APPENDIX

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

22-1039

[Filed February 29, 2024]

MICHAL HONICKMAN, Individually and for the Estate of HOWARD GOLDSTEIN, EUGENE GOLDSTEIN, LORRAINE GOLDSTEIN, RICHARD GOLDSTEIN, BARBARA GOLDSTEIN INGARDIA, MICHAEL GOLDSTEIN, CHANA FREEDMAN, DAVID GOLDSTEIN, MOSES STRAUSS, PHILIP STRAUSS, BLUMA STRAUSS, AHRON STRAUSS, ROISIE ENGELMAN, JOSEPH STRAUSS, TZVI WEISS, LEIB WEISS, Individually and for the Estate of MALKA WEISS, YITZCHAK WEISS, YERUCHAIM WEISS, ESTHER DEUTSCH, MATANYA NATHANSEN, Individually and for the Estate of TEHILLA NATHANSEN, CHANA NATHANSEN, Individually and for the Estate of TEHILLA NATHANSEN, YEHUDIT NATHANSEN, S.N., a minor, HEZEKIAL TOPOROWITCH, PEARL B. TOPOROWITCH, YEHUDA TOPOROWITCH, DAVID TOPOROWITCH, SHAINA CHAVA NADEL, BLUMY ROM, RIVKA POLLACK, RACHEL POTOLSKI, OVADIA TOPOROWITCH, TEHILLA GREINIMAN, YISRAEL TOPOROWITCH, YITZCHAK TOPOROWITCH, HARRY LEONARD BEER, Individually and as the executor of the Estate of ALAN BEER AND ANNA BEER, PHYLLIS MAISEL, ESTELLE CAROLL, SARRI ANNE SINGER, JUDITH SINGER, ERIC M. SINGER, ROBERT SINGER, JULIE	)

AVERBACH, Individually and for the Estate of)
STEVEN AVERBACH, TAMIR AVERBACH, DEVIR)
AVERBACH, SEAN AVERBACH, ADAM AVERBACH,)
MAIDA AVERBACH, Individually and for the)
Estate of DAVID AVERBACH, MICHAEL AVERBACH,)
EILEEN SAPADIN, DANIEL ROZENSTEIN, JULIA)
ROZENSTEIN SCHON, ALEXANDER ROZENSTEIN,)
ESTHER ROZENSTEIN, JACOB STEINMETZ,)
Individually and for the Estate of AMICHAI)
STEINMETZ, DEBORAH STEINMETZ, Individually and)
for the Estate of AMICHAI STEINMETZ, NAVA)
STEINMETZ, ORIT MAYERSON, NETANEL STEINMETZ,)
ANN COULTER, for the Estate of ROBERT L.)
COULTER, SR., DIANNE COULTER MILLER,)
Individually and for the Estate of JANIS RUTH)
COULTER, ROBERT L COULTER, JR., Individually and)
for the Estate of JANIS RUTH COULTER, LARRY)
CARTER, Individually and as the Administrator of)
the Estate of DIANE LESLIE CARTER, SHAUN)
CHOFFEL, RICHARD BLUTSTEIN, Individually and for)
the Estate of BENJAMIN BLUTSTEIN, KATHERINE)
BAKER, Individually and for the Estate of)
BENJAMIN BLUSTEIN, REBEKAH BLUTSTEIN,)
NEVENKA GRITZ, Individually and for the Estate)
of DAVID GRITZ and NORMAN GRITZ, JACQUELINE)
CHAMBERS, Individually and as the Administrator)
of the Estate of ESTHER BABLAR, LEVANA)
COHEN, Individually as the Administrator of the)
Estate of Esther BABLAR, ELI COHEN, SARAH)
ELYAKIM, JOSEPH COHEN, GRETA GELLER, as the)
Administrator of the Estate of HANNAH ROGEN,)
ILANA DORFMAN, as the Administrator of the Estate)
of HANNAH ROGEN, REPHAEL KITSIS, as the)
Administrator of the Estate of HANNAH ROGEN,)

TOVA GUTTMAN, as the Administrator of the Estate of HANNAH ROGEN, TEMIMA SPETNER, JASON KIRSCHENBAUM, ISABELLE KIRSCHENBAUM, Individually and for the Estate of MARTIN KIRSCHENBAUM, JOSHUA KIRSCHENBAUM, SHOSHANA BURGETT, DAVID KIRSCHENBAUM, DANIELLE TEITELBAUM, NETANEL MILLER, CHAYA MILLER, AHARON MILLER, SHANI MILLER, ADIYA MILLER, ALTEA STEINHERZ, JONATHAN STEINHERZ, TEMIMA STEINHERZ, JOSEPH GINZBERG, PETER STEINHERZ, LAUREL STEINHERZ, GILA ALUF, YITZHAK ZAHAVY, JULIE ZAHAVY, TZVEE ZAHAVY, BERNICE ZAHAVY,
Plaintiffs-Appellants,

ARIE MILLER,
Plaintiff,

v.

BLOM BANK SAL,
Defendant-Appellee.

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE

EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of The United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 29th day of February, two thousand twenty four.

PRESENT:

DENNIS JACOBS,
RICHARD C. WESLEY,
BETH ROBINSON,
Circuit Judges.

FOR APPELLANTS:

MICHAEL RADINE (Gary M. Osen, Aaron Schlanger, *on the brief*), Osen LLC, Hackensack, NY.

FOR APPELLEE:

MICHAEL MCGINLEY, Dechert LLP, Philadelphia, PA.

Appeal from a judgment of the United States District Court for the Eastern District of New York (Matsumoto, *Judge*).

UPON DUE CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the district court's order entered on April 8, 2022 is **VACATED** and the case is **REMANDED** for further proceedings.

Plaintiffs-Appellants are victims and their family members of attacks carried out by HAMAS, a group the United States has designated as a foreign terrorist organization. In January 2019, Plaintiffs sued Defendant-Appellee BLOM Bank SAL ("BLOM Bank") for aiding and abetting HAMAS by providing financial services to certain customers Plaintiffs allege are affiliated with HAMAS, in violation of the Anti-Terrorism Act, 18 U.S.C. § 2333, as amended by the Justice Against Sponsors of Terrorism Act ("JASTA"), *id.* § 2333(d)(2). A year later, the district court dismissed Plaintiffs' complaint for failure to state a claim upon which relief may be granted. *Honickman for Estate of Goldstein v. BLOM Bank SAL*, 432 F. Supp. 3d 253, 271 (E.D.N.Y. 2020) ("*Honickman I*").

On appeal, a panel of this Court concluded that the district court applied the wrong legal standard for aiding-and-abetting liability under JASTA. Nonetheless, we affirmed the district court's judgment because Plaintiffs' complaint still failed to state a claim under the correct standard. *Honickman v. BLOM Bank SAL*, 6 F.4th 487, 490 (2d Cir. 2021) ("*Honickman II*").

Armed with this Court's clarifications, Plaintiffs returned to the district court and moved under Federal Rules of Civil Procedure 60(b)(6) and 15(a)(2) to vacate the judgment of dismissal and grant them leave to file a first amended complaint. The court denied Plaintiffs'

motion in an April 2022 order, *Honickman v. BLOM Bank SAL*, No. 19-CV-0008, 2022 WL 1062315, at *5 (E.D.N.Y. Apr. 8, 2022) ("*Honickman III*"), which Plaintiffs now appeal. We assume the parties' familiarity with the underlying facts, procedural history, and arguments on appeal, to which we refer only as necessary to explain our decision to vacate and remand.

We review for abuse of discretion both a district court's "denial of a motion to vacate a judgment under Rule 60(b)(6)" and its "denial of a post-judgment motion for leave to replead." *Mandala v. NTT Data, Inc.*, 88 F.4th 353, 359 (2d Cir. 2023).[1] That means "we must affirm the denial of vacatur, unless the ruling is based on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Id.* Where, as here, plaintiffs "seek to file a first amended complaint . . . it is an abuse of discretion to deny post judgment relief 'without any justifying reason,' such as 'undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [or] futility of amendment.'" *Id.* at 362 (quoting *Foman v. Davis*, 371 U.S. 178, 182 (1962)).

We conclude that the district court exceeded its discretion by basing its ruling on an erroneous view of

[1] In quotations from case law and the parties' briefing, this opinion omits all internal quotation marks, alterations, footnotes, and citations, unless otherwise noted.

the law because it failed to balance Rule 60(b)'s finality principles and Rule 15(a)'s liberal pleading principles.[2]

A plaintiff is ordinarily entitled to Rule 60(b)(6) relief "only when there are extraordinary circumstances justifying relief, when the judgment may work an extreme and undue hardship, and when the asserted grounds for relief are not recognized in clauses (1)–(5) of the Rule." *Metzler Investment Gmbh v. Chipotle Mexican Grill, Inc.*, 970 F.3d 133, 143 (2d Cir. 2020). But "[w]hen vacatur is sought in order to obtain leave to file an amended complaint, special considerations come into play." *Mandala*, 88 F.4th at 361. In such cases, the district court must give "due regard" to "*both* the philosophy favoring finality of judgments . . . and the liberal amendment policy of Rule 15(a)." *Id.* Therefore, when presented with a motion to vacate and amend, the district court is required to consider Rule 60(b) finality and Rule 15(a) liberality in tandem.

Here, the district court evaluated Plaintiffs' motion under only Rule 60(b)'s standard. The court concluded that it "would be contradictory to entertain a motion to amend the complaint" under Rule 15(a) without "a valid basis to vacate the previously entered judgment" under Rule 60(b). *Honickman III*, 2022 WL 1062315, at *2 n.2. As a result, it incorrectly treated Plaintiffs' motion to vacate and amend as calling for two distinct

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[2] Because "abuse of discretion," which is a legal term of art, can apply to determinations that do not involve "'abuse' in the ordinary sense of the word," we use the more precise term "exceeded" to describe the same thing. *JTH Tax, LLC v. Agnant*, 62 F.4th 658, 666 n.1 (2d Cir. 2023).

analyses, requiring Plaintiffs to successfully navigate Rule 60(b)'s finality gauntlet before they could invoke Rule 15(a)'s liberal repleading policy. The district court's framework for analyzing Plaintiffs' motion was erroneous as a matter of law.

We accordingly vacate the district court's order and remand the case for the court to reconsider Plaintiffs' motion applying the above standards. In doing so, the district court should balance Rule 60(b)'s finality and Rule 15(a)'s liberal amendment policies, and it should examine all the "special considerations [that] come into play" "[w]hen vacatur is sought in order to obtain leave to file an amended complaint." *Mandala*, 88 F.4th at 361. Our discussion of the various considerations in *Mandala* will be particularly helpful to the district court's analysis. *Id.* at 361–65.

For the foregoing reasons, the District Court's order is **VACATED**, and the case is **REMANDED** for further proceedings consistent with this summary order.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court
/s/ Catherine O'Hagan Wolfe

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

19-CV-0008 (KAM)(SMG)

[Filed April 8, 2022]

HONICKMAN, *et al*, *Plaintiffs*,	)
v.	)
BLOM BANK SAL, *Defendant*.	)

MEMORANDUM AND ORDER

KIYO A. MATSUMOTO, United States District Judge:

Plaintiffs are victims, or the relatives of victims ("Plaintiffs"), of attacks conducted by Hamas, a designated Foreign Terrorist Organization ("FTO"), between December 2001 and August 2003 in Israel and the Palestinian Territories. Plaintiffs commenced this action pursuant to the Anti-Terrorism Act ("ATA"), as amended by the Justice Against Sponsors of Terrorism Act ("JASTA"), 18 U.S.C. § 2333(d), to recover damages from BLOM Bank SAL ("BLOM," or "Defendant") for allegedly aiding and abetting Hamas' commission of terrorist acts by providing financial services to Hamas

through three of BLOM's customers who are alleged to be Hamas affiliates: the Sanabil Association for Relief and Development ("Sanabil"), Subul Al-Khair, and the Union of Good (collectively, BLOM's "Three Customers").

This case has been closed since January 15, 2020, following this Court's order granting Defendant's motion to dismiss and the entry of judgment. (ECF No. 45.) On July 29, 2021, the Second Circuit affirmed the judgment of dismissal for failure to state a claim, albeit on other grounds. Presently before the Court is Plaintiff's motion to vacate the Judgment of this Court which dismissed their Complaint with prejudice after Plaintiffs' counsel twice declined the Court's offer to grant leave to amend. (ECF No. 44, Jan. 14, 2020 Order; ECF No. 45, Judgment.) For the reasons discussed further below, Plaintiffs' motion is respectfully DENIED.

BACKGROUND[1]

Plaintiffs twice expressly declined the opportunity to amend their complaint prior to the Court's decision dated January 14, 2020: 1) on May 15, 2019 at the pre-motion conference (Tr. 6:9–24, May 15, 2019), and 2) on November 25, 2019, at oral argument on the motion to dismiss. (*See* ECF No. 50, Pls. Pre-Motion Conference Req., p. 1.) On January 14, 2020, this Court issued an Order granting Defendant's motion to dismiss Plaintiffs' complaint with prejudice pursuant to

[1] The Court assumes familiarity with the underlying facts, the preceding procedural history, and the scope of issues presented before this Court and on appeal before the Second Circuit.

Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief may be granted. (*See* ECF No. 44, Order; *see also* ECF No. 45, Judgment.) Plaintiffs appealed this Court's Order and the accompanying Judgment to the Court of Appeals for the Second Circuit on February 13, 2020. (ECF No. 46.) On July 29, 2021, the Second Circuit in *Honickman v. BLOM Bank SAL*, 6 F.4th 487 (2d Cir. 2021), affirmed this Court's Order and judgment of dismissal (ECF No. 44) in *Honickman for Est. of Goldstein v. BLOM Bank SAL*, 432 F. Supp. 3d 253 (E.D.N.Y. 2020), albeit after applying a different standard. Following the Second Circuit's affirmance of this Court's Order, Plaintiffs filed a request for a pre-motion conference on August 9, 2021, in anticipation of their motion pursuant to Fed. R. Civ. P. 15(a) and 60(b)(6) to vacate the judgment and for leave to file an amended complaint. (ECF No. 50.) Defendant opposed this request. (ECF No. 51.)

On October 6, 2021, the Court held a pre-motion conference regarding Plaintiffs' proposed motions to 1) vacate the judgment of this Court dismissing their Complaint with prejudice; and 2) amend the Complaint that was previously dismissed. The Court granted the parties leave to file written submissions only as to the issue of *vacatur*. On December 7, 2021, the Court granted the parties a second opportunity to file accurate submissions. On December 13, 2021, Plaintiffs filed a Memorandum in Support of their Motion to Vacate Judgment (ECF No. 70), and Defendants filed a Memorandum in Opposition to the Motion to Vacate Judgment. (ECF No. 69.) On January 3, 2022, Plaintiffs filed a Reply in Support of their Motion (ECF

No. 73), and Defendants filed a Reply in Opposition to Plaintiffs' Motion. (ECF No. 72.)

LEGAL STANDARD

It is well established that "[a] party seeking to file an amended complaint post[-]judgment must first have the judgment vacated or set aside pursuant to Fed. R. Civ. P. 59(e) or 60(b)." *Metzler Inv. Gmbh v. Chipotle Mexican Grill, Inc.*, 970 F.3d 133, 142 (2d Cir. 2020) (citing *Ruotolo v. City of New York*, 514 F.3d 184, 191 (2d Cir. 2008)).[2]

Rule 60(b) of the Federal Rules of Civil Procedure allows a district court to relieve a party from a judgment under any one of five specified reasons, none of which are applicable (*see* Fed. R. Civ. P. 60(b)(1)-(5)), or under the sixth catch-all provision under Rule 60(b)(6), for "any other reason [that] justif[ies] relief[.]" *Simone v. Prudential Ins. Co. of Am.*, 164 F. App'x 39, 40 (2d Cir. 2006) (citing Fed. R. Civ. P. 60(b)(6)). Rule 60(b)(6) is "properly invoked only when there are extraordinary circumstances justifying relief" or "when the judgment may work an extreme and undue hardship," *Nemaizer v. Baker*, 793 F.2d 58, 63 (2d Cir. 1986). The Second Circuit has cautioned

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[2] Contrary to Plaintiffs' invocation of Federal Rule of Civil Procedure 15, it "would be contradictory to entertain a motion to amend the complaint" without "a valid basis to vacate the previously entered judgment." *Nat'l Petrochemical Co. of Iran v. M/T Stolt Sheaf*, 930 F.2d 240, 245 (2d Cir. 1991). "To hold otherwise would enable the liberal amendment policy of Rule 15(a) to be employed in a way that is contrary to the philosophy favoring finality of judgments and the expeditious termination of litigation." *Metzler*, 970 F.3d at 142 (citations omitted).

that "motions under Rule 60(b) are disfavored." *Simone*, 164 F. App'x at 40 (citing *Pichardo v. Ashcroft*, 374 F.3d 46, 55 (2d Cir. 2004)). The "burden of proof is on the party seeking relief" from the judgment. *Pichardo*, 374 F.3d at 55 (citation omitted).

DISCUSSION

For the following reasons, the Court concludes that Plaintiffs have not demonstrated that relief under Rule 60(b)(6) is warranted. As a preliminary matter, the Second Circuit in *Honickman* affirmed this Court's January 14, 2020, Order of dismissal, and in doing so specifically held,

> [b]ecause [...] Plaintiffs failed to plausibly allege BLOM Bank was aware the Three Customers were related to Hamas, [the Second Circuit does] not need to consider whether they plausibly alleged the Three Customers were closely intertwined with Hamas's violent terrorist activities. Nor do[es] [the Second Circuit] need to address whether the complaint satisfies the substantial assistance element. The complaint's failure to support a reasonable inference that BLOM Bank knew of the Three Customers' links to Hamas sounds the death knell of Plaintiffs' JASTA aiding-and-abetting liability action.

Honickman, 6 F.4th at 503. With regard to Plaintiffs' aiding-and-ability liability claim, the Court of Appeals "acknowledge[d] that the district court's decision came before [the Second Circuit's] opinion in *Kaplan* [*v. Lebanese Canadian Bank, SAL*, 999 F.3d 842 (2d Cir. 2021)] clarified the import of our earlier JASTA aiding-

and-abetting precedents which may have generated some ambiguity as to the proper standard." *Honickman*, 6 F.4th at 497, n. 11.

Second, the Court finds that Plaintiffs have not demonstrated any extraordinary circumstances warranting relief under Rule 60(b)(6). Given Rule 60(b)(6)'s potentially "sweeping reach, courts require the party seeking to avail itself of the Rule to demonstrate that 'extraordinary circumstances' warrant relief." *Stevens v. Miller*, 676 F.3d 62, 67 (2d Cir. 2012) (citing *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 864, 108 S.Ct. 2194, 100 L.Ed.2d 855 (1988); *Nemaizer*, 793 F.2d at 63).

Despite the Second Circuit holding in *Honickman*, 6 F.4th at 503, that Plaintiffs' aiding-and-abetting claim must fail, Plaintiffs argue in support of *vacatur* that this "Court should give Plaintiffs the opportunity to meet what the Circuit called the 'correct standard.'" (ECF No. 50, Pls. Req. for Pre-Motion Conference, p. 1.) Plaintiffs' unavailing argument that the Second Circuit's clarification of the aiding-and-abetting standard constitutes "extraordinary circumstances" ignores the long-settled proposition in the Second Circuit that "as a general matter, a mere change in decisional law does not constitute an 'extraordinary circumstance' for the purposes of Rule 60(b)(6)." *Empresa Cubana Del Tabaco v. Gen. Cigar Co. Inc.*, 385 F. App'x 29, 32 (2d Cir. 2010) (citing *Pichardo*, 374 F.3d at 56; *see also Agostini v. Felton*, 521 U.S. 203, 239, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997) ("Intervening developments in the law by themselves rarely constitute the extraordinary circumstances

required for relief under Rule 60(b)(6)...."))[3] The Second Circuit has affirmed the judgment of dismissal of the complaint. This Court does not consider the clarification by the Second Circuit of the standard for a successful aiding-and-abetting claim to constitute extraordinary circumstances meriting *vacatur* of this Court's prior Judgment, which the Second Circuit affirmed after applying the clarified standard. Plaintiffs fail to raise any other allegedly extraordinary circumstances, and do not show that any of their proposed new allegations were unavailable to them when given the opportunity to amend the complaint prior to this Court's decision on Defendant's motion to dismiss.

Third, although this Court is deeply sympathetic to the Plaintiffs, Plaintiffs have not satisfied this Court that denying the instant motion for *vacatur* would result in "an extreme and undue hardship[.]" *Nemaizer*,

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[3] Moreover, even if changes in decisional law *were* appropriate bases for vacatur, it is not clear to this Court that the deficiencies identified in Plaintiffs' Complaint by this Court and the Court of Appeals would be impacted by the Second Circuit's clarified standard for aiding-and-abetting claims. Even under the clarified standard, this Court's ruling that "Plaintiffs' complaint does not plausibly allege that BLOM was generally aware of any connection between the Three Customers and Hamas" is not meaningfully different from the Second Circuit's ruling as to this same basis for affirming this Court's dismissal. *See Honickman*, 432 F. Supp. 3d at 265; *see also Honickman*, 6 F.4th at 501 (the Second Circuit held that "Plaintiffs' aiding-and-abetting claim fails because the allegations do not support an inference that BLOM Bank was aware of the Three Customers' ties with Hamas prior to the relevant attacks, thereby undermining the second element of general awareness.").

793 F.2d at 63. Plaintiffs only summarily argue that they would be "[p]rejudiced and [d]efendant [w]ould [n]ot," and focus instead on the lack of prejudice for Defendant in continuing litigation if Plaintiffs' motion for *vactur* were granted. (ECF No. 70, Pls. Mem., pp. 26-27.) Fundamentally, Plaintiffs seek to amend their complaint after declining two prior opportunities to do so, and after unsuccessfully appealing the dismissal of that complaint with prejudice.[4] Plaintiffs will not be prejudiced by the ultimate conclusion of this litigation, as Plaintiffs have had ample opportunity to pursue all legal avenues available to them for relief. Indeed, Plaintiffs asserted in their opposition to the Defendant's motion to dismiss that this Court should apply the standard subsequently clarified by the Second Circuit in *Kaplan*, 999 F.3d 842, and in the *Honickman* appeal, and the Circuit ruled in the instant appeal that even applying the clarified standard, the dismissal of the complaint was affirmed. (ECF No. 37, Pl. Opp. Mem. pp. 10-23.)

Relatedly, Plaintiffs concede that they twice declined the opportunity to amend their Complaint before this Court dismissed it. (ECF No. 50 at 1.) At the May 15, 2019, Pre-Motion Conference, "[t]he Court offered Plaintiffs an opportunity to amend their complaint[] to add additional information in response

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[4] Defendant correctly notes that Plaintiffs never appealed the "with prejudice" aspect of the dismissal, and accordingly, waived it. (*See* ECF No. 72, p. 3); *see also* 18A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 4433 (3d ed. 2021) ("A party who elects to appeal on one issue, omitting another issue on which it lost, is subject to issue preclusion on the issue not appealed.").

to the arguments raised by Defendant. Plaintiffs declined to do so and represented that they would not be seeking to amend their Complaint in this regard." (Min. Entry, May 15, 2019.) The Court specifically asked Plaintiffs' counsel during the pre-motion conference: "Are there any additional facts you could add to the allegations that the defendant is challenging here or are you comfortable standing on your complaint as it is?" (Tr. 6:9–11, May 15, 2019.)[5] Plaintiffs' counsel expressly declined the Court's invitation to amend the complaint, stating "[n]o, I think we are prepared to brief it based on the arguments presented in the pre-motion letter." (*Id*. at 6:15–16.) Plaintiffs' counsel again confirmed that Plaintiffs would not seek leave to amend if the Court granted Defendant's motion, stating, "sitting here today based on what was represented as the arguments in the pre-motion letter, we would not seek leave to amend." (*Id*. at 6:22–24.)

