries, and 2) that those injuries were "reasonably foreseeable or anticipated as a natural consequence of defendants' conduct." *Atchley*, 22 F.4th at 226 (quoting *Owens IV*, 897 F.3d at 273) (internal quotations omitted). Proximate causation functions to "eliminate the bizarre," *id*. (citation omitted), and precludes liability based on "attenuated" causal links or "mere fortuity." *Paroline v. United States*, 572 U.S. 434, 445 (2014).

1. Plaintiffs have failed to establish that the US Campaign's actions were a "substantial factor" in the sequence of events that led to their injuries.

The Complaint contains only two relevant factual allegations about the US Campaign: that it served as the fiscal sponsor of the Boycott National Committee, Compl. pp. 35-37 ¶¶ 120-131 (J.A. __), and that it made social media posts and sent an e-mail regarding the Great Return March, Compl. pp. 37-38 ¶ 132 (J.A. __). The allegations of the Complaint do not support the claim that these acts were a substantial factor, or any factor at all, leading to Plaintiffs' alleged injuries by rockets or incendiary kites and balloons.

In *Atchley* and *Owens IV*, this Court set out the kinds of factual allegations that would support a finding that assistance was "a substantial factor."[4] In *Atchley*,

[4] Plaintiffs' suggestion, Appellants' Br. 17-18, that this Court use this case as an opportunity to adopt the reasoning employed by the Seventh Circuit in *Boim v. Holy Land Foundation for Relief & Development*, 549 F.3d 685 (7th Cir. 2008) (en banc), is misplaced. *Boim* involved material support provided directly to Hamas, a designated FTO. The Seventh Circuit in *Boim* held that any direct assistance to an

the Court pointed to detailed allegations that defendants gave "both cash and cash equivalents to the terrorist organization that harmed plaintiffs," including millions of dollars of free goods and hefty bribes on contracts. *See generally Atchley,* 22 F.4th at 226-28; *see also id.* at 210 (describing "millions of dollars" over years). In *Owens IV,* the court held that allegations of transactions between the defendant banks and Sudan alone could not entitle plaintiffs to relief when there were no plausible allegations that any currency processed by the bank was in fact sent to Al-Qaeda, or that the monies transferred were necessary for Sudan to fund the bombings. *Owens IV*, 897 F.3d at 275-76; *see also Rothstein v. UBS AG*, 708 F.3d 82, 97 (2d Cir. 2013) (finding no proximate cause where no allegations showed that currency transferred by the bank to Iran was given to an FTO).

In stark contrast to the allegations in *Atchley*, the Complaint here pleads no facts connecting the US Campaign's actions to the launching of burning balloons, kites, or rockets by Hamas or by any other known or unknown third parties. Plaintiffs

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FTO violated the direct liability provisions of the ATA, even when a particular contribution was directed to the FTO's social welfare services. *See id*. at 698. *Boim* is irrelevant to this case because Plaintiffs' Complaint contains no facts to support an allegation that the US Campaign made direct contributions to Hamas or any other designated FTO. The Seventh Circuit has affirmed that *Boim* did not do away with the ATA's proximate cause requirement. *Kemper v. Deutsche Bank AG*, 911 F.3d 383, 392 (7th Cir. 2018) ("proximate cause is necessary for ATA liability"). Nothing in the Complaint's factual allegations remotely suggests that serving as the fiscal sponsor for the Boycott National Committee was "like providing a loaded gun to a child," as Plaintiffs suggest. Appellants' Br. 16 (*see Boim*, 549 F.3d at 690).

seek to make up for their inadequate factual allegations by grossly overstating them. Their Brief's section purporting to summarize the "detailed factual allegations" relevant to direct liability only discusses allegations about Hamas and Sons of al-Zawari, and does not reference the US Campaign until the final paragraph, in an unsupported, conclusory statement ("[h]ence the terrorist acts committed by Hamas from Gaza are effectively subsidized by tax-deductible contributions made to USCPR."). Appellants' Br. 14-16. The Complaint contains no factual allegations supporting this claimed "subsid[y]." Unlike in *Atchley*, there are no factual allegations of any transfer of funds or other services from the US Campaign (or the Boycott National Committee, for that matter) to Hamas, Sons of al-Zawari, or any other organization that allegedly harmed Plaintiffs, let alone allegations about the amount, duration or mode of any such transfer. There are no allegations of any communication or contacts between the US Campaign and Hamas or any terrorist organizations. Plaintiffs' only allegation addressing any transfer of funds—the US Campaign's fiscal sponsorship of the Boycott National Committee involving an unspecified amount of funds for an unspecified amount of time—is too attenuated to constitute a causal link that would support direct liability. Finally, Plaintiffs also fail to specify how the other alleged US Campaign action—posting statements regarding the Great Return March—was any factor in a sequence of events that led

to Plaintiffs' injury.[5] Moreover, these statements are protected by the First Amendment. *Snyder v. Phelps*, 562 U.S. 443, 451-52 (2011) ("speech on matters of public concern . . . is at the heart of the First Amendment's protection") (alteration in original, citations and internal quotation marks omitted).

2. Plaintiffs have failed to establish that their injuries were a "reasonably foreseeable or anticipated as a natural consequence" of the US Campaign's actions.

Nothing in Plaintiffs' allegations establishes that rocket fire or incendiary kites and balloons were foreseeable or anticipated as a natural consequence of the US Campaign's fiscal sponsorship of the Boycott National Committee, or of its statements regarding the Great Return March. In *Atchley*, this Court found that violence was a foreseeable result of defendants' bribes because they went to Jaysh al-Mahdi, which was a known terrorist group dominated by Hezbollah, and because providing fungible resources to a known terrorist group could foreseeably result in violence. *Atchley*, 22 F.4th at 227-28. Here, the Complaint does not allege that the Boycott National Committee was a terrorist group; it describes the Boycott National Committee's primary activity as strengthening "boycott as a central form of civil resistance." Compl. pp. 23-24 ¶ 76 (J.A. __). The Complaint contains no non-

[5] Not only do Plaintiffs fail to show proximate cause, but they fail to even satisfy the lower standard required to show Article III standing. *Crow Creek Sioux Tribe v. Brownlee*, 331 F.3d 912, 915 (D.C. Cir. 2003). Plaintiffs must show "a causal connection between the injury and the conduct complained of." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

conclusory allegations suggesting that boycotts are anything but a non-violent tactic. The Complaint quotes the BNC as highlighting support for the boycott movement from groups ranging from "university campuses, academic associations and faith communities to national trade unions and even U.S. presidential debates." *Id.* p. 36 ¶ 131 (J.A. __). No factual allegations connect the BNC to any acts of violence. Furthermore, violence is not a foreseeable or anticipatable natural consequence of the US Campaign's non-violent statements regarding the Great Return March: advocating for human rights, opposing the excessive use of force and violations of international law, and urging followers to write to their Congressional representatives. Compl. pp. 37-38 ¶132 (J.A. __).