Subsequently, on November 25, 2019, at oral argument on the motion to dismiss, this Court again offered, and after having reviewed the fully submitted

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[5] Relatedly, during the October 6, 2021, pre-motion conference on the instant motion for *vacatur*, the Court asked: "If the standard wasn't clear and you were advocating for a particular standard, why wouldn't you allege facts that met the standard that you thought was the right standard?" (Oct. 6, 2021, Tr. at 4:23-5:1.) Counsel for Plaintiffs responded in relevant part, "We thought the allegations we had were sufficient at the time. The circuit disagreed, I think, on a fairly detailed basis. As opposed to rejecting our theory of knowledge generally, it found fault with specific deficiencies that we can address." (*Id*. at 5:18-22.) Counsel for Plaintiffs did not explain why they did not allege facts sufficient to satisfy the standard for which they were advocating.

motion to dismiss, Plaintiffs again expressly declined the opportunity to amend their complaint. (*See* ECF No. 50, Pls. Pre-Motion Conference Req., p. 1 ("Plaintiffs declined the opportunity to amend at the pre-motion conference for BLOM's motion to dismiss, which declination they confirmed at oral argument.").)[6] As this Court noted in *Honickman*, 432 F. Supp. 3d at 270, the Second Circuit has clarified that a district court may dismiss a complaint without granting leave to amend where, as here, the Plaintiffs previously declined an opportunity to amend their complaint. *See Rosner v. Star Gas Partners, L.P.*, 344 F. App'x 642, 645 (2d Cir. 2009) (summary order) (where plaintiffs previously declined opportunities to amend prior to dismissal, it was within the district court's discretion to dismiss the Complaint with prejudice); *see also Berman v. Morgan Keegan & Co.*, 455 F. App'x 92, 97 (2d Cir. 2012) (summary order) (stating that "a district court does not abuse its discretion to deny a plaintiff's motion to alter or amend a judgment" where "the court expressly invited plaintiffs to amend the Complaint, but plaintiffs declined the court's invitation"); *Berman v. Morgan Keegan & Co.*, 455 F. App'x 92, 97 (2d Cir. 2012) ("a district court does not abuse its discretion to deny a plaintiffs' motion to alter or amend a judgment" where "plaintiffs declined the court's invitation" to

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[6] Notwithstanding Plaintiffs' multiple declinations of the opportunity to amend their complaint and their failure specifically to appeal the "with prejudice" dismissal of their complaint, Plaintiffs do not contend that the additional facts they now propose to allege were not available when they declined the opportunity to amend before the briefing, oral argument, and this Court's decision.

amend). The Court respectfully declines to grant Plaintiffs' request for *vacatur* of the judgment following Plaintiffs' documented series of deliberate choices not to cure the deficiencies identified in their pleading by Defendant and this Court. As the Supreme Court long ago noted in *Ackermann v. United States*, 340 U.S. 193, 198 (1950), "[t]here must be an end to litigation someday, and free, calculated, deliberate choices are not to be relieved from."

CONCLUSION

For the foregoing reasons, Plaintiffs' motion for vacatur pursuant to Rule 60(b)(6) is DENIED.

SO ORDERED.

Dated: April 8, 2022
Brooklyn, New York

/s/
Kiyo A. Matsumoto
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 20-575

[Filed July 29, 2021]

MICHAL HONICKMAN, INDIVIDUALLY AND FOR THE ESTATE OF HOWARD GOLDSTEIN, EUGENE GOLDSTEIN, LORRAINE GOLDSTEIN, RICHARD GOLDSTEIN, BARBARA GOLDSTEIN INGARDIA, MICHAEL GOLDSTEIN, CHANA FREEDMAN, DAVID GOLDSTEIN, MOSES STRAUSS, PHILIP STRAUSS, BLUMA STRAUSS, AHRON STRAUSS, ROISIE ENGELMAN, JOSEPH STRAUSS, TZVI WEISS, LEIB WEISS, INDIVIDUALLY AND FOR THE ESTATE OF MALKA WEISS, YITZCHAK WEISS, YERUCHAIM WEISS, ESTHER DEUTSCH, MATANYA NATHANSEN, INDIVIDUALLY AND FOR THE ESTATE OF TEHILLA NATHANSEN, CHANA NATHANSEN, INDIVIDUALLY AND FOR THE ESTATE OF TEHILLA NATHANSEN, YEHUDIT NATHANSEN, S.N., A MINOR, HEZEKIAL TOPOROWITCH, PEARL B. TOPOROWITCH, YEHUDA TOPOROWITCH, DAVID TOPOROWITCH, SHAINA CHAVA NADEL, BLUMY ROM, RIVKA POLLACK, RACHEL POTOLSKI, OVADIA TOPOROWITCH, TEHILLA GREINIMAN,	)

YISRAEL TOPOROWITCH, YITZCHAK TOPOROWITCH, HARRY LEONARD BEER, INDIVIDUALLY AND AS THE EXECUTOR OF THE ESTATE OF ALAN BEER AND ANNA BEER, PHYLLIS MAISEL, ESTELLE CAROLL, SARRI ANNE SINGER, JUDITH SINGER, ERIC M. SINGER, ROBERT SINGER, JULIE AVERBACH, INDIVIDUALLY AND FOR THE ESTATE OF STEVEN AVERBACH, TAMIR AVERBACH, DEVIR AVERBACH, SEAN AVERBACH, ADAM AVERBACH, MAIDA AVERBACH, INDIVIDUALLY AND FOR THE ESTATE OF DAVID AVERBACH, MICHAEL AVERBACH, EILEEN SAPADIN, DANIEL ROZENSTEIN, JULIA ROZENSTEIN SCHON, ALEXANDER ROZENSTEIN, ESTHER ROZENSTEIN, JACOB STEINMETZ, INDIVIDUALLY AND FOR THE ESTATE OF AMICHAI STEINMETZ, DEBORAH STEINMETZ, INDIVIDUALLY AND FOR THE ESTATE OF AMICHAI STEINMETZ, NAVA STEINMETZ, ORIT MAYERSON, NETANEL STEINMETZ, ANN COULTER, FOR THE ESTATE OF ROBERT L. COULTER, SR., DIANNE COULTER MILLER, INDIVIDUALLY AND FOR THE ESTATE OF JANIS RUTH COULTER, ROBERT L. COULTER, JR., INDIVIDUALLY AND FOR THE ESTATE OF JANIS RUTH COULTER, LARRY CARTER, INDIVIDUALLY AND AS THE ADMINISTRATOR OF THE ESTATE OF DIANE LESLIE CARTER, SHAUN CHOFFEL, RICHARD BLUTSTEIN, INDIVIDUALLY AND FOR THE ESTATE OF BENJAMIN BLUTSTEIN,

KATHERINE BAKER, INDIVIDUALLY AND FOR THE ESTATE OF BENJAMIN BLUSTEIN, REBEKAH BLUTSTEIN, NEVENKA GRITZ, INDIVIDUALLY AND FOR THE ESTATE OF DAVID GRITZ AND NORMAN GRITZ, JACQUELINE CHAMBERS, INDIVIDUALLY AND AS THE ADMINISTRATOR OF THE ESTATE OF ESTHER BABLAR, LEVANA COHEN, INDIVIDUALLY AS THE ADMINISTRATOR OF THE ESTATE OF ESTHER BABLAR, ELI COHEN, SARAH ELYAKIM, JOSEPH COHEN, GRETA GELLER, AS THE ADMINISTRATOR OF THE ESTATE OF HANNAH ROGEN, ILANA DORFMAN, AS THE ADMINISTRATOR OF THE ESTATE OF HANNAH ROGEN, REPHAEL KITSIS, AS THE ADMINISTRATOR OF THE ESTATE OF HANNAH ROGEN, TOVA GUTTMAN, AS THE ADMINISTRATOR OF THE ESTATE OF HANNAH ROGEN, TEMINA SPETNER, JASON KIRSCHENBAUM, ISABELLE KIRSCHENBAUM, INDIVIDUALLY AND FOR THE ESTATE OF MARTIN KIRSCHENBAUM, JOSHUA KIRSCHENBAUM, SHOSHANA BURGETT, DAVID KIRSCHENBAUM, DANIELLE TEITELBAUM, NETANEL MILLER, CHAYA MILLER, AHARON MILLER, SHANI MILLER, ADIYA MILLER, ALTEA STEINHERZ, JONATHAN STEINHERZ, TEMIMA STEINHERZ, JOSEPH GINZBERG, PETER STEINHERZ, LAUREL STEINHERZ, GILA ALUF, YITZHAK ZAHAVY, JULIE ZAHAVY, TZVEE ZAHAVY, BERNICE ZAHAVY,

Plaintiffs-Appellants,

v.

BLOM BANK SAL,
Defendant-Appellee.[†]

August Term 2020

(Argued: December 10, 2020 |
Decided: July 29, 2021)

Before:

POOLER, WESLEY, CARNEY, *Circuit Judges*.

Plaintiffs-Appellants sued BLOM Bank SAL ("BLOM Bank") for aiding and abetting Hamas, designated as a foreign terrorist organization by the United States, in carrying out attacks in which Plaintiffs-Appellants and their relatives were injured or killed. They allege BLOM Bank aided and abetted Hamas's attacks in violation of the Anti-Terrorism Act ("ATA"), 18 U.S.C. § 2333, as amended by the Justice Against Sponsors of Terrorism Act ("JASTA"), by providing financial services to customers affiliated with Hamas. The district court granted BLOM Bank's motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) ("Rule 12(b)(6)"), concluding that Plaintiffs-Appellants did not plausibly allege BLOM Bank aided and abetted Hamas's attacks. Plaintiffs-Appellants argue that the

[†] The Clerk of the Court is directed to amend the official caption as set forth above.

district court misapplied the standard for JASTA aiding-and-abetting liability, and that their complaint suffices to survive a Rule 12(b)(6) dismissal. Although we agree that the court did not apply the proper standard, Plaintiffs-Appellants' complaint nonetheless fails to state a claim. Accordingly, we **AFFIRM** the judgment of the district court.

MICHAEL J. RADINE (Gary M. Osen, Ari Ungar, Aaron A. Schlanger, Dina Gielchinsky, *on the brief*), Osen LLC, Hackensack, NJ, *for Plaintiffs-Appellants*.

LINDA C. GOLDSTEIN (Michael H. McGinley, Ryan M. Moore, Selby P. Brown, Dechert LLP, Philadelphia, PA, *on the brief*), Dechert LLP, New York, NY, *for Defendant-Appellee*.

WESLEY, *Circuit Judge*:

Plaintiffs-Appellants and their family members (collectively, "Plaintiffs")[1] were injured or killed in attacks carried out by Hamas, which the United States has designated as a foreign terrorist organization. They sued BLOM Bank SAL ("BLOM Bank") for aiding and abetting Hamas's attacks by providing financial services to customers affiliated with Hamas, in violation of the Anti-Terrorism Act ("ATA"), 18 U.S.C.

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[1] As alleged, Plaintiffs brought this action on behalf of themselves and as representatives of the estates of their family members who died in the attacks.

§ 2333, as amended by the Justice Against Sponsors of Terrorism Act ("JASTA"), *id.* § 2333(d)(2). The United States District Court for the Eastern District of New York (Matsumoto, *J.*) granted BLOM Bank's motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), concluding that Plaintiffs failed to plausibly allege BLOM Bank aided and abetted Hamas's attacks in violation of JASTA. Plaintiffs argue on appeal that the district court erred in dismissing their complaint because it applied the wrong standard for JASTA aiding-and-abetting liability. Although we agree that the court did not apply the proper standard, we affirm its judgment because Plaintiffs' complaint fails to state a claim under the correct standard.

BACKGROUND

The United States government has designated Hamas[2] as a foreign terrorist organization ("FTO") since 1997.[3] Between December 1, 2001 and August 19, 2003, Hamas carried out a series of attacks, including shootings and bombings, in Israel and the Palestinian

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[2] "'Hamas' is an acronym for the Arabic phrase 'Harakat al-Muqawama al-Islamiya,' sometimes translated as the 'Islamic Resistance Movement.' . . . In accordance with common usage, we refer to it here as 'Hamas.'" *Linde v. Arab Bank, PLC*, 706 F.3d 92, 97 n.6 (2d Cir. 2013) (internal citation omitted).

[3] The U.S. Secretary of State "is authorized to designate an organization as a foreign terrorist organization" if it "engages in terrorist activity" or "retains the capability and intent to engage in terrorist activity" and "the terrorist activity . . . threatens the security of United States nationals or the national security of the United States." 8 U.S.C. § 1189(a)(1).

territories in which Plaintiffs were injured or killed. BLOM Bank is a Lebanese bank that operates internationally. Plaintiffs sued BLOM Bank for damages under the ATA for allegedly aiding and abetting Hamas's attacks by providing financial services to three customers affiliated with Hamas: the Sanabil Association for Relief and Development ("Sanabil"), Subul al-Khair, and the Union of Good (collectively, the "Three Customers").

I. Plaintiffs' Complaint

As alleged, Hamas operates a "civilian infrastructure" called the "*da'wa*," which translates in Arabic to "the call to the believers to shelter beneath the faith" and provides "social welfare activities." J.A. 141, 141 n.6. One of the founders of Hamas explained in an interview in 1998 that "[s]ocial work is carried out in support of [Hamas's aim to liberate Palestine from Israeli occupation], and it is considered to be part of the [Hamas] movement's strategy." *Id.* at 141. In the early 1990s, Hamas pursued a "three-pronged strategy" to strengthen its influence: (1) improving its military capacity, (2) "intensify[ing] its efforts to systematically gain control" of institutions important to the Palestinian public, and (3) "accelerat[ing] the development of its world-wide fundraising network." *Id.* at 143.

A. The Three Customers: Sanabil, Subul al-Khair, and Union of Good

Hamas established Sanabil in 1994 "with the unofficial goal of competing with H[i]zbollah's [(a designated terrorist organization's)] social welfare

infrastructure." *Id.* at 152. Sanabil was Hamas's "*da'wa* headquarters in Lebanon until late 2003." *Id.* at 154. It distributed funds it received from Hamas's fundraising network to Palestinian refugee camps in Lebanon "to build [Hamas's] support within that community." *Id.* at 154. Its board members were well-known leaders of Hamas in Lebanon. In August 2003, a Lebanese newspaper reported that pursuant to an order by a Hamas political leader, Sanabil had opened offices in all of the Palestinian refugee camps in Lebanon. "Sanabil regularly distributed small sums in cash from its accounts to hundreds (if not thousands) of individual dependents in the Palestinian refugee camps under the categories of 'Orphan Sponsorships,' 'Student Sponsorships,' 'Needy Sponsorships' and 'Family Sponsorships.'" *Id.* at 159. As a Lebanese publication reported in 2004, Sanabil "sponsored 1,200 Palestinian families and spent around $800,000 on orphans and $55,000 on needy patients." *Id.*

On August 22, 2003, the U.S. Department of the Treasury designated Sanabil as a Specially Designated Global Terrorist ("SDGT"),[4] finding that it is "part of a web of charities raising funds on behalf of [Hamas] and using humanitarian[] purposes as a cover for acts that

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[4] The "SDGT designation is distinct from the State Department's FTO designation." *Weiss v. Nat'l Westminster Bank PLC*, 768 F.3d 202, 209 n.7 (2d Cir. 2014). The Treasury Department is authorized to designate groups and individuals who "pose a significant risk of committing[] acts of terrorism" or "are determined . . . to assist in, sponsor, or provide financial, material, or technological support for . . . acts of terrorism" as SDGTs under Executive Order 13224. *See* Exec. Order No. 13224, 3 C.F.R. § 13224 (2001).

support [Hamas]." *Id.* at 147. The Treasury Department explained in a press release:

> [Hamas] recruits permanent members from the religious and the poor by extending charity to them from organizations such as Sanabil. . . . After starting by providing basic necessities the charity eventually began asking poor families within the camps to fill out application forms, particularly those who had worked with the Islamic Movement . . . and [Hamas].

Id. at 155. Sanabil was also "identified . . . as an unindicted co-conspirator" in the U.S. government's 2004 prosecution of the Holy Land Foundation ("HLF"), a charity designated as an SDGT, which transferred money to Sanabil. *Id.* at 159.

Subul al-Khair was founded in 1998 in Beirut, Lebanon, and "functioned much like Sanabil, but was more focused on [Hamas] supporters in the Beirut area." *Id.* at 161. It "regularly distributed small sums in cash from its accounts to individual[s] under the categories of 'Orphan Sponsorships' and 'Student Sponsorships.'" *Id.* Subul al-Khair was not designated as an SDGT; however, it was listed as an unindicted co-conspirator in HLF's criminal trial.

Union of Good was founded in 2000 "as the umbrella organization for [Hamas's] global fundraising activity." *Id.* at 162. It "originally began as a limited 101-day fundraising drive for emergency aid at the outset of

what was later called the Second Intifada."[5] *Id.* Because of its success, Union of Good became a permanent institution and "raise[d] tens of millions of dollars for [Hamas]." *Id.* The U.S. Department of the Treasury designated Union of Good as an SDGT in November 2008.[6] *Id.* at 163. The Treasury Department's press release noted:

> Union of Good acts as a broker for [Hamas] by facilitating financial transfers between a web of charitable organizations—including several organizations previously designated . . . for providing support to [Hamas]—and [Hamas]-controlled organizations in the West Bank and Gaza. The primary purpose of this activity is to strengthen [Hamas's] political and military position in the West Bank and Gaza, including by: (i) diverting charitable donations to support [Hamas] members and the families of terrorist operatives; and (ii) dispensing social welfare and other charitable services on behalf of [Hamas]. . . . In addition to providing cover for [Hamas] financial transfers, some of the funds

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[5] The "Second Intifada" was "a period [in the early 2000s] of intensified violence by Palestinian terrorist groups in the aftermath of failed peace negotiations between Israel and the Palestinian Authority." *See Linde v. Arab Bank, PLC*, 882 F.3d 314, 319 (2d Cir. 2018).

[6] Israel also "designated" Union of Good in 2002 "in an order of the Minister of Defense of the State of Israel, based on its being 'part of the Hamas organization or supporting it and strengthening its infrastructure.'" J.A. 162. The complaint does not specify what designation Israel gave Union of Good.

> transferred by the Union of Good have compensated [Hamas] terrorists by providing payments to the families of suicide bombers."

Id. at 163. The chairman of Union of Good, Sheikh Yusuf al-Qaradawi, gave interviews in 2002 and later years commending Hamas's suicide attacks and martyrdom operations.

B. BLOM Bank's Financial Services to the Three Customers

Each of the Three Customers held accounts at BLOM Bank. Sanabil held its account at BLOM Bank "[d]uring the relevant period (1999-2003)." *Id.* at 156. Three organizations in Hamas's fundraising network transferred money to Sanabil's account at BLOM Bank. Specifically:

> (1) HLF, a charity based in the U.S., "transferred over $2 million . . . through BLOM [Bank's] correspondent bank accounts in New York to Sanabil's bank account(s) at BLOM [Bank] in Lebanon." *Id.* The last payment from HLF to Sanabil was on September 7, 2001. The U.S. Department of the Treasury designated HLF as an SDGT on December 4, 2001; the complaint does not allege BLOM Bank processed any payments from HLF to Sanabil after HLF's designation.
>
> (2) KindHearts, a charity based in the U.S. which "succeeded to HLF's fundraising for [Hamas] after HLF was designated," "sent an additional $250,000 to Sanabil's accounts between July 2002 and July 2003." *Id*. at 158.

> BLOM Bank processed these transfers to Sanabil's account. The complaint does not allege KindHearts was designated as an SDGT.
>
> (3) The Al-Aqsa Foundation ("Al-Aqsa"), a charity based in Germany, "transferred at least $50,000 into Sanabil's accounts at . . . BLOM [Bank] between April – May 2003." *Id*. at 158–59 (emphasis omitted). Al-Aqsa was designated as an SDGT on May 29, 2003; BLOM Bank processed one transfer from Al-Aqsa to Sanabil the day after Al-Aqsa's designation. The complaint does not allege BLOM Bank processed any later transfers from Al-Aqsa to Sanabil.

In an invoice attached as an exhibit to the complaint, the stated purpose of the payment from Al-Aqsa to Sanabil's account at BLOM Bank was "help concerning orphan children." *Id*. at 177–78.

Subul al-Khair also maintained an account at BLOM Bank and BLOM Bank "deposited multiple transfers sent by HLF to Subul al-Khair." *Id*. at 161. "HLF sent Subul al-Khair over $500,000 between 1999 and 2001," but the complaint does not specify whether BLOM Bank processed that entire amount or some portion of it. *Id.* The complaint does not provide dates or further information regarding the financial services BLOM Bank provided for Subul al-Khair.

Union of Good held an account with BLOM Bank. The complaint does not identify any dates for this account; nor does it note the transactions, if any, BLOM Bank processed for Union of Good.

II. Applicable Law

The ATA authorizes U.S. nationals "injured in his or her person, property, or business by reason of an act of international terrorism" to sue for treble damages as well as attorney's fees and costs.[7] 18 U.S.C. § 2333(a). "[I]nternational terrorism" encompasses "activities that—(A) involve violent acts or acts dangerous to human life that . . . would be a criminal violation if committed within the jurisdiction of the United States or of any State," "(B) appear to be intended—to (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." *Id.* § 2331(1)(A)–(C).

The ATA did not expressly permit relief against parties who aided the primary perpetrator of the act of international terrorism. JASTA, Pub. L. No. 114-222, 130 Stat. 852 (2016), amended the ATA to create a cause of action against "any person who aids and abets, by knowingly providing substantial assistance, or who conspires with the person who committed . . . an act of international terrorism."[8] 18 U.S.C. § 2333(d)(2). JASTA applies to "any civil action . . . pending on, or commenced on or after, the date of [its] enactment . . .

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[7] Before the enactment of JASTA in 2016, the ATA did not specify which parties could be sued. *See* 18 U.S.C. § 2333(a).

[8] The term "person" includes corporations. *See* 18 U.S.C. § 2333(d)(1) (incorporating the definition of "person" in 1 U.S.C. § 1).

and . . . arising out of an injury to a person, property, or business on or after September 11, 2001." 130 Stat. at 855. Congress was clear that its purpose in enacting JASTA was to:

> [P]rovide civil litigants with the *broadest possible basis*, consistent with the Constitution of the United States, to seek relief against persons, entities and foreign countries, wherever acting and wherever they may be found, that have provided material support, *directly or indirectly*, to foreign organizations or persons that engage in terrorist activities against the United States.

Id. at 853 (emphases added). Congress also specifically endorsed the reasoning of the D.C. Circuit in *Halberstam v. Welch*, 705 F.2d 472 (D.C. Cir. 1983) in conducting the aiding-and-abetting analysis. *Id.* at 852. "*Halberstam* . . . provides the proper legal framework for how [aiding and abetting] liability [under the ATA] should function." *Id.* (emphasis added).

Under *Halberstam*, there are three elements for aiding-and-abetting liability: "(1) the party whom the defendant aids must perform a wrongful act that causes an injury" (the "aiding party who causes injury" element); "(2) the defendant must be *generally aware* of his role as part of an overall illegal or tortious activity at the time that he provides the assistance" (the "general awareness" element); "(3) the defendant must *knowingly and substantially assist* the principal violation" (the "substantial assistance" element). 705 F.2d at 477 (emphases added).

III. The District Court's Decision

The district court granted BLOM Bank's motion to dismiss for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6) ("Rule 12(b)(6)"), concluding that Plaintiffs' complaint did not plausibly allege that BLOM Bank aided and abetted Hamas's attacks. *See Honickman for Est. of Goldstein v. BLOM Bank SAL*, 432 F. Supp. 3d 253, 271 (E.D.N.Y. 2020). In the court's view, Plaintiffs failed to allege the latter two elements of JASTA aiding-and-abetting liability: "(1) that [BLOM Bank] was generally aware of its role as part of an overall illegal or tortious activity at the time that it provided the assistance, and (2) that [BLOM Bank] knowingly and substantially assisted the principal violation." *Id.* at 263 (alterations in original, internal quotation marks, and citation omitted).

As to general awareness, the court first found "Plaintiffs' complaint does not plausibly allege that BLOM [Bank] was generally aware of any connection between the Three Customers and Hamas." *Id.* at 265. It then concluded that "even if Plaintiffs' allegations plausibly alleged that BLOM [Bank] knew the Three Customers were related to Hamas, '[e]vidence that [BLOM Bank] knowingly provided banking services to [Hamas], without more, is insufficient to satisfy JASTA's scienter requirement.' . . . Plaintiffs have not plausibly alleged that BLOM [Bank] knew that by providing financial services to the Three Customers, it was playing a role in Hamas's violent activities." *Id.* at 265–66 (second alteration in original) (citation omitted). Regarding substantial assistance, the court analyzed the six factors identified in *Halberstam*,

discussed below, and ruled that "[t]he complaint fails to establish that BLOM[] [Bank's] provision of financial services to the Three Customers amounted to providing 'substantial assistance' to Hamas." *Id.* at 268.

Plaintiffs argue on appeal that: (1) the district court applied the wrong legal standard in evaluating the sufficiency of their complaint; and (2) their complaint plausibly alleges that BLOM Bank was generally aware of its role in Hamas's illegal activities and that BLOM Bank knowingly provided substantial assistance to Hamas.

DISCUSSION

"We review *de novo* a district court's dismissal of a complaint under Rule 12(b)(6), accepting all of the complaint's [non-conclusory] factual allegations as true and drawing all reasonable inferences in the plaintiffs' favor." *Giunta v. Dingman*, 893 F.3d 73, 78–79 (2d Cir. 2018). It is well established that:

> [t]o survive a [Rule 12(b)(6)] motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. 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. The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are merely consistent with a defendant's

> liability, it stops short of the line between possibility and plausibility of entitlement to relief.

Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (internal quotation marks and citations omitted).

I. The Standard for JASTA Aiding-and-Abetting Liability

A. The "Aiding Party Who Causes Injury" Element

The first element, that "the party whom the defendant aids must perform a wrongful act that causes an injury," *Halberstam*, 705 F.2d at 477, is straightforward. It is satisfied when the party whom the defendant directly or indirectly aided performed the injury-causing act. BLOM Bank argues that Plaintiffs' complaint falls short because "the only parties whom BLOM [Bank] allegedly 'aided' are the [Three] Customers," and "JASTA limits aiding-and-abetting liability to those circumstances in which a defendant actually 'aided and abetted . . . the person who committed' the relevant 'act of international terrorism.'" Appellee's Br. at 63 (emphasis omitted) (quoting 18 U.S.C. § 2333(d)(2)). We recently rejected the same contention in *Kaplan v. Lebanese Canadian Bank, SAL*, 999 F.3d 842 (2d Cir. 2021), holding that "[t]he language and purpose of JASTA are meant to allow an aiding-and-abetting claim where the defendant's acts aided and abetted the principal" who committed the wrongful act "even where [the defendant's] relevant substantial assistance was given to an intermediary" of the principal. *Id.* at 856.

B. The "General Awareness" Element

The second ("general awareness") and third ("substantial assistance") elements form the crux of most JASTA aiding-and-abetting cases. The "general awareness" element requires the defendant to be "generally aware" of its role in "an *overall illegal or tortious activity* at the time that [it] provides the assistance." *See Halberstam*, 705 F.2d at 477 (emphasis added). The defendant need not be generally aware of its role in the specific act that caused the plaintiff's injury; instead, it must be generally aware of its role in an overall illegal activity from which the act that caused the plaintiff's injury was *foreseeable*. *See id.* at 477, 488.

Halberstam establishes this foreseeability principle. There, the D.C. Circuit held that Linda Hamilton was civilly liable for aiding and abetting the murder of Michael Halberstam during a burglary of his home by Bernard Welch, Hamilton's partner, even though she was unaware of Welch's plan to burglarize or kill Halberstam. *See id.* at 474, 488. Over the five years Hamilton and Welch lived together, Welch acquired significant wealth by selling stolen goods that he obtained through burglaries. *Id.* at 475. Although Hamilton was never present during Welch's burglaries and claimed she was unaware that they were occurring, she performed the "secretarial work" for Welch's illegal enterprise, such as typing transmittal letters for sales of the stolen goods and keeping inventories of the stolen goods that were sold. *Id.*

The court concluded that the "sudden influx of great wealth" Hamilton and Welch experienced, "the filtering of all transactions through Hamilton *except* payouts for [the] goods" sold, and "Hamilton's collusive and unsubstantiated treatment of income and deductions on her tax forms . . . combine[d] to make the district court's inference that [Hamilton] knew [Welch] was engaged in illegal activities acceptable, to say the least." *Id.* at 486. Indeed, given the facts, "it [would] def[y] credulity that Hamilton did not know that something illegal was afoot." *Id.*

Hamilton's "general awareness of her role in [Welch's] continuing criminal enterprise," *id.* at 488, sufficed to establish her liability for aiding and abetting Halberstam's murder because the murder was a *foreseeable consequence* of Welch's illegal activity. As the court explained:

> [U]nder an aiding-abetting theory, [the murder] was a *natural and foreseeable consequence* of the activity Hamilton helped Welch to undertake. It was *not necessary that Hamilton knew specifically that Welch was committing burglaries*. Rather, when she assisted him, *it was enough that she knew he was involved in some type of personal property crime at night*—whether as a fence, burglar, or armed robber made no difference—*because violence and killing is a foreseeable risk in any of these enterprises*.

Id. (emphases added).[9] Foreseeability is thus central to the *Halberstam* framework, and as a result, to JASTA aiding-and-abetting liability.[10]

The district court, however, rejected the foreseeability principle, holding that "it is not enough for Plaintiffs to plausibl[y] allege that BLOM [Bank] was generally aware of [its] role in terrorist activities, from which terrorist attacks were a natural and foreseeable consequence." *Honickman*, 432 F. Supp. 3d at 264 (first and third alterations in original) (emphasis, internal quotation marks, and citation omitted). The court's conclusion contravenes both *Halberstam* and *Linde v. Arab Bank, PLC*, 882 F.3d 314 (2d Cir. 2018), one of the first cases in which we

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[9] The *Halberstam* court extracted the foreseeability principle from *American Family Mutual Insurance Co. v. Grim*, 201 Kan. 340 (1968), in which a group of teenagers broke into a church at night looking for soft drinks in the kitchen. *See Halberstam*, 705 F.2d at 482. Two of them failed to extinguish the torches they used to light their way to the attic, causing the church to catch on fire. *See id.* The defendant, one of the teenagers, did not know about the torches, did not enter the attic, and was not near the church when it caught on fire. *See id.* Still, he was found liable for damages caused by the fire because as part of the attempt to reach the church attic, "the need for adequate lighting could reasonably be anticipated," making the use of torches and subsequent fire foreseeable. *See id.* at 483 (citation omitted).

[10] *Halberstam* did not specifically attach foreseeability to the general awareness or substantial assistance elements; it used foreseeability broadly for establishing the extent of liability under an aiding-and-abetting theory. *See* 705 F.2d at 482–83. As a result, it is more important that courts do not skip foreseeability altogether rather than apply it at a precise stage of the JASTA aiding-and-abetting analysis.

interpreted aiding-and-abetting liability under JASTA.[11]

Linde was brought *before* JASTA was enacted. The plaintiffs alleged that a defendant bank was liable as a principal under the ATA for committing an act of terrorism by "knowingly providing" material support to an FTO in the form of "financial services." *Linde*, 882 F.3d at 318. At trial, the district court instructed the jury that the "provision of material support to [an FTO in violation of a distinct statute, 18 U.S.C. § 2339B] . . . necessarily proved the bank's commission of an act of international terrorism" under the ATA. *Id.* at 325. We held that this instruction was erroneous because providing material support to an FTO does not qualify under the definition of "an act of international terrorism." *Id.* at 326. However, the plaintiffs argued on appeal that the availability of aiding-and-abetting liability under JASTA, enacted between the time of trial and the appeal,[12] made the error in the jury instruction harmless. *Id.* at 328. *Linde* rejected their argument, determining that:

> aiding and abetting an act of international terrorism *requires more than the provision of material support to a designated terrorist*

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[11] We acknowledge that the district court's decision came before our opinion in *Kaplan* clarified the import of our earlier JASTA aiding-and-abetting precedents which may have generated some ambiguity as to the proper standard.

[12] We agreed that the plaintiffs were entitled to invoke JASTA on appeal because the act applies retroactively. *See Linde*, 882 F.3d at 328.

> *organization*. Aiding and abetting requires the secondary actor to be 'aware' that, by assisting the principal, it is itself assuming a 'role' in terrorist activities. *Halberstam*[], 705 F.2d at 477. Such awareness may not require proof of the specific intent demanded for criminal aiding and abetting culpability . . . . Nor does awareness require proof that Arab Bank [(the defendant)] knew of the specific attacks at issue when it provided financial services for Hamas. What the jury did have to find was that, in providing such services, the bank was 'generally aware' that it was thereby playing a 'role' in Hamas's violent or life-endangering activities. *Halberstam*[], 705 F.2d at 477. *This is different from the mens rea required to establish material support in violation of 18 U.S.C. § 2339B, which requires only knowledge of the organization's connection to terrorism, not intent to further its terrorist activities or awareness that one is playing a role in those activities. See Holder v. Humanitarian Law Project*, 561 U.S. 1, 16–17 . . . (2010).

Linde, 882 F.3d at 329–30 (some emphases omitted and others added) (footnotes and internal citation omitted).

Here, the district court misread this passage from *Linde* to conclude that applying the *Halberstam* foreseeability standard to the "general awareness" element would contravene *Linde* by "replac[ing] the scienter for aiding-and-abetting liability with the lower scienter required for [criminal] material support." *Honickman*, 432 F. Supp. 3d at 264. The court erred in

equating the foreseeability standard and the scienter required for criminal material support; the two are distinct. In doing so, the court also implicitly perceived *Linde* as requiring *more* than the *Halberstam* standard for general awareness, which we rejected in *Kaplan*.

"[N]othing in *Linde* repudiates the *Halberstam* standard that 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." *Kaplan*, 999 F.3d at 860. Nor could it, of course, given Congress's unambiguous assignment of *Halberstam* as the appropriate legal framework for JASTA aiding-and-abetting liability. *Linde's* holding that aiding-and-abetting "requires more than the provision of material support to a terrorist organization," 882 F.3d at 329, means only that allegations that a defendant "knowingly provid[ed] material support to an FTO, *without more*, does not *as a matter of law* satisfy the general awareness element." *Kaplan*, 999 F.3d at 860 (emphasis added). That language "does not establish that [a defendant's provision of] material support to an FTO is *never* sufficient for [JASTA] aiding-and-abetting liability." *Id.* (emphasis added). Instead, "[w]hether a defendant's material support to an FTO suffices to establish general awareness is a fact-intensive inquiry" depending on allegations that a defendant "was generally aware . . . that it was playing a role in unlawful activities from which [terrorist] attacks were *foreseeable*." *Id.* at 860–61 (emphasis added).

On the other hand, we reject Plaintiffs' attempt to equate the *Halberstam* foreseeability standard with the

"fungibility" theory in *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010). *Linde* recognized that general awareness "is different from the *mens rea* required to establish material support in violation of 18 U.S.C. § 2339B, which requires only knowledge of the organization's connection to terrorism . . . . *See Holder*[,] 561 U.S. [at] 16–17." *Linde*, 882 F.3d at 329–30. In *Holder*, a criminal material support case under § 2339B, the plaintiffs[13] knowingly provided material support to FTOs but claimed they were "seek[ing] to facilitate only the lawful, nonviolent purposes of those groups." 561 U.S. at 7–8. The Supreme Court determined that for the purpose of § 2339B, it did not matter that the "[m]aterial support [was] meant to promote peaceable, lawful conduct" because "[m]oney is fungible" and "there is reason to believe that foreign terrorist organizations do not maintain legitimate financial firewalls between those funds raised for civil, nonviolent activities, and those ultimately used to support violent, terrorist operations." *Id.* at 30–31 (internal quotation marks and citations omitted).

Plaintiffs urge us to adopt *Holder*'s "fungibility" rationale in assessing the sufficiency of their complaint. They contend that *Linde* merely recognized that the *mens rea* for aiding and abetting is "different" from criminal material support, not that it is "higher." Appellants' Br. at 44. However, *Linde* determined that

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[13] The plaintiffs were U.S. organizations and citizens who challenged the constitutionality of the criminal material support statute (18 U.S.C. § 2339B) and sought an injunction to prohibit its enforcement. *See Holder*, 561 U.S. at 10–11.

the facts in *Holder*—adequate for criminal material support—fall short for the general awareness element of JASTA aiding and abetting. 882 F.3d at 329–30. Indeed, *Linde* could not have been clearer*:* aiding and abetting "requires more than the provision of material support to a designated terrorist organization," 882 F.3d at 329. Plaintiffs' fungibility argument would displace the aiding-and-abetting standard with the standard for criminal material support by making "knowingly providing material support to an FTO, without more" sufficient "as a matter of law" for the general awareness element. *See Kaplan*, 999 F.3d at 860. Not only would this erase *Linde*'s distinction between general awareness and criminal material support, but it would also evade *Halberstam*'s foreseeability standard.[14]

Accordingly, the relevant inquiry for the general awareness element is: did Plaintiffs "plausibly allege[] the [Three] Customers were so closely intertwined with [Hamas's] violent terrorist activities that one can

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[14] Plaintiffs rely on *Boim v. Holy Land Found. for Relief & Dev.*, 549 F.3d 685 (7th Cir. 2008), a pre-JASTA case in which the Seventh Circuit held that the causation element of primary liability under the ATA, 18 U.S.C. § 2333(a), is satisfied when the defendant knowingly donated money to a terrorist organization because "[a]nyone who knowingly contributes to the nonviolent wing of an organization that he knows to engage in terrorism is knowingly contributing to the organization's terrorist activities." 549 F.3d at 698. *Boim* is inapposite. It was decided before Congress assigned *Halberstam* as the appropriate framework for JASTA aiding-and-abetting liability claims and therefore lacks the requisite analysis. Moreover, any persuasive value it might have is insufficient to overcome the binding effects of *Linde* and *Kaplan* on us.

reasonably infer that [BLOM Bank] was generally aware while it was providing banking services to those entities that it was playing a role in unlawful activities from which [Hamas's] attacks were foreseeable[?]"[15] *Kaplan*, 999 F.3d at 860–61.

C. The "Substantial Assistance" Element

The last element for aiding-and-abetting liability requires that the defendant "knowingly and substantially assist[ed] the principal violation." *Halberstam*, 705 F.2d at 477. As the analysis in *Halberstam* reveals, the "principal violation" must be foreseeable from the illegal activity that the defendant assisted; knowing and substantial assistance to the actual injury-causing act—here, Hamas's attacks—is unnecessary. *See id.* at 488.

The district court appeared to impose a higher standard on the "*knowing*" prong of "knowingly and substantially" assisted than required, concluding that "Plaintiffs' complaint fails plausibly to allege that any assistance BLOM [Bank] provided—even if substantial—would have been knowing." *Honickman*, 432 F. Supp. 3d at 268. The "knowledge component" is satisfied "[i]f the defendant knowingly—and not innocently or inadvertently—gave assistance."[16]

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[15] Contrary to BLOM Bank's argument, the Three Customers do not themselves need to be "engaged in . . . violent or terrorist acts." *See* Appellee's Br. at 32–34.

[16] BLOM Bank argues in its post-argument letter brief that under *Kaplan*, "where a complaint alleges that the assistance was indirect, it must allege (among other things) that the defendant had 'actual knowledge' of the intermediary's connection to the

Kaplan, 999 F.3d at 864. For instance, *Halberstam* held that "the district court . . . justifiably inferred that Hamilton assisted Welch with knowledge that he had engaged in illegal acquisition of goods." 705 F.2d at 488. It did not require Hamilton to "know" anything more about Welch's unlawful activities than what she knew for the general awareness element.

How much aid qualifies as substantial assistance? *Halberstam* identified six factors:

> (1) the nature of the act encouraged, (2) the amount of assistance given by defendant, (3) defendant's presence or absence at the time of the tort, (4) defendant's relation to the principal, (5) defendant's state of mind, and (6) the period of defendant's assistance.

Linde, 882 F.3d at 329 (citing *Halberstam*, 705 F.2d at 484–85). No factor is dispositive; the weight accorded to each is determined on a case-by-case basis. *See Halberstam*, 705 F.2d at 483; *see also Kaplan*, 999 F.3d at 856.

The district court misunderstood the first factor, "the nature of the act encouraged," to be a question of whether Plaintiffs plausibly alleged "that BLOM [Bank] knowingly encouraged Hamas'[s] violent activities, such as those which caused Plaintiffs'

FTO." Appellees' Letter Br. at 14. *Kaplan* did not so hold; instead, it asserted "the actual knowledge component of the *Halberstam* standard requires that the defendant 'know[ ]' that it is providing 'assistance,' . . . whether directly to the FTO or indirectly through an intermediary." 999 F.3d at 863–64 (alteration in original) (citation omitted).

injuries." *Honickman*, 432 F. Supp. 3d at 268. However, the "nature of the act involved dictates what aid might matter."[17] *See Halberstam*, 705 F.2d at 484 (emphasis omitted). As a result, the factor requires assessing whether the alleged aid (facilitating the transfer of millions of dollars to the Three Customers) would be important to the nature of the injury-causing act (Hamas's terrorist attacks).

For the second factor, the "amount of assistance," the district court held "Plaintiffs make no non-conclusory assertions that any of the funds processed by the Three Customers actually went to Hamas, or that BLOM [Bank], at the time it provided banking services to the Three Customers, was aware or intended that Hamas would receive the corresponding funds." *Honickman*, 432 F. Supp. 3d at 268. However, Plaintiffs did not need to allege the funds "actually went to Hamas." Factual allegations that permit a reasonable inference that the defendant recognized the money it transferred to its customers would be received by the FTO would suffice. *See Kaplan*, 999 F.3d at 866. In other words, if a plaintiff plausibly alleges the general awareness element, she does not need to also allege the FTO actually received the funds. Instead, the inquiry should focus on the amount and type of aid the defendant provided. *See Halberstam*, 705 F.2d at 488.

Lastly, the fourth factor, the "defendant's relation to the principal," is useful for determining the

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[17] For example, verbal encouragement of "physical acts of violence" may be important to a principal's commission of battery. *See Halberstam*, 705 F.2d at 484.

defendant's capacity to assist. *See id.* at 484. The district court erroneously construed this Court's finding in *Siegel v. HSBC N. Am. Holdings, Inc.*, 933 F.3d 217 (2d Cir. 2019), that "the plaintiffs d[id] not plead any non-conclusory allegations that [the defendant-bank] had any relationship with [the FTO]" to mean that Plaintiffs must plead a direct relationship between BLOM Bank and Hamas. *Id.* at 225; *see Honickman*, 432 F. Supp. 3d at 269. In *Siegel*, the defendant-bank's "relation to the principal" was several steps removed: it allegedly had a commercial relationship with *another bank* that was linked to *various terrorist organizations* including the FTO that caused the plaintiffs' injuries. *See* 933 F.3d at 220–21. Although the relationship between the defendant and the FTO should not be so attenuated as in *Siegel*, a direct relationship between the defendant and the FTO is not required to satisfy this factor.

II. The Sufficiency of Plaintiffs' Complaint

For Plaintiffs' JASTA aiding-and-abetting claim to be viable, the complaint must plausibly allege all three elements of the *Halberstam* standard for aiding-and-abetting liability.

The first element, that the party whom the defendant aided performed the injury-causing act, merits little attention. Plaintiffs plausibly allege that the party whom BLOM Bank aided (indirectly), Hamas, committed attacks causing Plaintiffs' injuries. For the second element, general awareness, the complaint must plausibly allege: (1) as a threshold requirement, that BLOM Bank was aware of the Three Customers' connections with Hamas before the

relevant attacks; and (2) the Three Customers were so closely intertwined with Hamas's violent terrorist activities that one can reasonably infer BLOM Bank was generally aware of its role in unlawful activities from which the attacks were foreseeable while it was providing financial services to the Three Customers. *See Kaplan*, 999 F.3d at 860. For the final element of substantial assistance, the complaint must contain sufficient factual allegations relating to the six factors identified above.

We conclude that Plaintiffs' aiding-and-abetting claim fails because the allegations do not support an inference that BLOM Bank was aware of the Three Customers' ties with Hamas prior to the relevant attacks, thereby undermining the second element of general awareness. In assessing this element, the district court found that the complaint's references to media articles and publications on the Three Customers' connection to Hamas were insufficient because "Plaintiffs fail[ed] plausibly to allege that BLOM [Bank] . . . actually knew or should have known of any of the cited sources." *Honickman*, 432 F. Supp. 3d at 265. However, as we explained in *Kaplan*, Plaintiffs did not need to allege that BLOM Bank knew or should have known of the public sources at the pleading stage. *See* 999 F.3d at 865. Such a requirement at this juncture would be too exacting.

Nevertheless, the public sources cited in the complaint do not plausibly support an inference that BLOM Bank had the requisite general awareness at the time that it provided banking services to the Three Customers. *See Halberstam*, 705 F.2d at 477 ("[T]he

defendant must be generally aware of [its] role . . . *at the time that [it] provides the assistance*.") (emphasis added). One of the news articles on Sanabil referenced in the complaint was dated August 27, 2004, more than a year after the last relevant attack, and reported only that Sanabil sponsored Palestinian families and spent money on orphans. The Lebanese press's coverage of Sanabil's center in Sidon closing due to "its links to [Hamas]" is undated. J.A. 159. The complaint lacks any allegations that at the time of the interviews in which al-Qaradawi—who chaired Union of Good—praised martyrdom and criticized the United States' designation of Hamas, it was public knowledge that al-Qaradawi chaired Union of Good.[18] Indeed, the Treasury Department's press release, announcing the designation of Sanabil and similar organizations as SDGTs only after the final attack at issue, describes these organizations as using "humanitarian[] . . . purposes *as a cover* for acts that support [Hamas]," which the Treasury Department unveiled only after developing "credible evidence" in an investigation. J.A. 147 (emphasis added). That organizations like the Three Customers maintained a "cover" in public undermines the plausibility of Plaintiffs' theory that

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[18] Plaintiffs argue that "the publicly available evidence [in the complaint] was largely available before or during the relevant period or discussed facts that were previously knowable." Appellants' Br. at 39, n.11. However, "publicly available" evidence is not the same as public sources such as media articles. The latter, depending on their substance, plausibly suggest a defendant's knowledge which can be confirmed during discovery, whereas the former requires the implausible inference that the defendant was aware of those facts even before the news media.

BLOM Bank understood these organizations' true nature and activities from the public record at the time.

The limited public sources Plaintiffs cite pale in comparison to the detailed, numerous sources that sufficed in *Kaplan*. *See* 999 F.3d at 864. The *Kaplan* complaint alleged Hizbollah made public statements identifying the defendant-bank's customers as "integral parts of Hizbollah" prior to the relevant attacks which were "specific as to the status of the speaker," "the circumstances in which the statements were made," and "the other specific media in which they were made," including Hizbollah's own websites. *Id.*

Plaintiffs' remaining allegations also fail to suggest BLOM Bank was aware of the connections between the Three Customers and Hamas.[19] The complaint alleges certain leaders of Hamas were board members of the Three Customers but does not aver that this was public knowledge during the relevant period. Sanabil and Subul al-Khair were identified as unindicted co-conspirators in HLF's criminal trial and/or prosecution, but HLF was not indicted until 2004, after the relevant period. Sanabil and Union of Good were not designated

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[19] Plaintiffs referenced in their briefs and at oral argument a 2001 FBI report identifying Sanabil as a "known front[]" for Hamas. *See* Appellants' Br. at 32; Appellants' Letter Br. at 11. Their complaint contained no reference to this FBI report. Similarly, Plaintiffs characterized BLOM Bank's transactions for the Three Customers as "untraceable" for the first time in their post-argument letter brief. *See, e.g.*, Appellants' Letter Br. at 8. "[A] Rule 12(b)(6) motion tests the adequacy of the complaint . . . not the briefs." *Hack v. President & Fellows of Yale Coll.*, 237 F.3d 81, 91 (2d Cir. 2000), *abrogated on other grounds by Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002), (internal citation omitted).

as SDGTs until after the last relevant attack, and BLOM Bank did not transfer any funds from non-customer charities after they were designated as SDGTs except for one transfer from Al-Aqsa to Sanabil the day after Al-Aqsa's designation. We agree with the district court that this single post-designation transfer, standing alone, is insufficient to suggest BLOM Bank was aware of Sanabil's links to Hamas.[20]

Because we conclude Plaintiffs failed to plausibly allege BLOM Bank was aware the Three Customers were related to Hamas, we do not need to consider whether they plausibly alleged the Three Customers were closely intertwined with Hamas's violent terrorist activities.[21] Nor do we need to address whether the

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[20] The allegation that Israel designated Al-Aqsa as a terrorist organization in 1998, without specifying whether and where this was made public, is also unavailing. Moreover, even if the complaint plausibly alleged it was public knowledge that Al-Aqsa, HLF, and KindHearts were linked with Hamas, those entities were not BLOM Bank's customers. Without any further allegations, a defendant-bank's transfers of funds from *non-customers* associated with an FTO to the defendant's customers does not compel an inference that the defendant knew of its *customers'* connections to that FTO.