Plaintiffs attempt to overcome their inadequate allegations establishing the foreseeability of the acts that injured them by stating that "[t]here is little to nothing that happens in Gaza that Hamas does not . . . support," Appellants' Br. 14, apparently suggesting that any support to any person, group or activity in Gaza is the same as support to Hamas. Plaintiffs cite no authority for this assertion. Moreover, the theory is directly contradicted by the very case Plaintiffs rely on, *Boim v. Holy Land Foundation for Relief & Development*, 549 F.3d 685 (7th Cir. 2008) (en banc). In *Boim,* the Seventh Circuit stated that making donations to a hospital that is unaffiliated with Hamas but located in Gaza would *not* give rise to liability for acts committed by Hamas. *Boim,* 549 F.3d at 699. Nor would liability arise in

the "easy case" of a donation to a charity by someone who does not know "that the charity gives money to Hamas or some other terrorist organization." *Id.* Thus, even if the Complaint contained facts to support the assertion that the US Campaign's assistance to the BNC was somehow used in Gaza (which the Complaint does not), unrelated acts of violence committed by Hamas would not be the foreseeable result of that assistance.

As noted above, the Complaint contains no factual allegations to support the claim that the Boycott National Committee transferred funds collected by the US Campaign to Hamas or to any other groups alleged to have harmed Plaintiffs. Plaintiffs' argument about whether the Boycott National Committee functioned as an "independent intermediary," breaking a chain of causation between the US Campaign and the acts of violence that harmed them, Appellants' Br. 11-14, is therefore irrelevant, because there is no such chain of causation. In any event, Plaintiffs' argument is wrong. This Court's examination of the Iraqi Ministry of Health's role in *Atchley* is instructive. Far from being "comparable" to the allegations here, Appellants' Br. 12, the extensive allegations in the *Atchley* complaint plausibly established that the Ministry was not independent but was "thoroughly dominated" and "control[led]" by Jaysh al-Mahdi. *Atchley*, 22 F.4th at 228. For instance, Jaysh al-Mahdi's leader had officially taken over the Ministry and placed operatives at every level of its leadership, including the procurement arm with

which the defendants dealt, and employed 70,000 Jaysh al-Mahdi members; and Ministry infrastructure, including ambulances and hospitals, was deployed for terrorist purposes. *Id.* The Court also relied on allegations that Jaysh al-Mahdi was integrated into and owed allegiance to Hezbollah, that Hezbollah "acted through" Jaysh Al-Mahdi, and that Hezbollah was involved in planning the specific attacks that injured or killed the plaintiffs. *Id.* at 216-19.

By contrast, the Complaint here contains no allegations establishing "dominat[ion]" or "control" of the BNC by a terrorist organization or any other group engaging in violence, beyond conclusory assertions that the Boycott National Committee is "controlled" by an FTO, Compl. p. 57 ¶ 246 (J.A. __), or is an FTO's "operative[]" or "front organization[]," Compl. p. 51 ¶ 203 (J.A. __). Plaintiffs grossly misrepresent their allegations when they state that the Complaint "showed that tax-deductible contributions were channeled by the defendant to Hamas" through an entity that "was not 'independent' but consisted of designated foreign terrorist organizations." Appellants' Br. 8-9. Plaintiffs' claims are based on allegations that the Boycott National Committee is a coalition of organizations, one of which is another coalition that represents numerous groups, some of which are FTOs. Plaintiffs' conclusory allegations that the PNIF is a "leading member" of the BNC, Compl. p. 24 ¶ 77 (J.A. __), or that it has "significant overlap in . . . personnel" with the BNC, *id.* at ¶ 80 (J.A. __), are not supported by any factual allegation in the

Complaint, and certainly do not support an inference that PNIF "dominates" or "controls" the BNC. Moreover, the PNIF itself is alleged to include "all the political national and Islamic factions," *id.* at ¶ 78 (J.A. __), and is not alleged to be a designated foreign terrorist organization. No factual allegation supports the Complaint's conclusory assertion that "terror organizations" in the PNIF dominate it. Compl. p. 22 ¶ 67 (J.A. __). In sum, although the Complaint contains pages of allegations about the BNC, the PNIF and Hamas, none support an inference that the BNC is an "alter ego" or "proxy," *Atchley*, 22 F.4th at 225, or "controlled by" an FTO.

Plaintiffs' citation to Wikipedia pages describing the defendants in other ATA cases (not the independent intermediaries in those cases) as large institutions is irrelevant for multiple reasons. Appellants' Br. 13-14. First, as explained above, the Complaint does not allege facts to support the assertion that the US Campaign's assistance to the BNC contributed in any way to injuries suffered by Plaintiffs, so the size, global presence or other feature of the BNC is not relevant. Second, Plaintiffs cite no case suggesting that the size, global presence or other feature of a *defendant* is relevant to a query of whether an *intermediary* was "independent" to break proximate causation. Third, to the extent that Plaintiffs intend to suggest that the BNC has a "single purpose" of destroying Israel (as opposed to a state with multiple legitimate goals), that conclusory claim about the

BNC's purpose is contradicted by their own allegations that the BNC is to promote boycott "as a central form of civil resistance," and by the list of supporters of boycott efforts, including faith communities and academic associations. *See supra* pp. 7-8, 19-20.

In the absence of any factual allegations to support the claim that Plaintiffs' injuries were a "reasonably foreseeable" consequence of the US Campaign's fiscal sponsorship of the Boycott National Committee and its statements regarding the Great Return March, the Complaint does not support a finding of proximate causation.