[21] However, we note that there is a meaningful difference between the alleged functions of the Three Customers and those of the customers in *Kaplan*. In *Kaplan*, the plaintiffs' theory was that the defendant-bank's customers provided subsidies to the families of Hizbollah suicide bombers—*i.e.*, veterans' funds for terrorists—and the defendant-bank "permitted the laundering of money . . . in violation of regulatory restrictions meant to hinder the ability of FTOs to carry out terrorist attacks." 999 F.3d at 858, 865. By contrast, Plaintiffs' theory rests on the *da'wa*, Hamas's social welfare program, and the Three Customers were alleged only to have supported orphans in Palestinian refugee camps.

complaint satisfies the substantial assistance element. The complaint's failure to support a reasonable inference that BLOM Bank knew of the Three Customers' links to Hamas sounds the death knell of Plaintiffs' JASTA aiding-and-abetting liability action.

CONCLUSION

We **AFFIRM** the judgment of the district court.

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

19-cv-00008(KAM)(SMG)

[Filed January 14, 2020]

MICHAL HONICKMAN for the ESTATE OF HOWARD GOLDSTEIN, et al.,
Plaintiffs,

v.

BLOM BANK SAL,
Defendant.

MEMORANDUM & ORDER

Plaintiffs are victims, or the relatives of victims, of attacks conducted by Hamas, a designated Foreign Terrorist Organization ("FTO"),[1] between December 2001 and August 2003 in Israel and the Palestinian Territories ("Plaintiffs"). Plaintiffs commenced this

[1] A Foreign Terrorist Organization is an organization designated by the U.S. Secretary of State pursuant to 8 U.S.C. § 1189(a) because it "engages in terrorist activity" or "retains the capability and intent to engage in terrorist activity or terrorism." 31 C.F.R. § 597.309; 8 U.S.C. § 1189(a). Hamas was designated an FTO on October 8, 1997. *Designation of Foreign Terrorist Organizations*, 62 Fed. Reg. 52,650 (Oct. 8, 1997).

action pursuant to the Anti-Terrorism Act ("ATA"), as amended by the Justice Against Sponsors of Terrorism Act ("JASTA"), 18 U.S.C. § 2333(d), to recover damages from BLOM Bank SAL ("BLOM," or "Defendant") for allegedly aiding and abetting Hamas' commission of terrorist acts by providing financial services to Hamas through three of BLOM's customers who are alleged to be Hamas affiliates: the Sanabil Association for Relief and Development ("Sanabil"), Subul Al-Khair, and the Union of Good (collectively, BLOM's "Three Customers"). These organizations are alleged to have engaged in non-violent conduct in furtherance of Hamas' goals.

Defendant moves to dismiss the complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, arguing that Plaintiffs have not plausibly alleged the elements of JASTA aiding-and-abetting liability as set forth in *Halberstam v. Welch*, 705 F.2d 472 (D.C. Cir. 1983), and adopted by the Second Circuit in *Linde v. Arab Bank, PLC*, 882 F.3d 314 (2d Cir. 2018). Specifically, Defendant argues that the complaint does not plausibly allege that BLOM (1) aided the persons or entity who carried out the attacks which caused their injuries, (2) was generally aware that, by providing financial services to the Three Customers, it was playing a role in Hamas' violent or life-endangering activities (the "general awareness" element), or (3) knowingly provided substantial assistance to Hamas (the "substantial assistance" element).

For the reasons set forth below, the Court finds that Plaintiffs' complaint does not plausibly allege the general awareness or the substantial assistance

elements necessary to plead JASTA aiding-and-abetting liability. Defendant's motion to dismiss Plaintiffs' complaint pursuant to Rule 12(b)(6) for failure to state a claim is GRANTED.

Background[2]

Plaintiffs are individuals, or the relatives of individuals, who suffered injuries in one of twelve violent attacks carried out by Hamas in Israel and the Palestinian Territories between December 1, 2001 and August 19, 2003. (*See* ECF No. 1, Complaint ("Compl."), ¶ 1.) Plaintiffs sue Defendant, a major bank headquartered in Beirut, Lebanon (*id.* ¶ 504-05), for allegedly aiding-and-abetting Hamas' commission of terrorist attacks, like those which caused Plaintiffs' injuries.

Much of Plaintiffs' complaint is dedicated to describing Hamas' use of a civil infrastructure, which Plaintiffs call its "*da'wa*," to compete with other organizations for support in the areas in which it operates. (*See* Compl. ¶ 511, n.6.) It appears that the complaint's focus on Hamas' *da'wa* is predicated on Plaintiffs' theory of liability, that BLOM is liable because it provided financial services to its Three Customers, all of which are alleged to be "*da'wa* institutions in Lebanon tasked by Hamas to extend [its] reach into [local] Palestinian refugee camps" through the provision of charitable services and

[2] The facts in this section are derived from Plaintiffs' complaint and are accepted as true for purposes of this Memorandum and Order.

financial support to the local populations. (*Id.* ¶¶ 526, 610-11, 626.)

I. The Three Customers

Because BLOM's alleged liability turns principally on its *knowing* conduct, and because its alleged provision of support to Hamas is indirect, the court reviews in detail Plaintiffs' allegations regarding the relationship between each of the three BLOM account holders with Hamas, Hamas' activities, and BLOM's alleged knowledge or awareness of the relevant facts.

A. Sanabil

"Hamas established [the] Sanabil Association for Relief and Development" in 1994. (*Id.* ¶ 574.) Sanabil served as "Hamas' *da'wa* headquarters in Lebanon until late 2003." (*Id.* ¶ 588.) "Between 1998 and 2001, [Sanabil] received millions of dollars in support from Hamas' fundraising network" and "channeled those funds to the Palestinian refugee camps in Lebanon to build Hamas' support within that community." (*Id.*)

Plaintiffs' allege that Sanabil is, in sum and substance, an alter ego of Hamas and, thus, BLOM is liable. As noted above, because knowledge is an integral component of a claim for civil aiding-and-abetting liability, the court considers which, if any, of Plaintiffs' allegations support the position that BLOM knew of Sanabil's alleged relationship with Hamas or Sanabil's alleged involvement in Hamas' violent acts at the time BLOM provided financial services to Sanabil.

1. Sanabil's Connection to Hamas

Plaintiffs do not allege that BLOM knew or was aware of a relationship between Sanabil and Hamas. Instead, Plaintiffs cite to several public statements and developments, or facts alleged to be within the public knowledge, from which Plaintiffs assert it could be plausibly inferred that BLOM was aware of a nexus between Sanabil and Hamas. These include:

- The August 22, 2003 designation of Sanabil as a Specially Designated Global Terrorist ("SDGT")[3] by the U.S. Treasury Department and accompanying press release, which stated that Sanabil "receives large quantities of funds raised by major Hamas-affiliated charities . . . and, in turn, provides funding to Hamas" (*id.* ¶ 590);
- An August 23, 2003 report published by a Lebanese newspaper, *Al-Saffir*, stating that in August 2001, following an order given by an unspecified Hamas leader, Sanabil opened offices in Palestinian refugee camps in Lebanon to "increase its activity" (*id.* ¶ 589);

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[3] The U.S. Treasury Department's Office of Foreign Assets Control's "SDGT designation is distinct from the State Department's FTO designation." *Weiss v. Nat'l Westminster Bank PLC*, 768 F.3d 202, 209 (2d Cir. 2014). The Specially Designated Global Terrorist designation covers, *inter alia*, foreign persons who "pose a significant risk of committing, acts of terrorism that threaten the security of U.S. nationals or the national security, foreign policy, or economy of the United States." 31 C.F.R. §§ 594.310, 594.201(a).

- Undated "reports" that in 2003, following a ruling from the Lebanese judiciary, the Sanabil organization in the town of Sidon closed, which closure was attributed to Sanabil's links to Hamas (*id.* ¶ 609), with the only example of such a report being an August 27, 2004 article published by a Lebanese newspaper, *The Daily Star* (*id.* ¶ 610).

Plaintiffs do not allege that BLOM knew of the aforementioned facts. Moreover, none of the public statements cited in the complaint was published until after the last attack.

Plaintiffs also allege that BLOM's knowledge of a nexus between Sanabil and Hamas could be inferred from the fact that Sanabil received payments from organizations later revealed to be affiliated with Hamas. The following provides a brief overview of the payments Sanabil received from organizations with alleged affiliations with Hamas:

- Holy Land Foundation ("HLF"). HLF was a U.S.-based charitable organization founded in October 1993. (*Id.* ¶ 555, 560.) BLOM processed roughly $1 million in payments in 2000 and $350,000 in 2001 from HLF to Sanabil through BLOM's New York correspondent accounts. (*Id.* ¶¶ 596-99.) The date of the last payment was September 7, 2001. (*Id.* ¶ 599.) The U.S. Treasury Department designated HLF as an SDGT on December 4, 2001. (*Id.* ¶ 567.) BLOM is not alleged to have processed any transactions

from HLF to Sanabil following HLF's designation as an SDGT.

- KindHearts. Kindhearts was a U.S.-based charitable organization founded in January 2002. (*Id.* ¶ 615.) Sanabil received $250,000 from KindHearts between July 2002 and July 2003 (*id.* ¶ 603). The U.S. Treasury Department first took action against Kindhearts on February 19, 2006, when it froze the organization's accounts (*id.* ¶ 619), well after the last of the attacks at issue in this action on August 19, 2003 (*id.* ¶ 76).[4]

- Al-Aqsa Foundation ("Al-Aqsa"). Al-Aqsa was a Germany-based charitable organization founded in July 1991. (*Id.* ¶ 549.) Sanabil received at least $50,000 from Al-Aqsa between April and May 2003. (*Id.* ¶ 604.) The U.S. Treasury Department designated Al-Aqsa an SDGT on May 29, 2003 due to its connection with Hamas. (*Id.* ¶ 553-54.) BLOM processed one transfer from Al-Aqsa to Sanabil the day after its designation, but Plaintiffs do not allege any later transfers from Al-Aqsa to Sanabil's account at BLOM. (*Id.* ¶ 605.)[5]

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[4] Defendant notes that "the United States is not alleged to have ever designated KindHearts — a U.S. organization — as an SDGT." (ECF No. 36-1, Mem. of Law in Supp. of Def.'s Mot. to Dismiss ("Def. Br.") at 10.)

[5] Plaintiffs allege that Israel outlawed Al-Aqsa in May 1997 and declared it a terrorist organization in January 1998 (*id.* ¶ 550), and

With one exception, BLOM did not process any payments from the aforementioned organizations to Sanabil after the U.S. Treasury Department took action against them, including by designating two of them as SDGTs.

2. Sanabil's Connection to Hamas' Violent Acts

Plaintiffs do not allege that BLOM knew of a nexus between Sanabil and Hamas' violent acts, or that Sanabil itself played a role in Hamas' violent activities. Rather, the allegations in the complaint suggest that Sanabil engaged in charitable acts rather than any acts related to terrorism:

- An August 27, 2004 article published by *The Daily Star* stated that Sanabil "had sponsored 1,200 Palestinian families and spent around $800,000 on orphans and $55,000 on needy patients" (*id.* ¶ 610);
- "Records seized from HLF show that Sanabil regularly distributed small sums in cash from its accounts to hundreds (if not

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that Germany closed Al-Aqsa's offices in July 2002 due to its support of violence as a means to achieve ends (but not specifically due to its links to Hamas) (*id.* ¶ 551-52). Plaintiffs do not allege that BLOM maintains an office in Germany or Israel or knew or would otherwise have any reason to know of these developments. (*Accord* Def. Br. at 7 (stating that BLOM "is actively present in 12 countries, serving the niche market of Lebanese and Arab expatriates and business people in Europe, but has no operations in the United States or in Israel, where all of the alleged [a]ttacks occurred").)

thousands) of individual dependents in the Palestinian refugee camps under the categories of 'Orphan Sponsorships,' 'Student Sponsorships,' 'Needy Sponsorships' and 'Family Sponsorships'" (*id.* ¶ 611); and

- The only invoice attached to Plaintiffs' complaint which indicates a "purpose" for a payment Sanabil received from the aforementioned organizations states that it was for "help concerning orphan children" (*id.* Ex. D).

The only portion of the complaint connecting Sanabil's funds to Hamas' activities is Plaintiffs' allegation that Sanabil operated on Hamas' behalf "in a manner of an old-style political machine, buying loyalty in periodic stipends of $40-50 per quarter." (*Id.* ¶ 612.) But Sanabil is not alleged to have engaged in any violent acts, either on its own or in conjunction with Hamas.

B. Subul Al-Khair

Plaintiffs allege fewer details regarding Subul Al-Khair. Subul Al-Khair "is a small Hamas institution founded in Beirut, Lebanon in 1998." (*Id.* ¶ 621.) Defendant maintained an account for Subul Al-Khair at its Rawsheh branch in Beirut and "deposited [over $500,000] in transfers sent by HLF to Subul Al-Khair" between 1999 and 2001. (*Id.* ¶¶ 623, 625.) Plaintiffs do not specify the date of the last HLF payment to Subul Al-Khair in 2001, but there is no allegation that it occurred after the December 4, 2001 designation of HLF as an SDGT by the U.S. Treasury Department (*id.* ¶ 567).

1. Subul Al-Khair's Connection to Hamas

Plaintiffs do not allege that BLOM knew of Subul Al-Khair's nexus to Hamas, nor do Plaintiffs cite any public statements regarding Subul Al-Khair's relationship with Hamas. Plaintiffs' only allegation suggesting that BLOM was aware of a nexus between Subul Al-Khair and Hamas is that "Subul al-Khair was identified as an unindicted co-conspirator in HLF's criminal trial" (*id.* ¶ 622), but this trial did not begin until sometime in 2004 (*id.* ¶ 567), well after the transactions BLOM processed on behalf of Subul Al-Khair.

2. Subul Al-Khair's Connection to Hamas' Violent Acts

Plaintiffs' similarly do not allege that BLOM was aware of a connection between Subul Al-Khair and Hamas' violent activities, or that any such nexus existed. The complaint states that "Subul al-Khair functioned much like Sanabil, but was more focused on Hamas supporters in the Beirut area." (*Id.* ¶ 624.) Subul Al-Khair "regularly distributed small sums in cash from its accounts to individual[s] under the categories of 'Orphan Sponsorships' and 'Student Sponsorships.'" (*Id.* ¶ 626.) And, like Sanabil, Subul Al-Khair "paid small amounts individually in a manner of an old-style political machine, buying loyalty in periodic stipends of $30-40 per quarter." (*Id.* ¶ 627.) Subul Al-Khair, however, is not alleged to have engaged in violent acts on its own or in conjunction with Hamas.

C. Union of Good

The Union of Good was established in 2000 "as the umbrella organization for Hamas' global fundraising activity." (*Id.* ¶ 629.) The Union of Good maintained an account with BLOM in Beirut. (*Id.* ¶ 640.) Plaintiffs do not specify which, if any, transactions BLOM processed on behalf of the Union of Good. Nor do Plaintiffs provide dates for when BLOM maintained the stated account on behalf of the Union of Good.

1. Union of Good's Connection to Hamas

Plaintiffs do not allege that BLOM knew of a nexus between the Union of Good and Hamas, but again rely on public statements to support this inference, including:

- That Sheikh Yusuf al-Qaradawi – the individual who chaired the 101-day fundraising drive for emergency aid at the outset of the Second Intifada, which ultimately developed into the Union of Good – made statements approving of terrorism, only one of which (made on April 14, 2002) also referenced Hamas, but not in a manner linking it to the Union of Good (*id.* ¶¶ 631-32, 637);
- That "Hamas often relies on al-Qaradawi's legal rulings in matters of current import and often turns to him to obtain legal rulings" (*id.* ¶ 638);

- That "Hamas leaders have . . . served openly in the Union of Good's executive leadership" (*id.* ¶ 639); and
- The November 12, 2008 designation of the Union of Good as an SDGT by the U.S. Treasury Department for its connections to Hamas (*id.* ¶ 635).

Plaintiffs do not allege that BLOM was aware of these facts.[6]

2. Union of Good's Connection to Hamas' Violent Acts

Plaintiffs do not allege that BLOM knew of a nexus between the Union of Good and Hamas' violent acts, nor do they allege that Union of Good engaged in any violent activities alone or in conjunction with Hamas.

II. The Instant Action

On January 1, 2019, Plaintiffs filed a complaint against BLOM for allegedly aiding and abetting Hamas' attacks under the civil liability provisions of the ATA, as amended by JASTA, 18 U.S.C. § 2333(d). As explained above, Plaintiffs do not argue that BLOM is liable because it directly provided Hamas with funding or weaponry. Rather, Plaintiffs argue that BLOM's Three Customers are, in sum and substance,

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[6] Plaintiffs cite Israel's February 25, 2002 designation of the Union of Good due to its reported affiliation with Hamas. (*Id.* ¶ 634.) Yet, Plaintiffs do not allege that BLOM maintains any branch in Israel or would have any other reason to know of the Israeli designation of the Union of Good.

alter egos of Hamas and, therefore, that BLOM's provision of financial services to *its Three Customers* amounted to aiding and abetting Hamas' terrorist acts in violation of 18 U.S.C. § 2333(d).

On May 3, 2019, BLOM sought leave to move to dismiss the complaint for failure to state a claim upon which relief may be granted. (ECF No. 20, Letter Motion for Pre-Motion Conference.) At a pre-motion conference addressing BLOM's proposed motion, the Court offered Plaintiffs an opportunity to amend their complaint to add additional allegations in response to BLOM's arguments. (ECF Dkt. Entry May 15, 2019.) Plaintiffs declined the Court's offer and represented to the Court that they would not be seeking to amend their Complaint. (*Id.*) After the parties submitted their memoranda, on November 25, 2019, the Court heard oral argument on Defendant's motion to dismiss. (ECF Dkt. Entry, Nov. 25, 2019. For the reasons set forth below, BLOM's motion to dismiss is granted.

Standard of Review

To survive a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, a complaint must contain sufficient factual matter to "state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The plaintiff must show "more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Rather, the plaintiff must plead facts that allow the court to "to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* The factual allegations pled

must "be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555.

In reviewing a complaint under Rule 12(b)(6), the Court considers whether the plaintiff's well-pleaded factual allegations, assumed to be true, and drawing all reasonable inferences in the non-movant's favor, "plausibly give rise to an entitlement to relief." *Iqbal*, 556 U.S. at 679. But the Court is "'not bound to accept as true a legal conclusion couched as a factual allegation.'" *Twombly*, 550 U.S. at 555 (quoting *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). Thus, a pleading that offers "labels and conclusions" or "a formulaic recitation of the elements of a cause of action" is not sufficient. *Iqbal*, 556 U.S. at 678. "Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual development.'" *Id.* (quoting *Twombly*, 550 U.S. at 557 (alteration in original)).

Discussion

Plaintiffs' claims against BLOM arise under the ATA. "The ATA establishes a cause of action for U.S. nationals who are the victims of international terrorism." *Kaplan v. Lebanese Canadian Bank*, 405 F. Supp. 3d 525, 531 (S.D.N.Y. 2019). "For purposes of and according to the ATA, 'international terrorism' includes 'activities that (A) involve violent acts or acts dangerous to human life that . . . would be a criminal violation if committed within the jurisdiction of the United States or of any State' and that '(B) appear to be intended (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation; or (iii) to affect the conduct of a

government by mass destruction, assassination, or kidnapping.'" *Siegel v. HSBC N. Am. Holdings, Inc.*, 933 F.3d 217, 222 (2d Cir. 2019) (quoting 18 U.S.C. § 2331(1)(A)–(B)).

"In its original form, the ATA afforded relief only against the perpetrators of the terrorist attacks, not against secondary, supporting actors." *Id.* (citing *Linde v. Arab Bank, PLC*, 882 F.3d 314, 319 (2d Cir. 2018)). In 2016, however, Congress amended the ATA through JASTA to provide for secondary liability against "any person who aids and abets, by knowingly providing substantial assistance [to], or who conspires with the person who committed[,] such an act of international terrorism." 18 U.S.C § 2333(d)(2). This aiding-and-abetting provision forms the basis of BLOM's alleged liability.

Congress instructed courts to assess aiding-and-abetting liability under JASTA pursuant to *Halberstam v. Welch*, 705 F.2d 472 (D.C. Cir. 1983). *Linde*, 882 F.3d at 329. *Halberstam* prescribes that civil aiding and abetting is comprised of three elements: (1) "the party whom the defendant aids must perform a wrongful act that causes an injury," (2) "the defendant must be generally aware of his role as part of an overall illegal or tortious activity at the time that he provides the assistance," and (3) "the defendant must knowingly and substantially assist the principal violation." *Id.* (citing *Halberstam*, 705 F.2d at 487).

I. The *Halberstam* Framework

BLOM argues that Plaintiffs have not satisfied *Halberstam* because they do not plausibly allege

(1) that BLOM aided the persons or entity who carried out the attacks, (2) that BLOM was "generally aware" that by providing financial services to the Three Customers, it was thereby playing a role in Hamas' violent or life-endangering activities, or (3) that BLOM knowingly provided substantial assistance to Hamas.[7] The Court agrees that Plaintiffs have failed plausibly to allege the general awareness and substantial assistance prongs.

A. "Aiding Party Who Causes Injury" Element

The first element Plaintiffs must plausibly allege is that "the party . . . whom [BLOM] aid[ed] . . . perform[ed] a wrongful act that cause[d] an injury." *Id.* BLOM argues that JASTA applies only to the provision of direct support to terrorist organizations. *See, e.g.*, *Crosby v. Twitter, Inc.*, 921 F.3d 617, 626-27 (6th Cir. 2019). In BLOM's view, because the Three Customers are distinct from Hamas, Plaintiffs cannot satisfy this element of *Halberstam* without establishing that BLOM either provided funding directly to Hamas or to the individuals who carried out the attacks.

The Second Circuit recently considered whether aiding-and-abetting liability under JASTA is limited to the direct provision of support to a terrorist organization. *Siegel*, 933 F.3d at 223. The panel stated

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[7] Defendant alternatively moves to dismiss certain individual plaintiffs' claims. (Def. Br. at 25-27.) Because the Court grants Defendant's motion to dismiss Plaintiffs' complaint in its entirety, it need not address whether these plaintiffs' claims should also be dismissed on other grounds.

in a footnote that "[JASTA] does not, by its terms, limit aiding-and-abetting liability to those who provide direct support to terrorist organizations, and Congress wrote that its purpose in enacting the statute was 'to provide civil litigants with the broadest possible basis' to seek relief against those who 'have provided material support, *directly or indirectly*, to foreign organizations or persons that engage in terrorist activities against the United States.'" *Id.* at 223 n.5 (emphasis in original). This *dicta* suggests a healthy skepticism on the Second Circuit's part as to whether JASTA liability is as limited as BLOM asserts.

The Court need not answer this question, however, because Plaintiffs' complaint fails on other grounds. As in *Siegel*, Plaintiffs have "failed to allege adequately two of the three *Halberstam* elements of civil aiding-and-abetting: (1) that [BLOM] was 'generally aware' of its role as part of an 'overall illegal or tortious activity at the time that [it] provide[d] the assistance,' and (2) that [BLOM] 'knowingly and substantially assist[ed] the principal violation." *Id.* at 224 (quoting *Halberstam*, 705 F.2d at 477). The Court thus leaves to a later date the resolution of the question regarding the necessity of direct support.

B. "General Awareness" Element

The second element Plaintiffs must plausibly allege is that "[BLOM] was 'aware that, by assisting the principal, it [was] itself assuming a role in terrorist activities.'" *Id.* (citing *Linde*, 882 F.3d at 329). Plaintiffs must allege that BLOM must have known it was assuming a role in Hamas' terrorist activities "at the

time that [it] provide[d] the assistance." *Linde*, 883 F.3d at 329 (citing *Halberstam*, 705 F.2d at 487).

The Second Circuit has clarified that the mere provision of routine banking services to an FTO does not render a bank liable for civil aiding and abetting. *Linde*, 882 F.3d at 329. "Evidence that [a bank] knowingly provided banking services to [an FTO], without more, is insufficient to satisfy JASTA's scienter requirement." *Weiss v. National Westminster Bank PLC*, 381 F. Supp. 3d 223, 239 (E.D.N.Y. 2019). This is because "aiding and abetting an *act* of international terrorism requires more than the provision of material support to a designated terrorist *organization*." *Linde*, 882 F.3d at 329 (emphasis in original).

Rather, the bank must be "'aware' that, by assisting the principal, it is itself assuming a 'role' in terrorist activities." *Id.* (citing *Halberstam*, 705 F.2d at 477). "Such awareness may not require proof of . . . specific intent" or knowledge "of the specific attacks at issue." *Id.* But "it does require that 'the bank was generally aware that[, by providing financial services to a client,] it was thereby playing a 'role' in [the] violent or life-endangering activities.'" *Siegel*, 933 F.3d at 224 (quoting *Linde*, 882 F.3d at 329 (alterations in original)). This is a higher *mens rea* than that sufficient to establish material support in violation of the ATA, "which requires only knowledge of the organization's connection to terrorism, not intent to further its terrorist activities or awareness that one is playing a role in those activities." *Linde*, 882 F.3d at 329-30.

In light of this precedent, it is not enough for Plaintiffs to "plausibl[y] allege that BLOM was

'generally aware of [its] role' in 'terrorist activities,' from which terrorist *attacks* were a natural and foreseeable consequence." (ECF No. 37, Pls.' Opp. to Mot. to Dismiss ("Pls. Opp."), at 11.) Adopting this reading would, in effect, replace the scienter for aiding-and-abetting liability with the lower scienter required for material support, in direct contravention of *Linde*'s holding that the bank must be aware that it is assuming a role in the organization's "violent or life-endangering activities." *See Siegel*, 933 F.3d at 224 (citing *Linde*, 882 F.3d at 329). Attempts to conflate these scienter requirements have been rejected by courts within this circuit. *See, e.g.*, *Weiss*, 381 F. Supp. 3d at 238-39 ("Plaintiffs again rely on evidence that tends to support a finding that Defendant had the requisite scienter required for providing material support to a terrorist organization under § 2339B to support their claim that Defendant had the requisite scienter for aiding and abetting liability under JASTA. *See*, Opp. at 24-25 (discussing Defendant's 'massive, illicit funds transfers' for Interpal and the Union of Good). However, as discussed in detail above, Plaintiffs allege no facts establishing a jury question as to whether Defendant generally was aware that it played a role in any of Hamas's, or even Interpal's, or the Union of Good's violent or life-endangering activities. Evidence that Defendant knowingly provided banking services to a terrorist organization, without more, is insufficient to satisfy JASTA's scienter requirement."); *Strauss v. Credit Lyonnais, S.A.*, 379 F. Supp. 3d 148, 164 (E.D.N.Y. 2019) (same); *Siegel*, 2018 WL 3611967, at *4 (finding claim insufficient where defendant bank

allegedly aided and abetted another bank, which was known to support terrorism).[8]

With this guidance in mind, the Court considers whether Plaintiffs have plausibly alleged that, by providing financial services to the Three Customers, BLOM generally assumed a role in Hamas' violent or life-endangering activities. The answer is no. As in *Siegel*, Plaintiffs have "failed to [plausibly] allege [1] that [BLOM] was aware that by providing banking services to [the Three Customers], it was supporting [Hamas], [2] much less assuming a role in [Hamas'] violent activities." *See Siegel*, 933 F.3d at 224.

First, Plaintiffs' complaint does not plausibly allege that BLOM was generally aware of any connection between the Three Customers and Hamas. In their complaint, Plaintiffs do not allege any acts or statements by BLOM or BLOM's employees which suggest any awareness on its part of a connection between any of the Three Customers and Hamas. Instead, Plaintiffs cite to press articles, government

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[8] Plaintiffs quote a passage from *Halberstam* stating that the district court's conclusions that Hamilton "*knew about* and acted to support *Welch's illicit enterprise*," if not the murder, establish that she "had a general awareness of her *role in a continuing criminal enterprise*." (Pls. Br. at 10 (quoting *Halberstam*, 705 F.2d at 488 (emphasis added)).) Plaintiffs argue that this standard simply requires Plaintiffs to show that BLOM knew that it was playing a role, in a sense, in Hamas' terrorist *enterprise*, by providing funds to organizations which supported Hamas. Again, the standard Plaintiffs seek to impose is simply that of knowingly providing material support to a terrorist organization, which differs from the scienter required to support aiding-and-abetting liability for supporting terrorist acts.

actions, and allegedly "public knowledge" discussing a connection between the Three Customers and Hamas as evidence from which a jury could infer that BLOM *might* have known of such a nexus. Yet, Plaintiffs fail plausibly to allege that BLOM or any of its employees actually knew or should have known of any of the cited sources, or that BLOM would otherwise have a reason to review or consider those sources in the course of its operations. This is particularly notable given that all of the sources cited regarding the Three Customers and their connection to Hamas are either undated or were dated after the last of the attacks. The sole exception – a single payment processed *from* Al-Aqsa, a non-customer, to Sanabil one day after Al-Aqsa's designation by the U.S. Treasury Department – is not sufficient to render Plaintiffs' allegation plausible, particularly given that Sanabil itself was not designated until several months later. Furthermore, during the period in question, none of the Three Customers was itself designated during the time BLOM processed transactions on its behalf, *see, e.g.*, *O'Sullivan v. Deutsche Bank AG et al.*, No. 17-cv-8709, 2019 WL 1409446 (S.D.N.Y. Mar. 28, 2019) (finding that designation of entities years after defendants transacted with them "undermin[ed] any inference that [d]efendants had reason to know about [their] connections with FTOs"). Plaintiffs' allegations therefore fail to raise above the speculative level the specter that BLOM was aware of a connection between

the Three Customers and Hamas at the time it provided financial services to the Three Customers.[9]

Second, even if Plaintiffs' allegations plausibly alleged that BLOM knew the Three Customers were related to Hamas, "[e]vidence that [BLOM] knowingly provided banking services to [Hamas], without more, is insufficient to satisfy JASTA's scienter requirement." *Strauss*, 379 F. Supp. 3d at 164; *accord Linde*, 882 F.3d at 329; *Weiss*, 381 F. Supp. at 239. Rather, Plaintiffs must plausibly allege that BLOM intended to further Hamas' *violent or life-endangering activities* or was generally aware that it was playing a role in those activities. *Linde*, 882 F.3d at 329-30; *O'Sullivan*, 2019 WL 1409446, at *10 (noting that to satisfy the second *Halberstam* element in this context, plaintiffs must allege that "in providing financial services, [the bank] w[as] 'generally aware' [it] w[as] paying a 'role' in an FTO's violent or life-endangering activities").

Plaintiffs have not plausibly alleged that BLOM knew that by providing financial services to the Three Customers, it was playing a role in Hamas' violent activities. The complaint does not allege that the Three Customers engaged in any "violent activities." To the

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[9] Plaintiffs also rely substantially on alleged transfers from HLF, KindHearts, and Al-Aqsa to the Three Customers to support the general awareness element. But none of these organizations are alleged to be customers of BLOM, nor was there any evidence, as in *Strauss and Weiss*, that any of these transfers "were used to perpetrate any of the [violent acts]" allegedly carried out by Hamas. Without further factual enhancement, Plaintiffs' citations to these transactions does nothing more than speculate as to whether BLOM might have known of this nexus.

contrary, the complaint sets forth a number of apparently charitable purposes towards which the Three Customers put their funds, including giving money to orphans, students, and the needy. *See, e.g.*, *Weiss*, 381 F. Supp. 3d at 232 (finding it relevant that plaintiffs conceded that recipients of funds actually engaged in charitable activities); *Strauss*, 379 F. Supp. 3d at 157 (same). This is evidenced by an invoice annexed to the complaint, which notes that the transaction was to be used for "help concerning orphan children." (Compl. Ex. D.) Even accepting as true that the Three Customers did so to procure political support for Hamas in the refugee camps, this does not cure the absence of any plausible allegation that BLOM was aware it was assuming a role in Hamas' violent or life-endangering activities. *See, e.g.*, *O'Sullivan*, 2019 WL 1409446, at *10; *Siegel v. HSBC Bank USA, N.A.*, No. 17-cv-6593, 2018 WL 3611967 (S.D.N.Y. July 27, 2018) ("Accepting those statements as true, however, the [complaint] does not demonstrate that defendants knew that the financial services they provided to ARB would in turn be given to AQI and al-Qaeda to carry out terrorist attacks . . . .").

Plaintiffs attempt to analogize their case to those in which courts have allowed aiding-and-abetting claims against banks to proceed. They cite *Miller v. Arab Bank, PLC*, 372 F. Supp. 3d 33 (E.D.N.Y. 2019), in which the court allowed the plaintiffs to proceed with an aiding-and-abetting claim against Arab Bank where the plaintiffs alleged that Arab Bank intentionally "administered a terrorist insurance scheme" for Hamas, quoted public notices directing individuals to proceed to Arab Bank to receive payouts pursuant to

the alleged scheme, and cited causes of death identified on lists that the bank received as part of the alleged scheme. Plaintiffs also cite *Lelchook v. Islamic Republic of Iran*, 393 F. Supp. 3d 261 (E.D.N.Y. 2019), in which the court entered default judgment against an unrepresented defendant where the court found that the allegations in the unanswered complaint plausibly supported the allegation that the defendant bank knowingly and substantially supported Hizbollah's operations.

A more appropriate comparison is Judge Daniels' recent decision in *Kaplan v. Lebanese Canadian Bank, SAL*. In *Kaplan*, plaintiffs sued Lebanese Canadian Bank ("LCB") for aiding and abetting Hizbollah by maintaining accounts for two Hizbollah leaders and three "subordinate entities." 405 F. Supp. 3d at 529. The subordinate entities allegedly functioned as Hizbollah's principal financial institutions or provided direct support to Hizbollah terrorists wounded in action.[10] *Id.* The plaintiffs alleged that Hizbollah "conducted wire transfers through the LCB [a]ccounts 'in order to transfer and receive funds necessary for planning, preparing and carrying out Hizbollah's terrorist activity,' including the rocket attacks that

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[10] "[T]hese 'subordinate entities' include the Shahid (Martyrs) Foundation ('Shahid'), which allegedly provides 'financial and other material support to Hizbollah terrorists wounded in action, and to the families of Hizbollah terrorists killed in action'; Bayt al-Mal, which allegedly functions as Hizbollah's 'main financial body'; and the Yousser Company for Finance and Investment . . . , which, together with Bayt al-Mal, allegedly functions as Hizbollah's 'unofficial treasury.'" *Kaplan*, 405 F. Supp. 3d, at 529.

injured Plaintiffs." *Id.* To satisfy the awareness element, the plaintiffs alleged that:

> [LCB] knew or should have known that providing such banking services would result in Plaintiffs' injuries. [T]hey allege[d] that [LCB] knew that Shahid, Bayt-al-Mal, and Yousser were 'integral constituent parts of Hizbollah,' that the LCB Accounts and funds therein were owned and controlled by Hizbollah, and that the wire transfers were conducted by and at the direction of Hizbollah. Plaintiffs allege that [LCB] had such knowledge because Hizbollah's affiliation with Shahid, Bayt-al-Mal, and Yousser was 'notorious public knowledge,' as evidenced by various news articles, reports, and Hizbollah's own media sources. According to Plaintiffs, if [LCB] did not have such actual knowledge, then [LCB] should have known because it had a duty to perform due diligence on its customers, monitor and report suspicious or illegal banking activities, and not provide banking services to [FTOs].

Id. The plaintiffs further alleged that "[LCB] provided the wire transfer and other banking services to Hizbollah 'as a matter of official LCB policy and practice' in order, among other things, 'to assist and advance Hizbollah's terrorist activities.'" *Id.*

Judge Daniels found the plaintiffs' allegations insufficient to state a claim of aiding-and-abetting liability under the *Halberstam* framework. The plaintiffs "d[id] not offer any non-conclusory allegations that Defendant was aware that, by providing financial

services to the subordinate entities, it was playing a role in violent or life-threatening acts intended to intimate or coerce civilians or affect a government." *Id.* at 535. None of the entities were designated by the United States prior to the rocket attacks at issue as having an affiliation with Hizbollah. *Id.* Moreover, although the plaintiffs argued that the entities' connections to Hizbollah "was openly, publicly and repeatedly acknowledged and publicized by Hizbollah [through its own sources]" and "in various English-language publications," the plaintiffs "nowhere allege[d] . . . that [LCB] read or was aware of such sources." *Id.* The same analysis applies even more strongly here, given the relatively greater strength of the allegations in *Kaplan*.[11]

C. "Substantial Assistance" Element

The third element Plaintiffs must plausibly allege is that BLOM "'knowingly and substantially assist[ed] the principal violation.'" *Id.* at 535-36 (quoting *Halberstam*, 705 F.2d at 477 (alterations in original)). To determine whether Plaintiffs adequately pleaded this element, the Court looks to "(1) the nature of the

[11] The only fact in this action which presents an arguably stronger argument than in *Kaplan* is that BLOM processed a transaction *from* Al-Aqsa, a nonclient, *to* Sanabil, a client, after its designation. But this transaction was not processed for a client, occurred just one day after Al-Aqsa's designation, was received from a Swedish bank through New York, and specified assistance to orphans as its purpose. It is nothing more than speculation that this transaction would trigger some awareness on BLOM's part that there was a nexus between Sanabil and Hamas, let alone Hamas' violent activities.

act encouraged, (2) the amount of assistance given by defendant, (3) defendant's presence or absence at the time of the tort, (4) defendant's relation to the principal, (5) defendant's state of mind, and (6) the period of defendant's assistance." *Linde*, 882 F.3d at 329 (citing *Halberstam*, 705 F.2d at 483–84). The complaint fails to establish that BLOM's provision of financial services to the Three Customers amounted to providing "substantial assistance" to Hamas.

As a threshold matter, *Halberstam*'s substantial assistance element requires that BLOM's assistance be *knowing*. For the same reasons set forth above, Plaintiffs' complaint fails plausibly to allege that any assistance BLOM provided – even if substantial – would have been knowing, as the allegations support nothing more than the speculative possibility that BLOM *might* have known about a nexus between the Three Customers and Hamas (though, as specified above, no allegations whatsoever link the Three Customers to Hamas' violent activities). The Court will address scienter in the context of the substantial assistance element in more detail in discussing the six considerations outlined in *Linde* and *Halberstam*.

Nature of the Act Encouraged. Plaintiffs' harm arises from violent acts conducted by Hamas, but Plaintiffs have not plausibly alleged that BLOM encouraged the attacks which injured Plaintiffs or knowingly provided any funds to Hamas for its violent activities. *See, e.g.*, *Siegel*, 933 F.3d at 225 ("The plaintiffs here have not plausibly alleged that HSBC encouraged the heinous November 9 Attacks or provided any funds to AQI."); *Kaplan*, 405 F. Supp. 3d

at 536 ("Plaintiffs do not advance any factual, non-conclusory allegations that Defendant knowingly and intentionally supported Hizbollah in perpetrating the rocket attacks."). Assuming *arguendo* that BLOM knew anything of the Three Customers' efforts to support Hamas, it would be that they engaged in the purchase of political support, but none of the factual allegations in Plaintiffs' complaint suggest that BLOM knowingly encouraged Hamas' violent activities, such as those which caused Plaintiffs' injuries.

Amount and Kind of Assistance Given by Defendant. Plaintiffs allege that BLOM's provision of financial services to the Three Customers resulted in "millions of dollars" flowing to Hamas which were "integral" to Hamas' terrorist operations. But Plaintiffs make no non-conclusory assertions that any of the funds processed by the Three Customers actually went to Hamas, or that BLOM, at the time it provided banking services to the Three Customers, was aware or intended that Hamas would receive the corresponding funds. *See, e.g.*, *Siegel*, 933 F.3d at 225 ("[P]laintiffs did allege that HSBC provided hundreds of millions of dollars to ARB, but they did not advance any non-conclusory allegation that AQI received any of those funds or that HSBC knew or intended that AQI would receive the funds."); *Kaplan*, 405 F. Supp. 3d at 536 ("[A]lthough Plaintiffs assert that Defendant processed millions of dollars' worth of wire transfers through the LCB Accounts, Plaintiffs do not plausibly allege that Hizbollah received any of those funds or that Defendant knew or intended that Hizbollah would receive the funds."). Again, even assuming the Three Customers did work to drum up political support for

Hamas, there are no non-conclusory allegations that BLOM's assistance to the Three Customers went towards Hamas' violent activities.

Defendant's Presence or Absence at the Time of the Acts. BLOM was not physically present during the attacks. Even if the term "presence" could be broadly interpreted, *Siegel*, 933 F.3d at 225 ("[A]s the plaintiffs themselves allege, HSBC was not 'present' at the time of the November 9 Attacks. Indeed, HSBC had *ceased transacting any business* with ARB ten months prior." (emphasis added)), BLOM was not "present" during the time of the attacks, other than providing banking services to Sanabil and Subul Al-Khair during the relevant period. (Plaintiffs make no allegations as to when the Union of Good maintained an account at BLOM.)

Defendant's Relation to the Principal. Plaintiffs make no non-conclusory allegations that BLOM had any relationship with Hamas. *See, e.g.*, *id.* ("On the fourth factor — defendant's relation to the principal — the plaintiffs do not plead any non-conclusory allegations that HSBC had any relationship with AQI.").

Defendant's State of Mind. Plaintiffs make no non-conclusory allegations that BLOM knowingly assumed a role in Hamas' terrorist activities or otherwise knowingly or intentionally supported Hamas. *See, e.g.*, *id.* ("[O]n the fifth factor — defendant's state of mind — the plaintiffs do not plausibly allege that HSBC knowingly assumed a role in AQI's terrorist activities or otherwise knowingly or intentionally supported AQI."). Plaintiffs' citation to allegedly public

knowledge, without any plausible allegations tying the cited public knowledge to BLOM, is not sufficient to show that BLOM had a culpable state of mind.

Period of Defendant's Assistance. Plaintiffs do not allege the full duration of BLOM's relationship(s) with the Three Customers. Plaintiffs allege that BLOM provided Sanabil and Subul Al-Khair with financial services for the duration of the relevant period but make no plausible allegation that any of the funds provided to the Three Customers during this period went to support Hamas' violent activities. *See, e.g.*, *id.* ("[P]laintiffs do not allege — even conclusorily — that most, or even many, of HSBC's services to ARB assisted terrorism.").

Plaintiffs again rely on cases addressing liability for the provision of material support to terrorist groups in arguing that their allegations are sufficient to withstand a motion to dismiss. They cite, for example, *Boim v. Holy Land Found. for Relief & Dev.*, 549 F.3d 685, 698 (7th Cir. 2008) (finding that the provision of support to a terrorist organization, even if "earmark[ed] . . . for the organization's non-terrorist activities[,] does not get [a defendant] off the liability hook" because such activities "reinforce [an FTO's] terrorist activities"), and *Gill v. Arab Bank, PLC*, 893 F. Supp. 2d 474, 507 (E.D.N.Y. 2012) ("A contribution, if not used directly, arguably would be used indirectly by substituting it for money in Hamas' treasury; money transferred by Hamas' political wing in place of the donation could be used to buy bullets."). As addressed above, however, Plaintiffs' reliance on this line of cases is misplaced. Liability for providing material support to

an FTO turns on a different, less onerous scienter requirement than aiding and abetting a terrorist act.

Kaplan again provides a more appropriate point of reference. There, as here, the plaintiffs "d[id] not advance any factual, non-conclusory allegations that [LCB] knowingly and intentionally supported Hizbollah in perpetrating [its violent activities, i.e., rocket attacks]." *Kaplan*, 405 F. Supp. 3d at 536. "[A]lthough Plaintiffs assert[ed] that [LCB] processed millions of dollars' worth of wire transfers through the LCB Accounts, [they] d[id] not plausibly allege that Hizbollah received any of those funds or that [LCB] knew or intended that Hizbollah would receive the funds." *Id.* "Nor d[id] Plaintiffs sufficiently allege that [LCB] knew, prior to the attacks, about any affiliations between Hizbollah and the [subordinate entities] under whose names the LCB Accounts were held."[12] *Id.* So too here.

II. Leave to Amend

Pursuant to Rule 15(a)(2) of the Federal Rules of Civil Procedure, courts should "freely give leave [to amend a complaint] when justice so requires." Fed. R.

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[12] Judge Daniels also rejected an argument, not made here, that LCB processed the payments pursuant to its longstanding policy of supporting Hizbollah. *Kaplan*, 405 F. Supp. 3d at 536. The plaintiffs' only evidence of this fact was the U.S. Treasury's February 2011 designation of LCB as a "primary money laundering concern" and limited allegations from a December 2011 complaint filed against LCB, which Judge Daniels found insufficient to support plaintiffs' allegations that LCB supported Hizbollah's agenda or that LCB provided funds to the subordinate entities to support this agenda. *Id.*

Civ. P. 15(a)(2). Whether to grant leave is a matter "within the sound discretion of the district court." *McCarthy v. Dun & Bradstreet Corp.*, 482 F.3d 184, 200 (2d Cir. 2007). In line with this authority, the Court typically grants plaintiffs an opportunity to amend their complaints following dismissal, to address any deficiencies raised by the Court's order. Plaintiffs here do not request leave to amend, and specifically declined the Court's offer to do so at the pre-motion conference. The Court addresses amendment of the complaint because BLOM asks that dismissal be with prejudice. (Def. Br. at 27.)

The Second Circuit has clarified that a district court may dismiss a complaint without providing for an amendment where, as here, the plaintiffs previously declined an opportunity to amend their complaint:

> The district court gave plaintiffs-appellants the opportunity to amend the Complaint after a pre-motion telephone conference where the defendants described their arguments in favor of dismissal. Plaintiffs-appellants declined to do so. Thereafter, plaintiffs-appellants did not move to amend the Complaint after the defendants filed their briefs in support of dismissal. Although plaintiffs-appellants informally requested leave to amend in their motion papers, they did not submit proposed amendments or otherwise indicate how they would correct any deficiencies in the Complaint. Under these circumstances, it was within the district court's discretion to dismiss the Complaint with prejudice.

Rosner v. Star Gas Partners, L.P., 344 F. App'x 642, 645 (2d Cir. 2009) (summary order); *see also Berman v. Morgan Keegan & Co.*, 455 F. App'x 92, 97 (2d Cir. 2012) (summary order) (stating that "a district court does not abuse its discretion to deny a plaintiff's motion to alter or amend a judgment" where "the court expressly invited plaintiffs to amend the Complaint, but plaintiffs declined the court's invitation").

Courts in the Second Circuit routinely dismiss complaints without leave under similar circumstances. *See, e.g.*, *Herman v. Town of Cortlandt, Inc.*, No. 18-CV-2440 (CS), 2019 WL 2327565, at *7 (S.D.N.Y. May 30, 2019) (granting motion to dismiss without leave to amend because "Plaintiffs did not amend, despite having been given leave to do so after receiving the benefit of a pre-motion letter from Defendants, as well as the Court's observations during a pre-motion conference"); *Berman v. Morgan Keegan & Co.*, No. 10-cv-5866(PKC), 2011 WL 2419886, at *3 (S.D.N.Y. June 3, 2011), *aff'd*, 455 F. App'x 92; *Williams v. Time Warner Inc.*, No. 09-cv-2962(RJS), 2010 WL 846970, at *7 (S.D.N.Y. Mar. 3, 2010), *aff'd*, 440 F. App'x 7 (2d Cir. 2011).

In light of Plaintiffs' rejection of the opportunity to amend their pleading at the pre-motion conference, and the fact that they have not identified any additional facts they could allege which would address the deficiencies in their complaint, the Court finds that it need not grant Plaintiffs leave to amend. The complaint will therefore be dismissed with prejudice.

Conclusion

For the reasons set forth above, the Court finds that Plaintiffs have failed to plausibly state a claim that Defendant aided and abetting Hamas's terrorist acts, such as those which caused their injuries, in violation of 18 U.S.C. § 2333(d). Plaintiffs' complaint fails plausibly to allege (1) that Defendant was generally aware that, by providing financial services to the Three Customers, it was thereby playing a "role" in Hamas' terrorist activities, and (2) that Defendant knowingly provided "substantial assistance" to Hamas by providing financial services to the Three Customers. In light of this holding, the Court need not reach Defendant's alternative argument that certain plaintiffs' claims require dismissal for jurisdictional or other reasons.

Defendant's motion to dismiss Plaintiffs' complaint with prejudice pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief may be granted is therefore GRANTED. The Clerk of Court is respectfully directed to enter judgment in favor of Defendant and to close this case.

SO ORDERED.

Dated: January 14, 2020
Brooklyn, New York

/s/
Hon. Kiyo A. Matsumoto
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

19-CV-00008 (KAM)

[Dated May 15, 2019]

HONICKMAN, et al.,
Plaintiffs,

-against-

BLOM BANK,
Defendant.

United States Courthouse
Brooklyn, New York

Wednesday, May 15, 2019
2 :00 p.m.