B. Plaintiffs did not plausibly allege that the US Campaign committed "an act of international terrorism."

Plaintiffs' direct liability claims also fail to allege facts to support the statutory requirement that the US Campaign's own conduct "constituted an act of international terrorism" as required by Section 2333(a), and as defined by Section 2331(1)(A)). *Owens IV*, 897 F.3d at 272; *see also Atchley*, 22 F.4th at 226 (remanding to consider whether plaintiffs "alleged that defendants themselves committed any acts of international terrorism within the meaning of the ATA").[6]

[6] Although the district court did not reach other defects in Plaintiffs' direct liability claims because it found Plaintiffs failed to plausibly allege proximate cause, this Court may affirm dismissal on alternative grounds. *Abbas v. Foreign Policy Grp., LLC*, 783 F.3d 1328, 1340 (D.C. Cir. 2015).

First, Plaintiffs failed to allege that the US Campaign itself engaged in "violent acts or acts dangerous to human life," as required by the statute. *Owens IV*, 897 F.3d at 270 n.1 (quoting 18 U.S.C. § 2331(1)(A)). There is nothing violent or dangerous about the two lawful acts in which the US Campaign itself is alleged to have engaged: fiscal sponsorship of the Boycott National Committee and making statements regarding the Great Return March, including condemnations of lethal force. *See Kemper v. Deutsche Bank AG*, 911 F.3d 383, 390, 394 (7th Cir. 2018) (finding that even the unlawful provision of extensive financial services to Iran, a designated state sponsor of terrorism, was not "violent" or "dangerous to human life" as required by 18 U.S.C. § 2331(1)(A)).

Second, Plaintiffs have not alleged any facts to support their claim that the US Campaign's conduct "appear[ed] to be intended to 'intimidate or coerce a civilian population,'" "influence the policy of a government by intimidation or coercion," or "affect the conduct of a government by assassination or kidnapping," as statutorily required. *Owens IV*, 897 F.3d at 270 n.1 (quoting. § 2331(1)(B)(i)-(iii)). Plaintiffs' formulaic recitation of this element, stating that the US Campaign's "material support . . . appeared to be intended to intimidate or coerce the civilian populations of Israel and the United States . . . ," Compl. p. 53 ¶ 217 (J.A. __), must be disregarded. There is simply no plausible allegation in Plaintiffs' Complaint that would lead an "objective observer," *Kemper*, 911 F.3d at 390, to reach such a

conclusion. Plaintiffs do not allege any facts to suggest that providing support to the Boycott National Committee appeared to be intended to be coercive or intimidating. The far more plausible conclusion is that the US Campaign's fiscal sponsorship of the Boycott National Committee was intended to support the legitimate goal of boycott, which the Complaint itself identifies as the Boycott National Committee's central goal. Compl. pp. 23-24 ¶ 76 (J.A. __). The Complaint alleges that the US Campaign's social media posts and email about the GRM condemned Israel's lethal response to the protest, and urged supporters to contact their members of Congress, Compl. p. 37 ¶ 132 (J.A. __)—hardly intimidating or coercive behavior.

Finally, Plaintiffs failed to allege that the US Campaign's conduct occurred "primarily outside the territorial jurisdiction" of the U.S., or "transcend[ed] national boundaries." 18 U.S.C. § 2331(1)(C). Plaintiffs fail to allege that the US Campaign ever transferred money or resources outside the United States or took any actions at all outside the United States. Indeed, Plaintiffs allege that the US Campaign "sponsor[ed] the BNC representative in North America." Compl. pp. 57, 59 ¶¶ 244, 257 (J.A. __). Plaintiffs have failed to allege that the US Campaign committed the required elements of an international act of terrorism.

C. Plaintiffs' allegations otherwise fail to state a claim against the US Campaign under Sections 2339A or 2339B.

In addition to failing to allege that the US Campaign's own actions met any of Section 2331(1)'s definitional elements of an "act of international terrorism,"

Plaintiffs also failed to allege facts required to state a claim under the specific provisions of section 2339A in their Second Claim and section 2339B in their Third Claim.

"[W]hile § 2333 itself requires at least reckless conduct, plaintiffs will also have to show varying levels of scienter depending on the underlying criminal violation alleged as constituting the requisite 'act of international terrorism.'" *Owens v. BNP Paribas, S.A.*, 235 F. Supp. 3d 85, 90–91 (D.D.C. 2017), *aff'd*, 897 F.3d 266 (D.C. Cir. 2018). Section 2339A(a), the underlying violation alleged in Plaintiffs' Second Claim, requires them to allege facts sufficient to plausibly suggest that the US Campaign provided financial services "knowing or intending" that the services "are to be used in preparation for, or in carrying out" an enumerated criminal violation. *Id.* at 91 (quoting 18 U.S.C. § 2339A(a)). Plaintiffs do not so allege. At most, the Complaint alleges that the US Campaign transferred to the Boycott National Committee some unspecified amount of money contributed through the US Campaign's fiscal sponsorship. No facts support the allegation that the US Campaign knew or intended the funds to be used for terrorism or any criminal act. "[R]epeated conclusory allegations" that the defendant "knew or should have known" that resources "would end up with" a designated FTO are insufficient in the absence of "detailed factual allegations" to support the claim of knowledge. *Ofisi v.*

BNP Paribas, S.A., 278 F. Supp. 3d 84, 100-01 (D.D.C. 2017), *vacated in part*, 285 F. Supp. 3d 240 (D.D.C. 2018).[7]

Plaintiffs also failed to plausibly allege that the US Campaign violated any "criminal laws" or did anything that "would be a criminal violation if committed" in the United States. 18 U.S.C. § 2331(1)(A). The purported violation of criminal law that Plaintiffs' Second Claim relies on is 18 U.S.C. § 2339A(a), which criminalizes the provision of material support or resources to carry out any one of a long list of U.S. criminal code violations. But Plaintiffs fail to plead an enumerated criminal predicate offense, as required. "[T]o prevail, a plaintiff must prove that the defendant would have violated any one of a series of predicate criminal laws had the defendant acted within the jurisdiction of the United States." *Estate of Parsons v. Palestinian Auth.*, 651 F.3d 118, 122 (D.C. Cir. 2011).[8]

Plaintiffs' Third Claim for Relief asserting a violation of 18 U.S.C. § 2339B also fails because they have not alleged that the Boycott National Committee is a designated FTO (it is not), or that any funds collected through the US Campaign's

[7] *See also Kemper*, 911 F.3d at 389–90 (citing *Boim*, 549 F.3d at 692-93) ("because the ATA provides for treble damages and cost shifting, 18 U.S.C. § 2333(a), a plaintiff must prove intentional misconduct by the defendant"). Plaintiffs have not alleged that the US Campaign engaged in intentional misconduct.