TRANSCRIPT OF CIVIL CAUSE FOR
PRE-MOTION CONFERENCE
BEFORE THE HONORABLE KIYO A. MATSUMOTO
UNITED STATES DISTRICT JUDGE

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[p.2]

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Proceedings recorded by computerized stenography. Transcript produced by Computer-aided Transcription.

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(In Judge KIYO A. MATSUMOTO's chambers.)

THE COURT: Hello. Good afternoon, this is Judge Matsumoto. The case is Honickman, et al versus Blom Bank, 19-Civil-008.

Who is on for the plaintiff, please?

MR. OSEN: Good afternoon, Your Honor.

Gary Osen, Osen LLC, for the plaintiff. With me on my end is my partner Ari Ungar, and also joining is Steve Steingard from Kohn, Swift & Graf.

THE COURT: All right.

Well, who is going to be speaking for the plaintiffs today?

MR. OSEN: I will be, Your Honor, Gary Osen.

THE COURT: Okay, thank you. Please just make sure you identify yourself before you speak during this call because we have a court reporter and she and I both need to be able to identify who is speaking.

Who is representing the defendants, please?

MS. GOLDSTEIN: Good afternoon, Your Honor. This is Linda Goldstein from Dechert.

THE COURT: Okay.

MS. GOLDSTEIN: With me on the line are my partner Michael McGinley, and my colleagues, Selby Brown and Justin Romeo, and I will be doing the speaking.

THE COURT: Okay, very good.

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The other two names that you mentioned after Mr. McGinley appear not to have entered a notice of appearance on this docket. So if you would ask them to do so, if they will be involved in the litigation or may appear in the future, I would appreciate it.

MS. GOLDSTEIN: Thank you, Your Honor, will do.

THE COURT: All right, thank you.

All right, I scheduled the pre-motion conference because of the defense request to file a motion to dismiss the complaint. And even though the complaint is very lengthy, the defendants have pointed out a variety of ways that it believes the complaint falls short.

I do have a question. The statute of limitations, as far as we could tell, is ten years after the date the cause of action accrued. And as I read the complaint it appeared to me that many of these occurrences occurred in 2000 through 2001, '2 or '3.

I am wondering if there is an issue regarding the statute of limitations?

Would Mr. Osen want to deal with that?

MS. GOLDSTEIN: I will let plaintiffs address that.

THE COURT: Ms. Goldstein?

MR. OSEN: Your Honor --

THE COURT: Wait.

Ms. Goldstein, did you say that you were going to

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let Mr. Osen address or did you want to?

MS. GOLDSTEIN: Yes, yes.

THE COURT: All right, go ahead, Mr. Osen.

MR. OSEN: Thank you, Your Honor.

Your assessment is correct. There is a ten-year statute of limitations. The claims are outside the ten-year timeframe. However, there is a savings clause that was part of the enactment of the statutory extension in 2013. And so when Congress passed the extension, which was originally four years, and made it ten, they created a savings clause that extended it six years from the date of enactment of that provision in 2013. And that's why the plaintiffs contend the action is timely.

THE COURT: All right, so it is six years beyond the ten years. So we have --

MR. OSEN: No, Your Honor. I'm sorry, six years from the date of enactment of January 1, 2000 -- or, I'm sorry, January 2nd, 2013.

THE COURT: All right. Okay, well, then let's talk about scheduling the motion.

Ms. Goldstein, are you moving under 12(b)(6)?

MS. GOLDSTEIN: Yes, Your Honor.

THE COURT: Okay. I am just wondering if it might be prudent to allow the plaintiffs to amend their complaint, not to add more claims, not to add more parties, but rather to

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factually support some of the claims that you have identified as being deficient regarding the standards that were adopted by the Second Circuit from the D.C. Circuit.

Mr. Osen, do you want that opportunity? Because as you probably well know, in the Second Circuit if I were to grant the 12(b)(6) motion generally, the Second Circuit would like the district courts to allow an amendment unless it would be futile.

Are there any additional facts you could add to the allegations that the defendant is challenging here or are you comfortable standing on your complaint as it is?

I am not asking for more, obviously, because it is very lengthy, but I just wanted to raise that.

MR. OSEN: Sure.

No, I think we are prepared to brief it based on the arguments presented in the pre-motion letter.

THE COURT: So you do not want an opportunity to amend. So if I were to grant the defendant's motion, you would not want to amend, is that correct?

Because I do not want to go through another round of motions.

MR. OSEN: Understood, Your Honor. And sitting here today based on what was represented as the arguments in the pre-motion letter, we would not seek leave to amend.

THE COURT: All right. Why don't we then just set

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up a briefing schedule.

I will adopt the proposed briefing schedule, if the parties would like me to do that, with the defendant moving and serving June 3rd, 2019; and then the plaintiff serving its opposition papers July 8th; and replies by defense, the defendant to be served on July 29th.

And at that point on July 29th is when the parties would cooperate to upload their motions in modular order.

Does anybody want relief from this proposed schedule that was set forth in Ms. Goldstein's pre-motion conference request letter?

MS. GOLDSTEIN: No, that schedule is fine with us, Your Honor.

THE COURT: Okay.

Mr. Osen, it's fine with you, too?

MR. OSEN: Indeed; thank you, Your Honor.

THE COURT: Okay.

Just please remember that I do not want you to upload anything on the docket until the motion is fully briefed on the 29th of July, and that you provide two courtesy copies to me. All right?

MS. GOLDSTEIN: Understood, Your Honor.

THE COURT: Mr. Osen, do you see any possibility that you would voluntarily dismiss some of these claims?

MR. OSEN: No, Your Honor.

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THE COURT: All right. Because the other claim Ms. Goldstein raises is regarding the requirement under the ATA that the plaintiffs be nationals of the United States. And some of your plaintiffs, as you allege, are not.

MR. OSEN: Right, I mean we would -- that's a fair point, Your Honor.

The question -- we'd have to look at that more granularly because it really depends on whether the decedent -- I'm sorry, whether the non-U.S. national is suing based on a death or an injury. At least, that's -- that's the construction that Judge Cogan has given in this district.

So to the extent that's raised, we'd have to look at it individually, but it's possible that certain of those claims we might be willing to withdraw.

THE COURT: So are you going to wait until you receive the defendant's papers, their submissions, or

are you going to talk about it and do some more research and figure out whether you want to spare them the ink and the time to brief as to those plaintiffs?

MR. OSEN: I think the latter, Your Honor.

THE COURT: Okay.

MR. OSEN: To the extent, I have to confess, I haven't focused on that issue in particular, but to the extent that that has been raised, we would -- I think our position would be we would look at that now on a plaintiff-by-plaintiff

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basis. Obviously, any claim that's dismissed, as we discussed earlier, there is no future recourse. So we would look at that carefully now, but in the event that we concur on any particular plaintiff, we would do that before the motion is briefed.

MS. GOLDSTEIN: Could I ask that Your Honor set a deadline for that?

THE COURT: Right, I will, because I mean, obviously, you cannot wait until it is briefed because she is going to start drafting. And she has identified at paragraph four of her letter a number of plaintiffs who are nationals of Israel and France, and also identifies by paragraph those allegations where the complaint does not really allege that the injuries allegedly suffered were proximately caused by the terrorism, alleged terrorism or the acts of the defendants.

So you should look at all of this because if this is something that you would agree to or in your oppositions you just say: Oh, well, we are not going to dispute that, it is not going to sit well with me that you forced the defendant to brief the issue. It really is up to you, as plaintiffs' counsel, to know your clients and to do the correct thing with regard to whether they belong in the case or not.

So --

MR. OSEN: Your Honor, Gary Osen.

THE COURT: Yes, go ahead.

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MR. OSEN: Sorry, Your Honor.

No, we fully agree with that and I think today is Wednesday, I think if we can get back to the defendant a week from Monday, I think that would be sufficient time for us to respond.

I will say, just by reference to the fact that the purported language that you just mentioned about a plaintiff who is a citizen of France, that's the kind of claim we would not be dismissing because the victim is an American national and there is a deceased individual. So it would be a more granular question. And I would just add, Your Honor, that the decision, I assume, that the defendant would be relying upon came out after the actual complaint was filed.

So we will take a look at it. With Your Honor's permission, we would let the defendants know in about

ten days' time, whatever that calendar date is, and then they can decide.

THE COURT: No, I think I am going to ask you to make a more rapid inquiry and response. Because we set June, or you proposed June 3rd as the date that the papers would be served and it is already May 15th. So I would ask you to let them know by May 22nd. All right?

MR. OSEN: That's fine, Your Honor.

THE COURT: So you are going to advise the defendants by May 22nd which plaintiffs, if any, you will

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voluntarily dismiss. Right?

MR. OSEN: I'm sorry, Your Honor?

THE COURT: You are going to let the defense lawyer know that the ATA claims brought by certain of your clients would be dismissed, correct?

MR. OSEN: Correct.

THE COURT: All right.

All right, is there anything else I should address? No?

MS. GOLDSTEIN: Linda Goldstein, Your Honor. That was all we had.

THE COURT: All right, anything else from you, Mr. Osen?

MR. OSEN: No, that's it, Your Honor. Thank you.

THE COURT: All right, thank you everybody. I will await your fully briefed motion on July 29th. And please deliver two courtesy copies of your motion papers to my chambers. All right?

MS. GOLDSTEIN: Yes, Your Honor.

MR. OSEN: Understood.

THE COURT: Thank you very much. Have a good day.

MS. GOLDSTEIN: Thank you, you too are, Your Honor.

MR. OSEN: Take care.

THE COURT: All right, bye-bye.

(Conference call concluded.)

APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

19 CV 0008(KAM)

[Dated November 25, 2019]

MICHAEL HONICKMAN, et al,
Plaintiffs,

versus

BLOM BANK,
Defendant.

U.S. Courthouse
Brooklyn, NY

November 25, 2019
2:00 PM

TRANSCRIPT OF CIVIL CAUSE FOR ORAL ARGUMENT
BEFORE THE HONORABLE KIYO MATSUMOTO
UNITED STATES DISTRICT JUDGE

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THE CLERK: This is Civil Cause for Oral Argument on defendant, BLOM Bank's motion to dismiss the complaint.

Will plaintiffs' attorneys please state your appearances, please?

MR. RADINE: Good afternoon, Your Honor. I'm Michael Radine from Osen, LLC, for plaintiffs.

THE COURT: All right. Good afternoon.

THE CLERK: And, sir?

MR. OSEN: Gary Osen, Osen, LLC, for plaintiffs.

THE COURT: Who will be arguing today?

MR. RADINE: I will, Your Honor.

THE COURT: Oh, all right. Thank you.

THE CLERK: And on behalf of the defendant?

MS. GOLDSTEIN: Linda Goldstein of Dechert, LLP, for defendant, BLOM Bank.

THE COURT: Good afternoon.

MS. GOLDSTEIN: Good afternoon, Your Honor.

MR. ROMEO: Justin Romeo of Dechert, LLP, for BLOM Bank.

MR. MCGINLEY: Michael McGinley from Dechert, LLP, for BLOM Bank.

THE COURT: All right. Thank you. Please have a seat.

I think we'll hear from the defendants first, since this is their motion. Would you like to be heard?

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MS. GOLDSTEIN: Thank you, Your Honor.

May it please the Court, the plaintiffs in this case were killed or injured by bombings and shootings in Jerusalem, Tel Aviv, and in the West Bank between December 1, 2001, and August 19, 2003. Those attacks were violent, life-threatening, and utterly despicable. They were committed by HAMAS operatives.

BLOM Bank, the Lebanese bank that is the only defendant in this case, is not alleged to have had any roles in those attacks, any connection to the HAMAS operatives or indeed, any direct connection to HAMAS itself.

The issue on this motion is whether plaintiffs' allegations that BLOM Bank provided routine banking services to three alleged customers that allegedly provided financial support to HAMAS is enough to hold BLOM Bank liable for aiding and abetting a terrorist act under the Justice Against Sponsors to Terrorism Act, or JASTA. Under clear Second Circuit precedent, the answer is plainly no.

JASTA is a relatively new statute. It was enacted by Congress in 2016. The statute states, and I quote, liability may be asserted as to any person who aids and abets by knowingly providing substantial assistance or who conspired with a person who committed such an act of international terrorism.

The term "knowingly" is a crucial *mens rea*

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requirement under the statute, as the Second Circuit has underscored in two recent cases interpreting JASTA.

In *Linde versus Arab Bank*, the Second Circuit held that plaintiffs have to allege facts plausibly showing that BLOM Bank had, quote, a general awareness of its role in violent or life-threatening activity.

The Second Circuit held that aiding and abetting an act of international terrorism requires more than the provision of material support to a designated terrorist organization. Aiding and abetting requires the secondary actor to be quote, aware, closed quote, that by assisting the principal is itself assuming a, quote, role, closed quote, in terrorist activities.

Second Circuit then considered whether it would be enough to make this required showing by alleging that a bank had knowingly provided material support to a terrorist organization in the form of financial services, and the answer was a strong no. To go back to the words of *Linde* again, quote, what the jury did have to find was that in providing such services, the bank was generally aware that it was thereby playing a role in HAMAS' violent or life-threatening activities, closed quote.

In the *Linde* case, the Second Circuit identified certain evidence from the trial record that could have supported that finding. In that case, Arab Bank, the

[p.5]

defendant, had a role in administering a terrorist insurance scheme which made payments to the survivors of suicide bombers, where the documentation that was submitted to Arab Bank made it clear those were payments for martyrdom, and expressly stated the violent manner in which the insureds had died.

Just a few months ago in the *Siegel* case, the Second Circuit provided a second guidepost for the assessment of *mens rea* allegations against financial services

institutions that are accused of aiding and abetting terrorist acts.

There, the Court of Appeals affirmed the dismissal of claims against HSBC Bank, which was alleged to have done business with a Saudi bank called Al Rajhi Bank. The complaint in that case alleged that Al Rajhi Bank was involved in financing terrorist activity by al-Qaeda in Iraq, and that HSBC knew that Al Rajhi Bank supported al-Qaeda in Iraq.

The complaint further alleged that HSBC was involved in stripping the identifying information from certain financial transactions with Al Rajhi Bank to conceal those activities from U. S. regulators and law enforcement.

And in fact, HSBC had entered into a non-prosecution agreement with the United States government, in which it paid nearly two billion dollars in forfeitures and civil penalties for alleged money laundering.

With respect to HSBC's *mens rea*, the Second Circuit

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held that the complaint did not plausibly allege that HSBC had assumed a role in the attacks at issue in that case. To quote from that opinion, at most, the allegations, even when viewed in the light most favorable to the plaintiffs, assert that HSBC was aware that Al Rajhi Bank was believed by some to have links to al-Qaeda in Iraq and other terrorist organizations, closed quote.

The Second Circuit held that that alleged knowledge was not enough to show that HSBC knowingly played a role in terrorist activities, in part because the complaint itself alleged that Al Rajhi was a large bank and plaintiffs did not contend that most or even many of its transactions were connected to terrorism.

The *Siegel* decision also affirmed the dismissal of the aiding and abetting claim against HSBC on the ground that it had not adequately pleaded substantial assistance. There, the court held that there was no encouragement of terrorism, and that even though HSBC was accused of sending hundreds of millions of dollars to Al Rajhi Bank and had paid a massive penalty for alleged money laundering, there was -- and I'm quoting again -- no non-conclusory allegation that al-Qaeda in Iraq received any of these funds or that HSBC knew or intended that al-Qaeda in Iraq would receive those funds, closed quote.

Against that legal background, I'd like to turn to the allegations in this case. The only fact alleged against

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BLOM are that it maintained accounts for three alleged customers: Sanabil, Subul Al-Khair and Union of Good.

Crucially, there are no allegations in the complaint that any of these three alleged customers themselves perpetrated terrorist acts. There's no allegation that any of these customers was itself involved in violence or life-threatening activity.

THE COURT: But don't they allege that these three customers did provide funding for HAMAS-related activities?

MS. GOLDSTEIN: They allege that -- well, the U. S. government later found that both Sanabil and Union of Good were Specialized Designated Global Terrorists, which means that they provided support, financial support to HAMAS, but not for any terrorist activities specifically, and certainly not the terrorist activities that are at issue in this complaint, and that is the crucial distinction that *Linde* draws: Providing material support to a terrorist organization is not the same as providing support to an act of terrorism. And the aiding and abetting statute requires knowing and substantial participation in the act perpetrated by the principal actor, and that's what's missing here.

And the complaint, in fact, contains numerous allegations that would be I guess completely inconsistent with the notion of any of these customers perpetrating terrorist acts themselves.

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Sanabil and Subul Al-Khair are explicitly described as charitable organizations and to the extent there is any description of their activities at all in the complaint, it's charitable acts. The allegation is that Sanabil was created to compete with Hezbollah's social welfare structure, that Sanabil provided basic necessities in Palestinian refugee camps, that Sanabil spent money on orphans and needy patients, that it spent money in the old manner of an old style political machine, and Subul Al-Khair -- I'm sure I'm mangling

the pronunciation -- is alleged to have functioned much like Sanabil.

The complaint also alleges that the Sanabil and Subul Al-Khair accounts at BLOM received funds from other charitable organizations, specifically, the Holy Land Foundation and Al-Aqsa. But critically, again, these organizations are not alleged to have been engaged in violent or life-threatening activities either. To the contrary, the two transfers from Al-Aqsa that are alleged in the complaint were both expressly-designated help concerning orphan children.

And with the exception of the later of those transfers which was made one day after the U. S. Treasury Department designation of Al-Aqsa, none of those transfers is alleged to have been made after Holy Land or Al-Aqsa was designated as providing material support to HAMAS.

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As to the third alleged customer, Union of Good, the complaint doesn't have a single allegation about any financial transactions in that purported account.

At the very most, what the complaint alleges is that BLOM provided financial services to three entities, two of which were later determined by the U. S. government to have provided financial support to HAMAS. This case is on all-fours with Siegel, where that was exactly the allegation made against HSBC with respect to Al Rajhi Bank, which was also later designated an SDGT by the Treasury Department.

The complaint does not make any non-conclusory allegations that BLOM knew that Sanabil, Subul Al-Khair or Union of Good was affiliated with HAMAS at the time of any of the attacks. But even if it did, that would not be enough to allege that BLOM had a general awareness of a role in violent or life-threatening activities.

As I said, the Second Circuit plainly drew a line in *Linde* between providing support for terrorist organizations and supporting terrorist acts. And in *Siegel*, that principle was applied to uphold the dismissal of the complaint against HSBC. Excuse me.

Turning for a moment to substantial assistance, the complaint does not allege that critical element of an aiding and abetting claim either. As noted, there are no allegations whatsoever about any financial transactions into or out of

[p.10]

Union of Good account.

And while the complaint does allege that certain funds were transferred into the Sanabil and Subul Al-Khair accounts, it makes no allegation that any of those funds were sent to HAMAS or that any of those funds had a role in any terrorist activity at all, much less the specific attacks at issue in this case.

If I might, Your Honor, in our briefs, we discussed several recent district court cases that apply *Linde* to dismiss aiding and abetting claims similar to those alleged here. There's a more recent case that was

issued by Judge Daniels after briefing, and if I might hand it to --

THE COURT: We're aware of it.

MS. GOLDSTEIN: You're aware of Kaplan, Your Honor? Okay. And I've given a copy to Mr. Radine as well. So he's aware of it as well.

THE COURT: Thank you.

MS. GOLDSTEIN: And we believe that Judge Kaplan's decision --

THE COURT: Judge Daniels.

MS. GOLDSTEIN: Judge Daniels' decision in *Kaplan* is particularly apt here. I mean, there, the claim like here, was against a Lebanese bank. That Lebanese bank was accused of holding accounts for five customers who were allegedly affiliated with Hezbollah. The claim was based on -- the

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claim of aiding and abetting was based on assertions that these five account holders were either Hezbollah leaders or entities that had been created and controlled by Hezbollah.

The complaint in that case further alleged that in the two years before the rocket attacks that had caused those plaintiffs' injuries, Hezbollah made and received wire transfers totaling millions of dollars through those five customer accounts, and more specifically, that Hezbollah perpetrated the attacks using funds received

from those wire transfers and that those funds were sufficient to carry out the attacks.

The *Kaplan* plaintiffs asserted that Lebanese Canadian Bank knew or should have known that the customers were affiliated with Hezbollah, and Judge Daniels expressly noted that Lebanese Canadian Bank had later been designated a primary money laundering concern, and that it had forfeited $102 million to the U. S. government after being charged with involvement in a money laundering scheme with links to Hezbollah.

Nonetheless, Judge Daniels still held that those allegations were not enough to show general awareness of a role in violent or life-threatening activities.

Similarly, Judge Daniels held that the complaint did not plead substantial assistance because it did not allege that Hezbollah actually received any of the funds that had

[p.12]

gone into the five customers' accounts or that the defendant knew or intended that Hezbollah would receive the funds. Those allegations, we contend, Your Honor, are far stronger than anything alleged in this case against Bank BLOM.

In, sum there is nothing in the complaint that adequately alleges knowing participation or substantial assistance to a terrorist attack.

Because the plaintiffs expressly declined the opportunity to amend their complaint after receiving

our premotion conference letter, we respectfully request that the complaint be dismissed with prejudice.

THE COURT: All right. Thank you.

Does the plaintiff want to be heard?

MR. RADINE: Yes, Your Honor. Sorry.

Good afternoon, Your Honor.

THE COURT: Good afternoon.

MR. RADINE: BLOM essentially makes three "even if" arguments: Its clients weren't HAMAS. Even if they were, BLOM didn't know that they were HAMAS, and even if they did, they believe its clients only had charitable purposes, meaning under its reading of *Linde*, it could not have been generally aware of its role in violence or terrorist activities.

THE COURT: But you're not alleging that these three account holders were HAMAS, right?

MR. RADINE: They are. We allege that they are as

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under *Weiss*, components of HAMAS. They are alteregos of HAMAS, as we allege in the complaint. They are -- they consist of HAMAS' Da'wa, D-A-W-A, headquarters in Lebanon.

As under the control test there, they share the same leadership. We're referring specifically to Sanabil here. They were created by HAMAS to increase HAMAS' role in the Palestinian refugee camps in Lebanon.

THE COURT: They're nonviolent, not terrorist-related activities, just to provide orphans care, scholarships, charitable contributions, you know, between 40 to $50 per family, and to solidify or to grow support for HAMAS, but not to engage in terrorism.

MR. RADINE: That's their stated purpose, and if they had no other role and if HAMAS operated like a normal organization, then that might mean that providing material assistance to those organizations would not, as under *Halberstam*, make you generally aware of your role in conduct from which violence was foreseeable, which is the standard under *Halberstam*.

THE COURT: Did you sue these entities, these account holders?

MR. RADINE: Sorry?

THE COURT: Did you sue these three account holders?

MR. RADINE: No, Your Honor.

THE COURT: Why wouldn't you do that if they are

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HAMAS? Why wouldn't you sue them if they are responsible for the terrorist acts that led to the horrible injuries suffered by your clients?

MR. RADINE: As Judge Posner pointed out in *Boim*, the very existence of the ATA civil provision is to allow plaintiffs to find some recovery for their injuries aside from the terror groups themselves, which are

usually hard to find or don't have the resources to cover any sort of judgment.

Sanabil was shut down by the Lebanese government in 2003 for its role -- working with HAMAS. The other organizations have taken essentially the same path, making suing them impossible.

But under defendant's view, suing a bank would be impossible because these organizations have ostensibly or purportedly charitable purposes, but the question under *Halberstam* is whether -- which is the governing law as laid out in *Linde* -- is whether you have a general awareness of your role in the overall tortious or illegal conduct that is not itself violent, but from which violence is foreseeable.

So in that case, of course, Mrs. Hamilton, the girlfriend of the burglar, doesn't know about the murder that her boyfriend would go on to commit. She doesn't even know about the burglary. She simply has a general awareness of her role -- and the Court's line was personal property crimes at night from which objectively, violence is a foreseeable

[p.15]

result.

That's the case here, too. And in fact --

THE COURT: Well, what are you saying that BLOM Bank was aware of with regard to these three account holders?

MR. RADINE: They were aware that they were HAMAS alteregos, and that providing financial

assistance for them would allow HAMAS to perpetuate more terror attacks as a result.

THE COURT: What are the facts that you allege that say that they -- BLOM Bank -- knew that these were HAMAS alteregos?

MR. RADINE: Well, HAMAS --

THE COURT: Did they -- it seems that all of the -- all of your allegations that are in the complaint talk about the charitable transfers of money that the three account holders made, not that BLOM Bank was aware that these account holders were HAMAS, and that they were knowledgeable about the violent activities, the violent side of the HAMAS operation.

MR. RADINE: So there are two components. One is the knowledge that they are part of HAMAS. HAMAS, even itself, not talking about its components under other names, performs a number of social activities. The separate question is one about where they'd understand that a foreseeable result of promoting those social activities is -- would foreseeably lead to violence.

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THE COURT: But how is giving money to an orphan or a scholarship to a student in order to camp going to foreseeably lead to violence?

MR. RADINE: Well, that transaction itself may not but giving money to HAMAS, which is what that operation -- handing the money to Sanabil and institutions like that does. This is not just our view. It's the finding of the federal government as deferred to in

-- by the Supreme Court in *Holder v. Humanitarian Law Project*. If I could just briefly read from that?

The Supreme Court found in the executive's view, sub-quote, given the purposes, organizational structure and clandestine nature of foreign terrorist organizations, it is highly likely that any material support to these organizations will ultimately enure to the benefit of their criminal terrorist functions, regardless of whether such support was ostensibly intended to support non-violent, non-terrorist activities. And that's at 561 U. S. 1 at 33.

It's also the finding of the U. S. designation of Sanabil, which I'll come to in a moment, but in brief, that designation finds that HAMAS uses its charitable institutions for cover, that it commingles assets -- another sign of alterego status, by the way -- and that it shifts money from the charities -- the line is, monies from the charities are, quote, often diverted or syphoned to support terrorism.

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I don't think any of this would have been lost on BLOM, operating in Lebanon -- Lebanon, where Hezbollah has -- another foreign terrorist organization runs a substantial non-society -- nor would it have been lost on BLOM in terms of HAMAS' role in the Palestinian refugee camps, especially in southern Lebanon.

So for instance, BLOM's -- the Sanabil account was with BLOM's branch in the city of Sidon, a small city in Lebanon, where enormous sums of money were coming

into Sanabil, especially in a country whose per capita GDP at the time was around five thousand dollars.

And Sanabil's stated purpose was to operate in the refugee camps where HAMAS was active. None of this would have gone unnoticed by BLOM Bank. Just as much as when the millions of dollars coming in from HLF, Holy Land Foundation, as far as we know, so far from the evidence in that trial, stopped when it was designated as a HAMAS fundraiser.

All of this is information that BLOM has to understand that it is dealing with a HAMAS organization, Sanabil, whose fundraisers abroad are designated because that sort of support leads to terrorism.

THE COURT: All right. But you don't have any direct evidence, do you, that Sanabil actually directly funded terrorist activities with funds on account or that had transferred through the BLOM Bank, do you?

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MR. RADINE: We don't have any sort of purchasing of weapons or allegations of that nature, but those allegations haven't been necessary. It's not *Linde*, which is in a line of cases explaining there is no need to trace a transaction from the bank all the way to the purchase of weapons, as explained in *Holder*.

THE COURT: Right, but you have to show some knowledge on the part of the bank, don't you, that they knew that the funds that they were -- that they were assisting with, the transactions that they were assisting with, were going towards terrorist activities.

And, you know, the fact that there is money going into the refugee camps, I don't know how large these camps are or how many people they are actually serving during this time, but in August 2001, HAMAS provided funds to provide basic necessities to poor families within the camps. How many people were in these camps?

I mean, I'm not -- it seems like a lot of money, but I don't even know what the population is and whether that would send red flags up to a bank that, oh, gee, these monies going into these camps are for terrorists as opposed to charitable activities. I just don't see any knowledge on the part of the bank here.

MR. RADINE: The knowledge is not to where the specific transactions go, because the bank understands that

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money is fungible and because the bank understands that HAMAS is a foreign terrorist organization, and that these components are part of HAMAS infrastructure. That's all the knowledge that is necessary.

The ATA won't operate if we would have to show a transaction marked for bombs or for guns. They'll always say for charitable purposes, and if that money is paid to a charitable purpose, it frees up -- this is the holding in *Goldberg*.

THE COURT: I think in some of the cases that were cited, they actually did earmark certain payments to suicide bombers' families as opposed to here, where

they were giving scholarships and taking care of orphans and that kind of thing.

MR. RADINE: In *Linde*, there are allegations or rather evidence at trial. That's a post-trial decision that Arab Bank helped operate an insurance fund to pay families of suicide bombers. That's certainly better evidence at that stage of the bank's knowledge, but it doesn't mean that because a bank doesn't have that list in front of it, it can't understand the role of charity foundations in HAMAS.

I'd point out that the charities involved here include charities that pay to suicide bomber families. That's part of the findings of the Watson memo on *Holy Land Foundation*. That same -- it's actually a great example of how

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charity payments can very directly encourage terrorism, and BLOM doesn't need at the pleading stage, at least, that sort of allegation to understand its role in supporting HAMAS and providing that amount of liquidity to HAMAS.

The result otherwise is to simply immunize any sort of banking for a foreign terrorist organization if they are bright enough to simply move money straight to their charitable wing under charitable purposes as opposed to requesting money for violent purposes.

It's the reason why the United States found, as noted in *Holder*, that that money will ultimately enure to the benefit of terrorist functions, regardless of how

it was ostensibly intended -- something, again, that BLOM would have understood.

THE COURT: I think the defense points out in its papers that you waited until the very last possible moment to name the BLOM Bank, where you sued numerous other parties involved in the injuries sustained by your clients, you know, since -- almost since the day of the injury. And sort of -- I think the defendant is making an argument that it is sort of a last ditch effort, you decided, well, let's just name the bank before the statute expires, because you may not have had the ability to collect from other more direct players in this whole thing.

MR. RADINE: Yeah. It was a disappointing argument

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to read, given that our plaintiffs had the legal right to bring the case. The statute hasn't run on their claims. It struck me as a disparaging remark about their sort of -- whether it's abberatious bringing of stale claims or not. The claims against BLOM Bank are no less direct than Arab Bank, unlike HSBC, for instance, in *Siegel*.

HSBC held an account for a bank that held an account for a charity that was not the alterego of HAMAS or al-Qaeda in Iraq, but simply had given some money to both of them. There is no evidence, for instance, that any money from HSBC ever made it to those charities or to the terrorist organizations, either.

Here, like Arab Bank, BLOM holds accounts for the charitable institutions that are part of HAMAS. That's true in *Linde* as well.

THE COURT: Where do you allege that in your complaint that BLOM Bank knew that these account holders are alteregos or are a part of, or the same as HAMAS?

MR. RADINE: I think certainly for pleading purposes, it's a plausible inference from the --

THE COURT: Just give me a couple of paragraphs -- I've got the complaint here --

MR. RADINE: Sure.

THE COURT: -- where you make that clear.

MR. RADINE: So in paragraphs 588 to 594, for

[p.22]

instance, we set out some of Sanabil's history and that its board was composed of HAMAS officials in Lebanon, and I point out that HAMAS in Lebanon operates openly. These aren't secret -- secret terrorists hiding in the shadows. This is information -- especially in Sidon -- that would have been evident to BLOM that these were HAMAS institutions. The same is true for the HLF transactions.

THE COURT: Well, you don't allege that here, do you?

MR. RADINE: That BLOM knew as a result that it was HAMAS?

THE COURT: Yes.

MR. RADINE: Your Honor, I think we've presented it as a plausible inference from the allegations.

THE COURT: All right.

MR. RADINE: I just want to add to -- if I may, Your Honor, to the purported staleness of the claims.

Defendant also wrote that the time the claims were brought, the statute of limitations was ten years long. That's not the case. The time the claims starting out were brought -- the times that the attacks occurred.

At the time that the attacks occurred, the statute of limitations was four years long. BLOM's role in financing HAMAS did not become clear until the HLF trial in 2008, after those claims would have run.

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In 2013, the statute of limitations was extended to ten years with a saving provision capturing post-9/11 claims that included our plaintiffs. So it's not until 2013 that they can bring a claim based on the information from the HLF trial. And even then, it's not until 2016 that JASTA is passed, providing a more straightforward path to liability. So the characterization itself is not only unnecessary, it's simply inaccurate.

THE COURT: What about the proximate cause of the injuries suffered by the Steinherz family? They claim -- the defense claims that those are not -- the allegations don't establish that the Steinherz family

injuries were proximately caused by the Ben Yehuda Street --

MR. RADINE: Ben Yehuda Street bombing?

THE COURT: Yes.

MR. RADINE: They characterize -- it's a little mystifying to us. To lay out what happened, the Ben Yehuda Street bombing took place in a pedestrian mall. The Steinherzs were in the area of the attack. They heard the attack. They feared for their lives. They also heard two bombings, knowing that multiple bombings sometimes occur in order to kill first responders.

They got up to leave -- defendant treats their decision that they were then safe as meaning the attack was over as a matter of truth and they would never fear for their

[p.24]

lives until some intervening event happened. Naturally, they're seeking to escape an attack that they can't know if it's over or not. When they see a crazed-looking man after two bombers, they have the reasonable fear that this is a third bomber, and react accordingly.

It's certainly within *Halberstam* a foreseeable result of the fundraising for HAMAS as much as the injuries in the other attacks were.

THE COURT: Do you want to address the non-citizenship status of Matanya Nathanson?

MR. RADINE: Yes, Your Honor. The -- Matanya has a claim as the survivor of his daughter who was murdered in that attack. His own physical injuries for that attack don't constitute their only claim, but our argument is that well, simply, we're not sure what is being asked of the Court to do with it.

The evidence of his solation injuries, as in the injuries from losing his daughter, how that is related to his physical or emotional injuries from the attack itself is something to be determined by a jury, with -- a properly instructed jury at that stage?

But aside from excluding certain evidence or whatever the Court might do at a later stage with that, there's no part of the claim to dismiss here on those grounds.

THE COURT: All right. So right now, we're just

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looking at the sufficiency of your pleadings?

MR. RADINE: Yes, Your Honor.

THE COURT: And your -- I do recall that you did not want an opportunity to try to replead, which is usually what we try to encourage the plaintiffs to do before motion practice. And I think the Second Circuit may not encourage district courts to allow another round of pleading if there's been a declination of an opportunity to replead before motion practice.

So everything I need to consider in terms of sufficiency of your pleading is going to be found in the complaint that's filed in this case, correct?

MR. RADINE: Yes, Your Honor. The --

THE COURT: There are no facts that you would have to offer to address some of the contentions of the defendants regarding knowledge, especially?

MR. RADINE: I think we could always add allegations, but the -- we believe the complaint goes far enough in saying that BLOM holding accounts for Specially Designated Global Terrorists designated for this conduct for financing HAMAS, was generally aware of its role in that elicit conduct, and was -- the violence that resulted from it was foreseeable, as was the case in *Linde*.

And *Linde*, of course, is a decision on a, you know, on jury instructions. It didn't hold that there was a

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pleading bar here. In fact, when *Linde* holds that provision of material support to an FTO is not enough from a general awareness point of view, it cites to *Holder*, a case in which presumably well-meaning NGO provided de-escalation, anti-violence, sort of international law training to a terrorist group in hopes that it would turn to less violent ends. That is a violation of 2339B. It is a provision of material support to a terrorist group, but it may not objectively make violence a foreseeable result of it.

That's different than here. As would have been understood to BLOM or to any reasonable person and as was found by the United States government, providing millions of dollars to HSBC's -- sorry -- I'll get back to HSBC in a moment -- millions of dollars to

HAMAS, whether it's its Da'wa wing or otherwise, foreseeably leads to violence.

My only HSBC comment is to just offer a little correction. Al Rajhi was never designated. The Al-Haramain, the charity it held accounts for was, but that was not designated as an alterego for HAMAS or al-Qaeda, whereas Sanabil, I think it was clear from the designation -- I'm happy to read further from that if it would benefit the Court -- was designated because it was being used as cover for HAMAS, because it was used to facilitate funding and to funnel money and because its assets were commingled or diverted or syphoned to support terrorism.

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Particularly under the scienter standard preferred in the Second Circuit, the motion to dismiss a case, under *In Re: DDAVP*, which is set out in *Weiss* also and in our complaint, even tenuous inferences, scienter should be enough at the pleading stage, and we think we have more than tenuous inferences here.

THE COURT: Is the *Kaplan* case on appeal?

MR. RADINE: I don't know that the appeal has been filed. The Notice of Appeal has been filed.

If I could speak briefly to *Kaplan*? *Kaplan* requires a level of proof that is out of step with JASTA, out of step with *Linde*, and would be impossible to meet. Just reading from page six of that decision, "Plaintiffs do not advance any factual non-conclusory allegations that defendants knowingly and intentionally supported Hezbollah in perpetrating the rocket attacks."

That's not a standard that courts have required plaintiffs to meet. It wouldn't operate in *Halberstam*. Ms. Hamilton did not knowingly, intentionally assist her boyfriend in murdering Dr. Halberstam.

The Kaplan case also requires -- I'll just read it again from page six, "Plaintiffs do not plausibly allege that Hezbollah received any of those funds or that defendant knew or intended that Hezbollah receive the funds, nor do they sufficiently allege that defendant knew prior to the attacks

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that any affiliations between Hezbollah and the five customers, whether there were those affiliations."

This is not our allegation here. Our allegation here is that any money for Sanabil is a money for HAMAS. It's also the finding of the U. S. government. It's our allegation that that was something that was known to BLOM. I think it was certainly known to LCB as well, but that was that decision in that case.

Respectfully, a case that requires knowledge of purchasing of rockets is, as a minimum, is going to render the ATA a dead letter, and certainly make *Halberstam* irrelevant to the analysis.

I point out also, Your Honor, that the fact that Sanabil is part of HAMAS is also a finding in the 2012 decision in the *Boim* line of cases, which obviously does not bind this Court, but is indicative of information that's certainly sufficient at the pleading stage.

In *Boim v. Quranic Literacy Institute*, 2012 Westlaw 13171764, the court said, "The evidence further shows that all of these organizations" -- and that list included Sanabil -- "are either known fronts for HAMAS, known supporters of HAMAS, or entities whose funding is known to benefit the HAMAS agenda."

I think the evidence shows that Sanabil's firmly in the front for HAMAS for category of those particular

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organizations.

I'm happy to discuss substantial assistance, if that's helpful.

THE COURT: No. Anything else? I mean, your response to the defense motions, if you have anything else to add? Otherwise, I'll hear from Ms. Goldstein.

MR. RADINE: No, I think that will do it for plaintiffs. Thank you, Your Honor.

THE COURT: Ms. Goldstein, do you want to be heard any further?

MS. GOLDSTEIN: Yes, Your Honor.

I would like to start where I started before, which is with words of the statute. We're here to interpret and apply a specific statute, JASTA, which was enacted in 2016, and which is not addressed in *Halberstam* or *Boim* or *Goldberg*, because it didn't even exist at that time.

So the key points are the words in the statute which requires knowing and substantial assistance to a

terrorist act. And we have the further gloss from *Linde* that the statute requires with respect to a financial institution such as BLOM, a general awareness of the bank's role in terrorist acts and violent and life-threatening activities.

The *Holder* decision by the U. S. Supreme Court was not interpreting JASTA. Again, JASTA hadn't been enacted at the time the Supreme Court issued the *Holder* decision. The

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Supreme Court was looking at one of the material support statutes. And one of the keys here is that the *Linde* decision expressly says that the *mens rea* standard for the material support statute is different than the *mens rea* requirement for JASTA.

Looking at pages 329 to 330 of the Second Circuit's decision in *Linde*, first, the court says what I read earlier, what the jury did have to find was that in providing such services, the bank was generally aware that it was playing a role in HAMAS' violent or life-endangering activities.

Second Circuit then goes on to say expressly, "This is different from the *mens rea* required to establish material support in violation of 18 USC, Section 2339B, which requires only knowledge of the organization's connection to terrorism, not intent to further its terrorist activities or awareness that one is playing a role in those activities. See *Holder v. Humanitarian Law Project*." So the Second Circuit has told us don't look at the *Holder* case. That's not the standard here.

Similarly, the *Boim* case was distinguished by the Second Circuit as well, where the Second Circuit pointed out that in the *Boim* case, the Second Circuit did not hold that material support of terrorism is always an international act of terrorism, addressing a definitional issue that's not at issue here.

Mr. Radine pointed to the *Halberstam* case, which

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requires only knowledge of participation in tortious activity. But again, the Second Circuit expressly says not just tortious activity. We're looking at violent or life-threatening activity. That's what's required under JASTA.

It's not an impossible standard that the Second Circuit laid out. The Second Circuit expressly said that the evidence in the *Arab Bank* case, the *Linde* case could be enough, and pointing to the terrorism insurance evidence and the like, and the same was recently found by Judge Cogan of this court in the *Miller versus Arab Bank* case, where he denied a motion to dismiss an aiding and abetting claim.

The alterego arguments, we submit, Your Honor, number one, the allegations in the complaint do not rise to the level of establishing alterego similarity, and even if they did -- even if they did, there is still the point that -- providing material support to a terrorist organization.

So providing material support, even if you're providing it directly to HAMAS, is not enough if there isn't knowledge, if there isn't general awareness of a

role in terrorist acts. And Sanabil certainly does more than terrorist acts. The complaint says nothing about them doing terrorist acts. It just talks about charities and helping children in the camps and so on.

Finally, I wanted to point out that the level of knowledge that Judge Daniels rejected in *Kaplan* was very much

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what's claimed here, where it said that it was notorious that there were links between the accounts at issue there, between those persons and in that case, Hezbollah.

And that's exactly what's said here. It was apparently notorious that BLOM should have known that these accounts were linked to HAMAS, but there's no direct allegation of why BLOM should have known that. As I pointed out earlier, the designations by the U. S. Government all postdate it, the activities at issue here.

So, unless Your Honor has any further questions --

THE COURT: All right. Thank you. No. I think we're set.

Is there anything else you wanted to say, sir?

MR. RADINE: I'm happy to give a brief response, Your Honor, if it is helpful to the Court, to those last few comments.

THE COURT: Well, why don't you just -- whatever you'd like, sir.

MR. RADINE: Okay. Thank you.

Very briefly, the JASTA statute says aiding and abetting the person who committed the attacks. It does not require that you aid and abet the attacks in some way that increases the scienter from what's laid out in *Halberstam*.

As opposing counsel mentioned, *Halberstam* was decided before JASTA. It's JASTA that incorporates

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Halberstam, and that's approved by *Linde*. *Linde* did not seek to raise the standard in *Halberstam*. I think if the Second Circuit was going to adopt *Halberstam* and then dispose of it, it would have said so, which it did not.

And finally, the statement that material support to an FTO is not enough even if the entity is itself the alterego, such as its own support to its sort of parent here, is certainly indicative enough that it would render the ATA a dead letter.

The *Linde* decision did not say don't look at *Holder*. It said that the conduct in *Holder*, which is material support, is not sufficient to bring in the foreseeability aspect, but millions of dollars, we allege, is. That's all, Your Honor.

THE COURT: All right. Thank you.

All right. Thank you. I will take all this under advisement, and will issue a decision. Thank you.

MR. RADINE: Thank you, Your Honor.

THE COURT: Thank you. We're adjourned.

(Proceedings concluded.)

APPENDIX G

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

19 CV 8 (KAM)

[Dated October 6, 2021]

MICHAEL HONICKMAN, et al.,
Plaintiffs,

versus

BLOM BANK SAL,
Defendant.

U.S. Courthouse Defendant.
Brooklyn, New York

October 6, 2021
3:00 p.m.

Transcript of Civil Cause for
Telephone Premotion Conference

Before: HONORABLE KIYO A. MATSUMOTO,
District Court Judge

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MICHELE NARDONE, CSR -- Official Court Reporter

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Honickman v. Blom

(Via teleconference.)

THE COURT: Hello. Good afternoon. This is Judge Matsumoto.

The case is Michal Honickman, et al. versus Blom Bank SAL, 19 CV 008.

May I have the plaintiffs' appearance, please.

MR. RADINE: Good afternoon, Your Honor. This is Michael Radine from Osen LLC for plaintiffs, and I'm joined today by Gary Osen.

THE COURT: All right. Who is going to speak for the plaintiff today, please?

MR. RADINE: I will, Michael Radine will, Your Honor.

THE COURT: Okay. Thanks. Just please, sir, make sure you identify yourself before you speak.

Who do we have for the defendant, please?

MS. GOLDSTEIN: Linda Goldstein of Dechert LLP, for Blom Bank; and I'm joined today by Michael McGinley and Tamer Mallat.

THE COURT: Thank you. Who will be speaking on behalf of the defendant today?

MS. GOLDSTEIN: I will, Linda Goldstein.

THE COURT: All right. Thank you.

Have I overlooked anybody?

Is there any other party that I haven't

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acknowledged?

MS. GOLDSTEIN: No.

THE COURT: Okay. Thank you.

So I understand that the plaintiffs, despite two opportunities to amend and two prior declinations and statements that they don't have any other facts, are now trying to seek the fact that the circuit standard for

pleading wasn't clarified at the time and that's why you didn't plead.

I mean that is something the circuit recognized, that they weren't clear and I applied a standard that was not the appropriate standard; but these are facts, and I don't think anything about the facts that you wish to add necessarily adds to, you know, they existed at the time you were invited, the plaintiffs were invited, to amend. I'm not sure what reason the plaintiffs have for not adding those facts, regardless of what the standard was, because, as you argued, I applied the wrong standard.

Why didn't you make those facts part of an amended pleading when you were invited to do so?

MR. RADINE: Sure, Your Honor. This is Michael Radine.

As you stated, of course, it's our position that now that the Second Circuit has correctly clarified the standard for pleading a JASTA claim, that we should be able to amend to meet that standard. And, as you noted, the circuit court

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noted the confusion in applying the correct standard before it vacated Kaplan; and, of course, we are no more clairvoyant than this Court in accommodating that standard.

Any prior amendment would have been futile because we still cannot allege, as this Court required, quote, any acts or statements by Blom or Blom's

employees which suggest any awareness of its connection -- on its part of a connection between any of the three customers and Hamas. So that is the knowledge standard that the Court rejected as well as the standard that Blom knew or should have known of the cited sources.

So the prior opportunities to amend, which plaintiffs did decline, would have been futile to have met.

I think the more appropriate way to view this is as if the Second Circuit's decision had been this Court's dismissal decision, then we would be in a situation like Cortac, for instance, where the Second Circuit held that, It is the usual practice upon granting a motion to dismiss to allow leave to replead. We are now, for the first time, in a position to amend based on the correct standard, and we should be given that opportunity.

The allegations --

THE COURT: Sir, the question I had was: If the standard wasn't clear and you were advocating for a particular standard, why wouldn't you allege facts that met the standard

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that you thought was the right standard?

I'm not quite sure why you wouldn't allege those facts, which were available at the time. If you were taking the position that the standard that I applied was too exacting, and if these facts existed in the universe, as you claim they did at the time, and you

were advocating that the standard I was applying was erroneous -- and you were right about that -- why wouldn't you allege those facts that you were arguing were a different standard? Why does it make it futile?

MR. RADINE: Well, so, we obviously saw --

THE COURT: That's a call for me. That's a call for me, in denying an amendment saying, well, that's futile; but you, as advocate for the plaintiffs, decided I don't want to avail myself of the opportunity to bring forth different facts that would support a claim under the standard that we, the plaintiffs, think is the correct one.

MR. RADINE: We thought the allegations we had were sufficient at the time. The circuit disagreed, I think, on a fairly detailed basis. As opposed to rejecting our theory of knowledge generally, it found fault with specific deficiencies that we can address.

But it's the same reason, just going back to Cortac, that had this Court applied the correct theory and then said, but your facts, you know, like on a detail-by-detail basis

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don't meet that standard, this Court would have ordinarily then given us the opportunity to amend.

So we didn't add -- just to be clear, that general -- that general, allow us to let plaintiffs to replead in that situation was not based on newly discovered evidence. That's based on the Court saying, this is the correct standard, here is where I have identified a couple or

however many deficiencies, so long as the general theory is correct, and can you meet those. We just now have that decision from the circuit in this case, and we believe we can meet those.

THE COURT: Well, my understanding of Second Circuit law was that a change in decisional law is not a basis for 60(b) relief.

MR. RADINE: That would be a change in decisional law in another case.

So once this case ended and then, you know, however many years or whatever down the line a decision comes out that's more favorable for us, then, you know, that's too bad. You take the law as you have it in the case while you are in it; but this is the same case. This is on appeal.

THE COURT: Kaplan came down. It's a different case, correct?

MR. RADINE: Yes, but not only after this lower case had been decided, but after we briefed and argued Honickman above.