[8] Although Plaintiffs' Brief mentions 18 U.S.C. § 2332(c), it is not a claim they assert in their Complaint. Appellants' Br. 17. Nor could they, as it criminalizes "physical violence" with the intent or the result of causing serious bodily injury, which they do not allege.

fiscal sponsorship actually provided "material support or resources," directly or indirectly, to a designated FTO. As the Supreme Court has made clear, "§ 2339B only applies to designated foreign terrorist organizations," *Holder v. Humanitarian Law Project*, 561 U.S. 1, 35 (2010), and "reaches only material support coordinated with or under the direction of a designated foreign terrorist organization." *Id.* at 31. For the same reasons discussed above, the US Campaign's fiscal sponsorship of the BNC was not support for Hamas or any other designated FTO, or any organization that is under the direction of an FTO. Therefore, Plaintiffs have not pled a violation of Section 2339B.

III. The Complaint Does Not Plausibly Allege Secondary Liability Under the ATA (Plaintiffs' First Claim for Relief).

Plaintiffs' allegations also fail to state a claim for aiding and abetting liability under Section 2333(d) of the ATA (Plaintiffs' First Claim for Relief). Section 2333(d) imposes aiding and abetting liability for 1) "an injury arising from an act of international terrorism"; 2) that is "committed, planned, or authorized" by a designated FTO; 3) if a defendant "aids and abets, by knowingly providing substantial assistance." 18 U.S.C. § 2333(d)(2); *Atchley*, 22 F.4th at 216 (listing the required elements). Plaintiffs have failed to plead facts to support a claim that the US Campaign "knowingly provided substantial assistance" to an act of international terrorism or that the acts that harmed them were "committed, planned or authorized" by a designated FTO.

A. Plaintiffs have failed to allege that the US Campaign knowingly provided substantial assistance to acts of international terrorism that harmed them.

When Congress enacted Section 2333(d), it adopted this Court's *Halberstam* test for aiding and abetting liability. *Atchley*, 22 F.4th at 215 (citing *Halberstam v. Welch*, 705 F.2d 472 (D.C. Cir. 1983)). To be found liable for aiding and abetting, (1) the party the defendant aids must perform a wrongful act that causes an injury; (2) the defendant must be generally aware of its role as part of an overall illegal or tortious activity at the time that it provides the assistance; and (3) the defendant must knowingly and substantially assist the principal violation. *Id.* at 220 (citing *Halberstam*, 705 F.2d at 477). Plaintiffs fail to allege facts to support any of these requirements.

1. Plaintiffs have failed to allege that the US Campaign provided assistance to a party that performed wrongful acts that harmed Plaintiffs.

The Complaint fails to allege facts to support the conclusory allegation that the US Campaign provided assistance to an individual or entity that harmed Plaintiffs. The Complaint does not connect either of its two factual allegations—that the US Campaign served for an unstated amount of time as the US fiscal sponsor of the Boycott National Committee and the US Campaign made statements regarding the Great Return March in social media posts and an email—to an act that harmed Plaintiffs.

As to the fiscal sponsorship, the Complaint does not allege that the Boycott National Committee committed any wrongful acts that harmed Plaintiffs. Nor does the Complaint allege that any part of the unspecified amount of funds collected ever reached Hamas or any other entity responsible for the acts that harmed Plaintiffs. The conclusory assertions that funding raised or collected by the BNC through the US Campaign's fiscal sponsorship "directly and indirectly benefits" Hamas, Compl. p. 12 ¶ 24 (J.A. __), or that the US Campaign provided "substantial assistance" to Hamas "through its sponsorship of the BNC . . . ," Compl. p. 51 ¶ 205 (J.A. __), are not supported by any factual allegations and must be disregarded.

The attenuated chain of connections in the Complaint—that the US Campaign provided fiscal sponsorship to the Boycott National Committee as of 2017, and that Hamas is a member of a coalition that is in turn a member of the Boycott National Committee—are a far cry from those held sufficient in *Atchley*. *See Atchley*, 22 F.4th at 210-14, 217-19. In that case, the complaint provided extensive details about the years-long takeover of the Ministry of Health by Jaysh al-Mahdi, a terrorist group that thoroughly dominated and controlled the Ministry. The complaint also "describe[d] in detail" the relationship between Jaysh al-Mahdi and Hezbollah, from Hezbollah's role in founding the group to the involvement of hundreds of Hezbollah agents (some identified by name in the complaint) who "direct[ed]" and planned the

attacks that harmed the plaintiffs. *Id.* at 218-19.[9] The *Atchley* complaint also stated that the U.S. government "formally recognized" the extensive links between Hezbollah and Jaysh al-Mahdi. *Id.* at 218.[10] Here, Plaintiffs allege no facts to support their conclusory assertions about a relationship between the US Campaign and the acts (or actors) that harmed Plaintiffs.

Similarly, the Complaint alleges no facts to support the conclusory assertion that the US Campaign's statements regarding the GRM somehow assisted the launching of burning kites and balloons during the marches. The Complaint provides

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[9] *See also Atchley,* 22 F.4th at 211 (Hezbollah's "chief terrorist mastermind [worked] . . . to establish Jaysh al-Mahdi as a fighting force in Iraq to violently expel the Americans"; "Hezbollah recruited, trained, and armed its fighters" and "provided Jaysh al-Mahdi with explosively formed penetrators and trained the group's fighters how to use them [sic]"; those "penetrators" were "used in many of the terrorist attacks on the plaintiffs in this case.")

[10] *Atchley* notes similarly detailed allegations in two other cases in which courts have found aiding-and-abetting liability. *Atchley*, 22 F.4th at 217-18 (citing *Bartlett v. Société Générale de Banque Au Liban SAL,* No. 19-CV-00007 (CBA) (VMS), 2020 WL 7089448, at *8 (E.D.N.Y. Nov. 25, 2020) and *Freeman v. HSBC Holdings PLC*, 413 F. Supp. 3d 67, 96-97 (E.D.N.Y. 2019)).

In *Bartlett*, the district court relied on a complaint that provided "a treatise on Hezbollah and the Lebanese economic system" in "5,695 paragraphs [that] span[ned] nearly 788 pages" and thoroughly explained both how Hezbollah raised funds through multiple operations and front organizations and how the financial services provided by the defendant banks "enabl[ed] Hezbollah to access millions of dollars which ultimately enabled the Attacks that injured Plaintiffs." 2020 WL 7089448 at *1-*2.

In *Freeman*, the district court cited factual allegations that portrayed Hezbollah "as deeply involved in supporting and coordinating an extensive campaign of terrorist activity against American citizens in Iraq." 413 F. Supp. 3d at 96-97.

no link between the US Campaign and the launching of incendiary kites and balloons and rockets. It similarly provides no link between the Boycott National Committee and the launchings. The conclusory allegation that the Boycott National Committee was "integrally involved" with the marches, Compl. p. 32 ¶ 112 (J.A. __), is unsupported by factual allegations. The Complaint alleges only that: (1) one day of the March to demand Palestinians' right to return, Compl. pp. 37-38 ¶ 132 (J.A. __), would be dedicated to boycotting Israel, Compl. p. 32 ¶ 113 (J.A. __) (a lawful non-violent tactic); and (2) that some people associated with the Boycott National Committee attended or supported the marches, which were described by one of them as a form of "popular resistance against the occupation," and carried signs calling for an end to arms deals with Israel, Compl. pp. 32-33 ¶ 116 (J.A. __); and (3) that the BNC Facebook page described the marches as "mass popular mobilizations demanding Palestinian refugees' right to return to their homes" involving "unarmed protestors," *id.* at p. 33 ¶ 116 (J.A. __). These allegations of comments about the marches and their lawful goals do not constitute material support to terrorism. None of the facts alleged support Plaintiffs' conclusory statement that "by promoting and supporting the GRM, the BNC materially supports and sponsors these acts of . . . terror upon the people and property of Israel, including the Plaintiffs," Compl. p. 34 ¶ 119 (J.A. __).

Finally, the Complaint does not state facts sufficient to support the conclusory

allegation that Plaintiffs were harmed by wrongful acts committed by Hamas or any other designated FTO, as opposed to the unnamed militant or terrorist groups, Palestinian youths, or "others" referenced in the Complaint. In the absence of factual allegations indicating which group or groups performed the acts that harmed Plaintiffs, even if the Complaint alleged that any US Campaign assistance reached Hamas (which it does not), it does not plausibly allege that Hamas was the entity that harmed Plaintiffs.

2. Plaintiffs have failed to allege that the US Campaign was "generally aware" of playing a role in illegal activity or knowingly provided substantial assistance to the acts of international terrorism that harmed them.

The ATA requires plausible allegations that a defendant "knowingly" provided "substantial assistance" to the acts of international terrorism that harmed a plaintiff. 18 U.S.C. § 2333(d)(2). Analyzing these elements through the *Halberstam* framework as statutorily required, *Atchley* begins with the "general awareness" and "knowledge" requirements and then applies the six *Halberstam* factors to analyze "substantial" assistance. *Atchley*, 22 F.4th at 219-24.

As explained above, the Complaint contains no factual allegations to support a claim that assistance provided by the US Campaign to the Boycott National Committee constituted assistance to acts of international terrorism or that the US Campaign provided *any* assistance to the Great Return March (as distinguished from statements in support of marchers' rights). Since there are no allegations supporting

any role in any illegal activity, the US Campaign clearly cannot have been "generally aware" of such a role, nor did it provide knowing and substantial assistance to the acts of international terrorism that allegedly harmed Plaintiffs.

a) The Complaint does not allege that the US Campaign was "generally aware" of having a role in illegal activity.

Halberstam explains that a "defendant must be generally aware of his role as part of an overall illegal or tortious activity." *Atchley*, 22 F.4th at 220 (quoting *Halberstam*, 705 F.2d at 487-88). As applied to ATA claims, "a defendant may be liable for aiding and abetting an act of terrorism if it was generally aware of its role in an 'overall illegal activity' from which an 'act of international terrorism' was a foreseeable risk." *Id.* (quoting *Kaplan*, 999 F.3d at 860 (citing *Halberstam*, 705 F.2d at 488)).

Without citing the Complaint, Plaintiffs' Brief asserts that the US Campaign's "own statements to its contributors demonstrate that it is 'generally aware' of its 'role as part of an overall illegal and tortious activity.'" Appellants' Br. 19. This is a gross misstatement of the allegations of the Complaint. First, as explained above, the Complaint does not plausibly allege that the US Campaign actually played a role in any illegal activity. In the absence of such a role, there was nothing to be aware of.

Second, even if the Complaint plausibly alleged that the US Campaign had somehow played a role in illegal activity, the Complaint contains no facts to support

the conclusion that the US Campaign was "generally aware" of this role. Conclusory statements that the US Campaign "knew" that it was assisting terrorist acts by providing fiscal sponsorship to the Boycott National Committee or by "promoting" or "supporting" the Great Return March must be disregarded. *See, e.g.*, Compl. pp. 39, 51, 57 ¶¶ 137, 205, 243 (J.A. __). The allegation that the US Campaign was a "strategic partner[]" of the Boycott National Committee is similarly inadequate. Compl. pp. 36-37 ¶¶ 130, 131 (J.A. __). The Boycott National Committee is not alleged to be an FTO, nor has it been so designated; the Complaint describes it as a broad coalition that advocates for lawful tactics such as boycotts, divestment and sanctions. Compl. pp. 23-24, 35 ¶¶ 73, 76, 124 (J.A. __). Plaintiffs' allegations that the Boycott National Committee engaged in nonviolent activities like the promotion of a boycott and other advocacy work defeats their claim that the US Campaign had general knowledge that, by fiscally sponsoring the Boycott National Committee or partnering with it, the US Campaign played a role in Hamas's or others' terrorist activities. A tweet by the US Campaign's then-Executive Director criticizing Israeli use of force and mentioning "burning kites and balloons" (but *not* mentioning the Great Return March) similarly does not lead to any inference of general awareness that the US Campaign played a *role* in such launchings. Compl. p. 38 ¶ 134 (J.A. __).

Third, there are no allegations to support the requirement that the US

Campaign was aware that an act of international terrorism was a *foreseeable risk* of its support for the Boycott National Committee or of its statements regarding the Great Return March. The Complaint alleges that the Boycott National Committee is the "broadest coalition in Palestinian civil society," Compl. p. 35 ¶ 124 (J.A. __), with a call to action endorsed by over 170 groups, Compl. p. 23 ¶ 73 (J.A. __), and that one of the members of the coalition is *another* coalition that includes Hamas and other designated FTOs as members. Compl. p. 22 ¶ 66 (J.A. __). Notably, however, the Boycott National Committee is not alleged to have taken any action in support of any acts of international terrorism committed by Hamas or any other alleged terrorist organization, much less in a manner that would have alerted the US Campaign to its supposed role in terrorist acts. See discussion *supra* at pp. 19-20, 33.

By comparison, in *Atchley*, where defendants provided assistance to the Iraqi Ministry of Health, the Circuit relied on detailed factual allegations that demonstrated that "defendants were aware of reports extensively documenting . . . Jaysh al-Mahdi's domination of" the Ministry of Health and "its mission to engage in terrorist acts." 22 F.4th at 221. In addition to the extensive allegations establishing control of the Ministry by Jaysh al-Mahdi (see *supra* at pp. 21-22, 31-32), the Court pointed to media reports that would have been tracked by each defendant's "corporate security group," and to physical evidence visible to defendants'

employees, who regularly visited the Ministry, where Jaysh al-Mahdi's dominance was clearly visible. *Atchley*, 22 F.4th at 221. *Atchley* contrasts these allegations with those found insufficient in *Siegel v. HSBC N. Am. Holdings, Inc.*, 933 F.3d 217, 224 (2d Cir. 2019), noting that, in that case, plaintiffs "'failed to allege that [defendant bank] was aware that by providing banking services' it was supporting a terrorist organization, 'much less assuming a role in [its] violent activities.'" *Atchley*, 22 F.4th at 221 (quoting *Siegel*, 933 F.3d at 224).

Here as in *Siegel*, the Complaint fails to allege facts to support its claim that the US Campaign was aware that, by providing a financial service to the BNC, it was "supporting" a terrorist organization, "much less assuming a role" in that group's violent activities, such that international terrorism was a "foreseeable risk" of its actions. The Complaint contains no factual allegations to plausibly support the conclusion that the US Campaign was aware that fiscal sponsorship of the BNC might assist in the launching of kites and balloons or rockets (or that it in fact did).

b) The Complaint does not allege that the US Campaign "knowingly" provided assistance to the acts of international terrorism that harmed Plaintiffs.

As explained by this Court in *Atchley*, the "knowledge component . . . requires that the defendant 'know[ ]' that it is providing 'assistance,' 18 U.S.C. § 2333(d)(2) – whether directly to the FTO or indirectly through an intermediary." *Atchley*, 22 F.4th at 222 (quoting *Kaplan*, 999 F.3d at 863-64 (alteration in original)). That is,

the defendant must "knowingly," not "innocently or inadvertently," give "assistance, directly or indirectly," to an FTO. *Kaplan*, 999 F.3d at 864. In *Kaplan*, the Second Circuit found that plaintiffs had adequately alleged that the defendant bank knew that its clients were "subordinate entities" of Hizbollah, *id.* at 849, and had been categorized by the United Nations as a "Hizbollah-linked money laundering gang," *id.*; *see also id.* at 850-51, 858, 862, 864-65.[11]

Here, the Complaint alleges no facts to support a plausible inference that the US Campaign had knowledge that it was providing assistance to an FTO, directly or through an intermediary. A bare assertion of knowledge, "devoid of 'further factual enhancement'" will not suffice. *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557; *see Bartlett*, 2020 WL 7089448, at * 9 (allegation that defendant "knew" customers were affiliates of Hezbollah and that Hezbollah was responsible for attacks was conclusory without "specific factual averments" to support inference of

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[11] To support the allegation that the defendant bank had knowledge that its clients were actually part of the Hizbollah organization, the court noted that the complaint alleged:

> The fact that [the clients] were integral parts of Hizbollah was openly, publicly and repeatedly acknowledged and publicized by Hizbollah [over several years], on Hizbollah's official websites, in official press releases issued by Hizbollah, on Hizbollah's official television station, . . . on Hizbollah's official radio station, . . . and in numerous press conferences and news media interviews conducted by senior Hizbollah officials . . . In addition, the SAC described a dozen published English-language articles that recounted the connection between Hizbollah and [one of the entities] . . . .

Kaplan, 999 F.3d at 850-51.

knowledge). As discussed above, the Complaint does not assert facts which plausibly allege that the financial service that the US Campaign provided to the BNC—an unspecified amount of donations collected during an unspecified period of time—actually assisted Hamas, much less that the US Campaign *knew* that it would. Allegations that Hamas had some connection to the BNC through the PNIF are insufficient to raise an inference that the US Campaign knew that a donation to the BNC provided assistance to Hamas. Allegations about the US Campaign's statements regarding the Great Return March similarly fail to establish any requisite knowledge.

c) The Complaint does not allege that the US Campaign provided "substantial" assistance to the acts of international terrorism that harmed Plaintiffs.

As a threshold matter, the Complaint does not plausibly allege that the US Campaign provided *any* assistance to acts of international terrorism, much less *substantial* assistance. The Complaint makes no factual allegations that the US Campaign provided financial or other support to Hamas or other entities involved in launching any devices. It states that the US Campaign "transfer[red] presently unknown sums of money" to Hamas, Compl. p. 51 ¶ 203 (J.A. __), but alleges no facts to support that claim. Thus, there are no non-conclusory allegations from which the Court can infer that any group responsible for launching rockets, kites, or balloons actually received any funds through the US Campaign's fiscal sponsorship.

See Averbach v. Cairo Amman Bank, No. 19-CV-0004-GHW-KHP, 2020 WL 486860, at *16 (S.D.N.Y. Jan. 21, 2020), *report & recommendation adopted in full*, 2020 WL 1130733 (S.D.N.Y. Mar. 9, 2020) (noting that no non-conclusory allegations show that Hamas actually received any of the funds transferred to defendant's accounts). There are no allegations as to what the funds collected through the fiscal sponsorship are for, beyond their stated purpose: a donation to "the broadest coalition in Palestinian civil society that leads the global BDS movement for Palestinian rights." Compl. p. 35 ¶ 124 (J.A. __).

Plaintiffs' inflammatory claims about the US Campaign's relationship with the March are equally without support. The Complaint's only factual allegations linking the US Campaign and the March are that the US Campaign expressed support for rights of Palestinian protesters and condemned the brutal force employed against them. Compl. pp. 37-38 ¶ 132. These expressions of support, *the only factual allegations that link the US Campaign and the March*, do not support the Complaint's baseless claim that the US Campaign provides "material[] support[]" to the "terror [inflicted] upon the people and property of Israel, including the Plaintiffs," Compl. p. 39 ¶ 137 (J.A. __), and hardly constitute "substantial assistance" to the acts of terrorism alleged by Plaintiffs. Compl. p. 51 ¶ 202 (J.A. __).

Second, application of the *Halberstam* factors, as analyzed in *Atchley,* further demonstrates that the US Campaign's relationship with the Boycott National Committee did not constitute "substantial" assistance to any act of international terrorism.

Factor 1, the nature of the acts assisted, is irrelevant here, given the lack of allegations that the US Campaign provided any assistance at all to the acts alleged by Plaintiffs. Moreover, *Atchley* involved particularly "vicious" acts: the "violent terrorizing, maiming, and killing of U.S. nationals in Iraq," *Atchley*, 22 F.4th at 222, in a "years-long campaign to harm Americans" that "injured or killed hundreds of United States service members and civilians." *Id*. at 209. *Atchley* also points out the importance of the assistance provided—the transfer of "several million dollars per year in cash or goods over a period of years." *Id.* at 222. Here, the Complaint alleges the US Campaign advocated for human rights and condemned the use of lethal force, and fiscally sponsored the Boycott National Committee, collecting an unknown sum of money for it. Neither the US Campaign nor the Boycott National Committee is alleged to have assisted, much less substantially assisted, the launching of devices alleged to have damaged Plaintiffs' property and caused them emotional harm.

Factor 2, amount and kind of assistance: *Halberstam* and *Atchley* focus on the amount of assistance and the time during which it was provided. Here, the Complaint alleges only that the US Campaign served as the US fiscal sponsor for

the Boycott National Committee as of 2017, Compl. p. 35 ¶ 123 (J.A. __), without any allegations about how long that sponsorship lasted and how much funding was actually donated. None of the cases cited by Plaintiffs or in *Atchley* involve anything approaching such conclusory and de minimis assistance, even assuming it was toward an unlawful activity. By contrast, Hamilton's extensive contribution to the *Halberstam* burglary operation lasted five years and "added up" to "an essential part" of the criminal operation. *Halberstam*, 705 F.2d at 488 (quoted in *Atchley,* 22 F.4th at 222). Similarly, the assistance in *Atchley* amounted to several million dollars per year for "a period of years," *Atchley*, 22 F.4th at 222, described by this Court as "a considerable source of funding that helped the organization commit multiple terrorist acts." *Id. See also supra* note 10 (discussing allegations in *Bartlett* and *Freeman*).

Further, the Complaint contains no factual allegations indicating that Hamas or any other terrorist organization actually received any funds as a result of the US Campaign's fiscal sponsorship of the BNC. The lack of allegations that the group responsible for the acts of terrorism received any funds provided by a defendant, or that the defendant intended that it receive those funds, weigh against a finding of "substantial" assistance. *Atchley*, 22 F.4th at 222 (citing *Siegel*, 933 F.3d at 225).

Plaintiffs' Brief cites 18 conclusory paragraphs of their Complaint in support of the argument that it includes "plausible" allegations that the US Campaign

provided "indisputably important," "essential" support to Hamas. Appellants' Br. 20 (citing Compl. pp. 51-54 ¶¶ 202-212, 214-222 (J.A. __)). Conclusory allegations that parrot the elements of the claim must be disregarded. *See Iqbal,* 556 U.S. at 678.

Factor 3, presence at the time of the tortious conduct: The Complaint does not allege that the US Campaign was present at the time of the launchings, or was present at any time in Gaza or Israel, for that matter. Nor does it allege that any money donated through the fiscal sponsorship left the United States.

Factor 4, relationship: The Complaint does not suggest any special relationship—or any relationship at all—between the US Campaign and the "principal tortfeasors," *Atchley*, 22 F.4th at 223, that would impact the analysis of liability. The US Campaign's only alleged relationship is with the BNC, which is not alleged to have committed any tortious act.

Factor 5, state of mind: Just as the Complaint fails to allege facts to support general awareness or knowledge, it fails to allege that the US Campaign's "state of mind" supports aiding-and-abetting liability. In *Atchley*, the "state of mind" factor supported a finding of aiding-and-abetting liability "because defendants' assistance was knowingly provided with a general awareness that it supported the terrorist acts of a notoriously violent terrorist organization that had overrun the Ministry of Health." *Atchley*, 22 F.4th at 223. Similarly, in *Halberstam*, this Court found that Hamilton provided "knowing[]" assistance to an "ongoing illicit enterprise."

Halberstam, at 477, 488 (quoted in *Atchley*, 22 F.4th at 223). Here, the Complaint contains no factual allegations to support a finding that the US Campaign knowingly provided assistance to the rocket, balloon or kite attacks or that it was "generally aware" that its actions would assist the perpetrators of those attacks.[12]

Factor 6, duration: The Complaint alleges only that the US Campaign served as the fiscal sponsor for the Boycott National Committee for an unspecified length of time as of 2017. Compl. p. 35 ¶ 123 (J.A. __). By comparison, *Halberstam* and *Atchley* included allegations of years of support. The allegations in *Atchley* described "a set of enduring, carefully cultivated relationships consisting of scores of

[12] In finding that the "state of mind" factor weighed against finding that the alleged assistance was substantial, the district court relied in part on the fact that the US Campaign was not "one in spirit" with Hamas, Mem. Op. 10 (J.A. __), a requirement rejected by this Court in *Atchley*, which held that the "state of mind" factor requires that assistance be "knowingly provided with a general awareness that it supported" terrorist acts. 22 F.4th at 223-24. Given the Complaint's lack of allegations about the US Campaign's actual assistance, knowledge, or general awareness, as discussed above, this factor amply weighs against a finding of "substantial" assistance.

As part of the "one in spirit" discussion, the District Court stated that "plaintiffs allege defendant knowingly provided financial and other support and were [sic] aware those resource [sic] would be used by Hamas and other groups to support terrorist attacks." Mem. Op. 10 (J.A. __) (citing Compl. p. 51 ¶ 205 (J.A. __); Pls.' Opp'n to Def.'s Mot. to Dismiss 23-24, ECF No. 24 (J.A. __)). Referring to the same paragraph of the Complaint, the opinion found, "[W]hile plaintiffs make broad allegations that the US Campaign provided financial assistance to Hamas, *see* Compl. ¶ 205, they fail to plead factual allegations sufficient to support these claims." *Id.* at 6 (J.A. __). Read together, these quotes make clear that the District Court was not suggesting that the factual allegations supported the broad claim of knowing, aware support for terrorist acts; indeed, it found the opposite.

transactions over a period of years." *Atchley*, 22 F.4th at 224. Here, the well-pleaded allegations in the Complaint do not support *any* relationship between the US Campaign and the perpetrators of the violent acts.

d) The Complaint does not allege that the US Campaign provided assistance to acts of international terrorism "directly" or "indirectly."

Atchley held that an ATA aiding-and-abetting claim need not plead that a defendant assisted a tortfeasor directly. *Atchley*, 22 F.4th at 222-25. Unlike *Atchley*, however, the Complaint in this case contains no factual allegations to support a plausible inference that the US Campaign provided *any* assistance, direct or indirect, to the attacks that injured Plaintiffs. *See supra* discussion at pp. 17-19.

B. Plaintiffs have failed to allege that their injuries arose from an act "committed, planned, or authorized by a designated Foreign Terrorist Organization."

Even if the Complaint alleged facts to satisfy the other requirements of aiding-and-abetting liability (it does not), it would still fail to state a claim because it does not allege that Plaintiffs' injuries arose from acts committed by Hamas or any other designated FTO.

Without any citations to the Complaint, Plaintiffs' Brief asserts that "[t]he Complaint alleges that Hamas . . . perform[ed] the 'wrongful act that causes an injury.'" Appellants' Br. 19. Setting aside conclusory statements, as we must, that assertion is unfounded. *See supra* at p. 9. The repeated assertion in the Complaint

that multiple unidentified groups and individuals fired rockets, balloons, and kites cannot support a reasonable inference that Plaintiffs were injured by an act "committed, planned, or authorized" by a designated FTO, as required by the statute. 18 U.S.C. § 2333(d)(2).

Similarly, to the extent that the Complaint alleges that some of the devices were launched during the Great Return March, it also pleads that the March was organized by and included multiple Palestinian organizations. Compl. p. 26 ¶ 88 (J.A. __) (governing body of Great Return March formed with agreement of several named organizations and "*the rest of the Palestinian organizations*"); *id*. at ¶ 92 (J.A. __) ("Hamas and *the rest of the Palestinian factions* are part of the Great Return March"); *id*. at ¶ 95 (J.A. __) (a meeting about the March included "PNIF and *all the Palestinian factions*"); Compl. p. 34 ¶ 118 (J.A. __) (the March is "sponsored and supported by Hamas, and *other terrorist organizations*) (emphasis added). Although the Complaint alleges that Sons of al-Zawari launched some of the kites and balloons and had ties to Hamas, *id*. at p. 27 ¶¶ 100-101 (J.A. __), it also states explicitly that this is "[o]ne group of terrorists that launch" such balloons, not the only such group. *Id*. at ¶ 100 (J.A. __).

The Complaint's conclusory statements that Hamas committed the attacks against Plaintiffs must be disregarded both because they are conclusory, and because they are inconsistent with the repeated allegations that other people and entities—

militant groups, youths, terrorist organization, factions—"committed, planned, or authorized" the attacks alleged to injure Plaintiffs. *Acosta Orellana*, 711 F. Supp. 2d at 109 (citations omitted) ("where some allegations in the complaint contradict other allegations, the conflicting allegations become 'naked assertions devoid of further factual enhancement . . . [, which therefore] cannot be presumed true.'"); *Amore ex rel. Amore v. Accor*, 529 F. Supp. 2d 85, 94 (D.D.C. 2008) ("the court does not accept as true self-contradictory factual allegations"); *see also Tamayo v. Blagojevich*, 526 F.3d 1074, 1086–87 (7th Cir. 2008) (considering whether plaintiff "effectively pleaded herself out of court" by including allegations in complaint that undermined elements of her claim).

Finally, Plaintiffs' conclusory statement that Hamas controls Gaza is insufficient to establish that Hamas planned or committed the attacks alleged in the Complaint. Hamas' control over Gaza does not suggest that Hamas is responsible for everything that occurs in Gaza. *See* discussion *supra* at pp. 20-21.

CONCLUSION

Because the Complaint fails to allege any nonconclusory basis for either direct or indirect liability under the ATA, the decision of the District Court dismissing Plaintiffs' Complaint should be affirmed.

Respectfully submitted,

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Dated: March 1, 2022

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CERTIFICATE OF SERVICE

I hereby certify that on March 1, 2022, I electronically filed the foregoing document through the CM/ECF system, which sends notification to counsel for Plaintiffs-Appellants and Defendant-Appellee.

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