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THE COURT: Well, if that were the case, why -- I mean, wouldn't you have expected the Second Circuit to have vacated my decision?

MR. RADINE: The Second Circuit found, I think, ample specific factual deficiencies that it held weren't enough.

It's just as if this Court, again, might have come to the same conclusion, might have had the correct standard, and then directed plaintiffs, if they are able to, to correct those deficiencies. I think it's a different case than if the Second Circuit had said the Court standard is wrong but plaintiffs' theory of liability is off base as well.

Our theory of liability is correct, but there are specific factual allegational deficiencies that the Court identified that we should be able to address.

THE COURT: I mean, I have seen Second Circuit decisions that reverse and remand the district court from further proceedings consistent with their decision.

Here, my understanding is the circuit just said although I, the district court, applied the incorrect standard, we nonetheless affirm the dismissal with prejudice and the judgment that was entered to that effect; and there was no indication that defendant come back for further proceedings or there should be further proceedings.

MR. RADINE: Well, I think that's -- I'm sorry, Your

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Honor.

THE COURT: Okay. I'm just not sure that there is, you know, given the record -- and I did really try to get you all, the plaintiffs' counsel, to take the opportunity to amend even under a standard that you thought was correct. Right?

I mean, your argument now that it would have been futile is your argument, but futility and amendment is a call for the Court, not for the litigant. So if you thought there should be a different standard and that you had facts that support that, then you should have availed yourself of that opportunity.

Because really, this was, you know, talk about the whole issue of encouraging finality of judgment and the exacting high standard for 60(b)(6) relief. It's a very difficult standard to meet.

Even you acknowledge in your papers that this liberal amendment language that you get from Foman versus Davis, et cetera, is really diminished by the fact that you were given the opportunity that you didn't avail yourself.

The other case you cite, either there wasn't a request to amend or -- yes.

So I'm just not sure that you are on very firm ground for a vacatur. I think -- look, I will let the defendant be heard.

MR. RADINE: Could I, Your Honor, just address those

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statements, if I could?

THE COURT: Go ahead.

MR. RADINE: So in the cases we cited, Williams, Foman, and SAIC, and so on, underlying the post-judgment relief was sought on decisions that were

correct. Those were just plaintiffs seeking to add allegations to meet the correct standard from the Court. There was nothing else that was required to overcome the vacatur standard.

The case that goes the other way, Metzler, that we raised in our letter, doesn't disagree with that at all or say those cases are wrongly decided. It just says that where -- and I just want to make sure I'm quoting this correctly -- it says, acknowledges the liberal spirit of Rule 15 and says that it applies where the plaintiff failed to do so repeatedly after having, quote, the benefit of an opinion that, quote, identified the defects that a second amended complaint should cure.

That is an opportunity that plaintiffs are just getting now, but, otherwise, there is nothing about the vacatur standard in the context of amending a complaint post-judgment that requires something more extraordinary than just having sufficient allegations, much less having the correct standard available to plaintiffs to meet. I think ultimately it's a question of fairness, and the Supreme Court's direction to let meritorious claims go forward

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notwithstanding the sort of strange procedural history that this case had.

THE COURT: That's whether the claim is meritorious, not that the claim is per se meritorious. You are correcting the language of the Supreme Court there, because it's, you know, one must be afforded an opportunity to test the claim on the merits; but, I think, as you acknowledge in your letter, both in

Williams and in Foman there was not a request by the plaintiff to amend.

Now, you are trying to say, well, like them, we didn't request to amend; but the details, in my mind and what sticks in my mind, is you were asked twice. Why didn't you just amend? Why didn't you try to fix this situation rather than have the defendant and the Court -- talk about fairness to the defendant -- but to go through and move against this voluminous complaint, why not try to fix it now.

So it's not that you never sought to amend. You were invited; and I don't want to say I begged you to amend, but I certainly encouraged you to think about amending, and twice you said no.

MR. RADINE: Yes, Your Honor.

THE COURT: Anyway, Mr. Radine, did have you anything else before I hear from the defendant?

MR. RADINE: Judge, just to note again that we didn't, of course, know any better than the Court what the

[p.11]

standard would be to amend. We believed we had the correct allegations, and now we have the guidance from the circuit in this case that we should be able to pursue.

And, of course, we are happy to brief that at further length, if the Court wants briefing on this issue; but, aside from that, I will step back and let the defendant speak.

MS. GOLDSTEIN: Thank you, Your Honor. This is Linda Goldstein.

First, I think we need to step back and consider what the state of the law was at each time that the plaintiffs declined the opportunity that it was given to amend. So the first opportunity was at the premotion conference; and at that point, obviously, this Court had not ruled on the motion. We had submitted a premotion conference letter, in which we argued that none of the allegations in the complaint established that Blom was aware of the connection between the alleged customers and Hamas and Hamas' act of terrorism at the time that it provided banking services.

So at that point the plaintiffs knew that Blom was raising a defense that the -- I guess retrospective allegations alleging that information was in the public domain after the time that Blom provided banking services was not sufficient, that plaintiffs had to provide evidence of awareness at the time that the services were provided, and the

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plaintiffs at that point were invited to amend and declined the opportunity to do so.

There was no allegation in our premotion conference letter that there had to be signs of knowledge from Blom employees in order to state a claim.

The second opportunity that plaintiff was given to amend was at the oral argument of the motion, and at that point this Court had not yet issued its decision; and so, there was no erroneous standard that the

plaintiff was being asked to cure. Again, the issue was Blom's awareness and whether there was any allegation of publicly available facts at the time that Blom was providing banking services, you know, prior to the attacks, that connected any of the alleged customers to Hamas' terrorist activities.

Again, plaintiffs declined the opportunity to amend their complaint; and, in fact, plaintiffs' counsel said that we could always allege more facts but chose to rest upon the complaint.

Then, the Court issued its decision; and, Your Honor, I think you are being a little hard on yourself because the decision expressed multiple bases for dismissing of the complaint and multiple bases for finding that the general awareness allegations were deficient. One of those, the Second Circuit held, was not correct, that the plaintiff does not have to allege evidence that Blom employees had read

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publicly available information.

But the Court did hold that there was in fact no allegation of publicly available information prior to the last of the attacks. In fact, that was the basis that the Second Circuit ultimately affirmed on, that there was a lack of evidence that at the time that Blom provided the banking services there was publicly available information connecting any of the three alleged customers to Hamas or to Hamas' terrorist activities.

So I don't accept the premise that plaintiffs were unaware of the standard and of the kinds of facts that

needed to be alleged. Certainly not the first time it declined the chance to amend, certainly not the second time it declined the chance to amend, and then not even after this Court issued its opinion.

What plaintiffs could have done after this Court issued its opinion was what the plaintiffs did in the other cases on which they rely, which is move to vacate and to amend after the judgment was issued; but, again, plaintiffs chose not to do that. They chose instead to appeal, which they certainly had a right to do; but, as part of their appeal, they could have, but did not, challenge the Court's decision not to permit amendment, which the Court addressed in its opinion when it held that it was dismissing the complaint with prejudice.

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I guess, finally, plaintiffs could have, in the course of their appeal, you know, said to the Second Circuit, and if you reject the standard we want a chance to plead additional facts, which was done in the Schwab case that we cited in our opposition to plaintiffs' request for a premotion conference.

So effectively, Your Honor, we are saying that there were four separate chances that they had, either to tell this Court or the Second Circuit, that there were additional facts that could cure the deficient general awareness standard, and they never chose to do so.

There is no basis to distinguish this case from the cases that we cited holding that a change in decisional law is not a basis for 60(b) relief. First, because we don't think that there was, in a material respect, a

change in the law because this Court held that there was no publicly available information at the time of the services, and that is what the Second Circuit ultimately affirmed on.

Second, all of the cases permitting vacatur and amendment that we have been able to find, and certainly that the plaintiffs have cited, involved requests that were made prior to an appeal. So we have now had an appeal, plaintiffs had a chance to make the arguments that they are making now to the Second Circuit. The Second Circuit could have determined whether vacatur and remand was appropriate during the appeal,

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but they didn't do that. So it's simply too late.

I guess my final point, Your Honor, is if one were to accept that there was a change in the law, in the Second Circuit's opinion, which, I should point out, affirmed this Court's decision dismissing the case, then essentially you are opening the door to this kind of post-appeal amendment whenever the circuit affirms the dismissal of a complaint on somewhat different reasoning than was used by the district Court. We submit that there is absolutely nothing in 60(b) that suggests that that would be appropriate.

THE COURT: Thank you. I guess my question is this. I am wondering if the parties want to treat their premotion conference letters as a fully briefed motion to vacate and to amend, because this case was filed in 2019. Both parties have spent tremendous amounts of time both drafting the complaint -- which, again, it's a

very sympathetic set of facts, and it was very difficult to think about the plaintiffs' allegations and sort of set those very compelling facts to the side while we consider the legal issues.

But now we have another complaint that is voluminous, again, and it seems to me the legal issues are fairly straightforward. I'm just very reluctant.

I don't -- I tend to think here that defense are correct on a procedural ground on whether or not this liberal amendment casewise is really applicable in this situation

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here, given the plaintiffs' litigation decisions, which they probably now regret somewhat.

MR. RADINE: Your Honor, this is Michael Radine.

We would, just to resort back, we think that the issue requires a little further briefing. I think it's more complicated. We did not have a chance to respond.

Of course, there was no reply letter under Your Honor's rules, and we didn't get a chance to respond to some of these arguments made by defendant, such as that the law didn't change, which is definitely not right, or that we passed up an opportunity to amend post-judgment but pre-appeal, when the law of this case would be that we would have to show acts or statements by Blom employees, which we could not do then and could not do now.

I think it's worth elaborating a little further in a brief. We propose 15 pages for the parties and a short reply from plaintiffs to set this out.

I don't think defendants have produced any case law saying that this is procedurally improper. I understand that they want out of this case, and I think we have very compelling allegations that would be worrisome to them; but, I think, in service to our clients, they should have the opportunity to hear their case on the merits, and we would like the opportunity to brief that for the Court.

MS. GOLDSTEIN: Your Honor, if I might, Mr. Radine's

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comments reminded me of one point I had neglected to make a moment ago, which is futility.

Contrary to what counsel just suggested, we are not at all concerned by the allegations raised in the proposed amended complaint. We think that they are futile, that there are essentially no new allegations about two of the alleged customers, Sanibal and Subul al-Khair. Essentially, plaintiffs have added a bunch of pejorative adjectives to describe the cash withdrawals that were already alleged at length in the dismissed complaint.

With respect to Union of Good, the third alleged customer, plaintiffs have backtracked that the customer was not in fact Union of Good, which is an entity that was designated by the Treasury Department in 2008, but it was in fact a different

entity that was the Blom customer, an entity called the Zakat Fund; and there is no allegation that the Zakat Fund was ever designated by the Treasury Department and there is no allegation in the proposed amended complaint that there was any publicly available information linking the Zakat Fund to Hamas at the time that Blom provided, allegedly provided banking services to it. Nor were there any allegations about what those banking services consisted of.

So, contrary to counsel's suggestion, but we are not at all concerned about the amendments. We think it would be futile, and that would be a separate ground for denying the

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motion.

MR. RADINE: Sorry. This is Michael Radine. Sorry for jumping in there.

I think the mischaracterization of our allegations is all that was, and is all the more reason to brief this out thoroughly.

We specifically answered the Second Circuit's questions about whether Blom would have investigated the recipients to who the transactions were coming from; that the Israeli designations of those entities were publicized in the press; and that their own due diligence procedures would have noticed the unusual conduct of a nonprofit organization, its large cash withdrawals.

The Zakat committee, obviously, was wrong too. The Zakat Committee's website showed a picture of Sheikh Yassin, the leader of Hamas, and many, many statements about how they supply money to support the Palestinian jihad from their Blom account to liberate Palestine from the American Jew, so on, so forth, on their website.

It's this topic and the misconstrual of it that, we think, speaks all the more to the fact that this should be briefed properly.

THE COURT: Well, sir, did you raise arguments about a legal standard that you didn't raise before me in the district court? I'm just not familiar with your briefing in

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the circuit; but I just have a hard time accepting your statement that you decided that the fact that you are now proffering would have been futile because you thought the standard was -- you accepted a certain standard, but, as a lawyer, both in the district court and the circuit, did you raise a whole panoply of standards and did you make arguments on the law to the circuit that you didn't make before me?

MR. RADINE: I don't think so, Your Honor. I'm not sure if I fully understand it, but we argued before -- I mean, our argument has been that the Halberstam foreseeability standard governs general awareness; that knowledge, that I believe I said during oral argument, that knowledge could be inferred from publicly available sources as opposed to having to show a bank's specific knowledge of a fact.

I think we have been consistent in our arguments, and we certainly thought our complaint covered those bases.

Kaplan was discussed. It had just come out in a lower court decision after briefing but before oral argument; and I believe I said in oral argument that the Kaplan standard was incorrect; but, when it was adopted in this Court's decision, it took on the knowledge standard from the lower court in Kaplan that we could not have met. We couldn't meet it now, again.

I don't have allegations about what Blom Bank saw. This Kaplan case includes the due diligence allegations that

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we have included in our complaint. Those were rejected in Kaplan as well. It would have been an unmeetable standard.

As I mentioned before, we thought and believed until the Second Circuit corrected us that our complaint met the correct standard. The Second Circuit disagreed as to specific allegations.

The ones I mention now are ones that relate to specific deficiencies that the Second Circuit noted, as in the Second Circuit found it was a close call as opposed to, again, rejecting our theory of knowledge, it found specific problems that we can correct; and that is the role of post-dismissal amendment, is to correct specific factual problems. We have those now, after the Second Circuit decision, and should be able to correct them.

THE COURT: Okay.

MS. GOLDSTEIN: Again, Your Honor, if there were additional facts that counsel wanted to proffer, that the time to do that would have either been at the initial conference, at the oral argument, after this Court issued its opinion, or before the Second Circuit. It's simply hindsight is 20/20.

To say that it was -- it would have been futile to raise those points then because the first two times this Court had not articulated any standard, and then when this Court did articulate a standard it made it clear that the key issue was public availability of information at the time the services

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were provided, which the Second Circuit affirmed was correct.

So, that was an issue on the appeal, and it was an issue before, in the briefing before Your Honor. So it did not come out of the blue. It was not an unanticipated issue.

It was one of many, many defects that were briefed in the original complaint, and the fact that the Court of Appeals disagreed with this Court on whether there needed to be knowledge or demonstration of knowledge by Blom is really irrelevant to that more fundamental defect, that there was no contemporaneous public information from which general awareness could be inferred.

So, respectfully, the argument that amendments would have been futile before is really smoke and mirrors.

THE COURT: All right. Does plaintiffs' counsel have anything else to say?

MR. RADINE: No, Your Honor.

Obviously, we felt that we had and wanted to recount for the Court, but we made our publicly available allegations before, which is to say we didn't think we didn't need them, obviously. And then, in terms of what defendant wrote in their premotion letter for motion to dismiss, we didn't feel the need to change that, certainly not after the decision in this case but only upon the appeal when the standard was changed.

We think that this is worth, given this unusual

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situation, briefing this issue. Again, we propose a 15-page brief for us, for them, and then a short reply from us to give the Court everything, if Your Honor needs analysis.

THE COURT: Just let me issue a vacatur, you wanted to speak to that. We are not going to go into the amendment, because I think we should take it one step at a time.

Do you agree?

MR. RADINE: That's fine with us, Your Honor.

THE COURT: Is it all right with you, Ms. Goldstein, on behalf of the defendant?

MS. GOLDSTEIN: Yes, Your Honor.

THE COURT: So I'm not sure I want 15 pages as a limit, just because there is a lot of procedural history here. I think Ms. Goldstein's timeline was very helpful that she just laid out. Laying that out may take a lot of pages, but.

I'm happy to hear from the -- we can do it one of two ways. We could either have simultaneous submissions and then simultaneous responses, so we don't have three sets of papers. That would be my preference.

Or, we can just do it in the traditional way.

MS. GOLDSTEIN: I would be happy to do the first alternative, Your Honor, simultaneous submissions and simultaneous responses.

THE COURT: I mean, that way everybody gets what they would feel is the last word to their opponent's

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submissions. Doesn't that make sense?

MR. RADINE: Your Honor, this is Michael Radine.

Of course, we prefer the traditional three-brief structure.

I this it's important that everything is characterized correctly. I think that structure -- I don't want to

disagree with the Court on what benefits it, but I think it's the more fair to use the normal structure on this.

THE COURT: Respectfully, I think you have had a lot of opportunity to present your arguments; and I think this way you can lay out your best arguments for vacating the judgment, and you will have an opportunity to respond to the defendant's opposition to that request.

I think we can get to the point where we can hopefully decide this sooner rather than later.

MS. GOLDSTEIN: If I might, Your Honor.

I guess the implied premise of structuring things this way is that if the Court were to grant the motion for vacatur we would then have a separate set of briefings on whether amendment was appropriate.

THE COURT: Yes.

MR. RADINE: Okay. So plaintiffs certainly appreciate the preference of the Court for simultaneous briefings. I understood it a set of briefs due on the same day, and then at some point after that a set of responsive

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briefs due from both parties on the same day.

THE COURT: Yes. That way everyone will have an opportunity to respond to their opponent's argument; and it would be helpful for me to get that response and to understand the argument that you want to make based on the law and the record.

MR. RADINE: Okay, Your Honor. Sure. We are happy to do that.

THE COURT: All right. Ms. Goldstein, did you have -- you sounded a little hesitant or maybe concerned.

Did you want to do all the briefing on both?

MS. GOLDSTEIN: No, no. I just wanted to make sure that I wasn't waiving anything, but I'm fine proceeding in this way, Your Honor.

THE COURT: I think we should. I think it makes sense to do it this way because if I grant the motion, then there will be a second set of motions regarding whether or not it's appropriate to grant the plaintiffs' request to amend.

If I deny the motion to vacate the judgment, then that's the end of it and nobody will have to brief the amendment.

So let's talk about scheduling. When do the parties think they would want to make their submissions, only on vacating the judgment?

MR. RADINE: We could do the usual 30-day window for

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the first round?

THE COURT: Okay.

MR. RADINE: Let's see. On the 5th. That would be November 5, for the first round.

THE COURT: All right.

MS. GOLDSTEIN: Can I just ask to push that back by a few days?

THE COURT: Yes.

MS. GOLDSTEIN: I have a few competing obligations. Could we say the following week, November 12?

THE COURT: All right. That's fine, November 12.

Then your oppositions to file your responses?

MR. RADINE: I'm only thinking about Thanksgiving here. The 25th.

THE COURT: There is always going to be a holiday. That's my philosophy.

MR. RADINE: That's true. That's true. Yeah, December 1st?

MS. GOLDSTEIN: That's fine.

THE COURT: How about December 3rd, just so you have three weeks? Okay? Is that all right with everybody, December 3?

MR. RADINE: That works for us, Your Honor.

MS. GOLDSTEIN: That's fine.

THE COURT: Okay. Thank you.

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If I decide I need something more, I will let you know, but I doubt it.

MR. RADINE: Thank you, Your Honor.

MS. GOLDSTEIN: Thank you, Your Honor.

THE COURT: All right. Thank you, everybody. Stay well. Bye.

MS. GOLDSTEIN: Bye-bye.

MR. RADINE: Sure.

(End of proceedings.)

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Certified to be a true and accurate transcript.
/s/ Michele Nardone
MICHELE NARDONE, CSR -- Official Court Reporter

APPENDIX H

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 22-4

[Filed December 8, 2023]

GEORGE MANDALA AND CHARLES BARNETT, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, Plaintiffs-Appellants,	)
v.	)
NTT DATA, INC., Defendant-Appellee.	)

August Term, 2022
Argued: May 4, 2023
Decided: December 8, 2023

Before: KEARSE, JACOBS, and SULLIVAN, Circuit Judges.

This appeal arises from the denial of plaintiffs' motion to vacate the judgment of dismissal and for leave to file a first amended complaint. The United States District Court for the Western District of New York (Siragusa, J.) construed plaintiffs' motion as arising under Federal Rule of Civil Procedure 60(b)(1) and denied the motion as untimely per the applicable

one-year filing window. The court held in the alternative that plaintiffs' motion fails under Rule 60(b)(6), which does not have a strict time limit, but which requires a showing of extraordinary circumstances to merit relief from judgment. For the reasons explained herein, we conclude that Rule 60(b)(1) is inapplicable, and the unique facts of this case necessitate post-judgment relief under Rule 60(b)(6). Accordingly, we **REVERSE** the denial of Plaintiffs' motion to vacate the judgment of dismissal and for leave to file a first amended complaint, and **REMAND** for further proceedings consistent with this opinion.

Judge Sullivan dissents in a separate opinion.

CHRISTOPHER MCNERNEY (Ossai Miazad, on the brief), Outten & Golden LLP, New York, NY, and TIFFANI BURGESS (Samuel Spital and Rachel M. Kleinman, on the brief), NAACP Legal Defense & Educational Fund, Inc., New York, NY, for Plaintiffs-Appellants.

JACQUELINE P. POLITO (Abigail L. Giarrusso, on the brief), Littler Mendelson, P.C., Fairport, NY, for Defendant-Appellee.

DENNIS JACOBS, Circuit Judge:

The appeal in this Title VII suit challenges the denial of a motion to vacate the judgment of dismissal and to file a first amended complaint. After the complaint was dismissed for failure to state a claim,

plaintiffs pursued a hotly contested appeal, which resulted in a split panel decision in this Court affirming the dismissal, and an in banc petition that was ultimately denied over the dissent of five judges. Plaintiffs then asked the district court to vacate the judgment of dismissal so they could (attempt to) cure the pleading deficiencies.

Construing plaintiffs' vacatur request as arising from their own "mistake, inadvertence, surprise, or excusable neglect" under Federal Rule of Civil Procedure 60(b)(1), the district court denied the motion—brought twenty months after entry of the judgment of dismissal—as untimely under the one-year filing window that governs Rule 60(b)(1). The court held in the alternative that under Rule 60(b)(6), which requires only that the motion be brought within a reasonable time, no extraordinary circumstances entitle plaintiffs to relief from judgment.

On appeal, plaintiffs argue that their motion falls outside the scope of Rule 60(b)(1) and instead must be analyzed under the catchall provision of Rule 60(b)(6). Plaintiffs further contend that this case is among the few that justifies relief from final judgment under 60(b)(6), and the district court exceeded the bounds of its discretion in concluding otherwise. We agree on both counts.

BACKGROUND

I

In 2017, George Mandala and Charles Barnett ("Plaintiffs") applied for jobs at NTT Data, Inc. ("NTT"), one of the world's largest information technology

service providers. Mandala applied to be a salesforce developer and was hired after his last round of interviews. Upon accepting NTT's offer, Mandala authorized the company to run a routine background check. A week later, a representative from NTT informed Mandala that the company had a policy against hiring individuals with a felony conviction. A letter followed, withdrawing his job offer. Mandala then filed a Charge of Discrimination with the U.S. Equal Employment Opportunity Commission ("EEOC"), and a year later, in May 2018, the EEOC issued Mandala a Notice of Right to Sue.

Charles Barnett had a similar experience. In July 2017, NTT contacted Barnett regarding an opportunity to contract as a web developer for the Commonwealth of Kentucky. Barnett, who had an associates degree and a masters in the field of computer science, had previously worked for the Commonwealth of Kentucky as an administrative specialist performing IT and other services. He applied for the role with NTT, was offered the position, and accepted. Barnett then authorized NTT to run a background check. As with Mandala, NTT withdrew Barnett's offer of employment when the check turned up a prior conviction. Barnett tried to apply for other contracting positions overseen by NTT, but the company informed him that it would not consider his applications.

II

In August 2018, Mandala and Barnett filed a putative class action against NTT, asserting a claim of disparate impact discrimination under Title VII of the

Civil Rights Act of 1964, 42 U.S.C § 2000e et seq., as well as state law claims under New York's human rights and general business laws.

The gist of the Title VII claim is that NTT's blanket practice of refusing to employ people with felony convictions disproportionately harms Black applicants because Black people are arrested and incarcerated at higher rates than others. The Complaint cites reports by the Department of Justice, Census Bureau, and EEOC, and it references studies showing that: Black people who made up 13% of the U.S. population in 2010 constituted 40% of the U.S. prison population at that time; that an estimated one out of every three Black males born today will go to prison, compared to just one out of every seventeen white males; and that Black applicants with criminal records are more disadvantaged in the job market as compared to other applicants. Compl. ¶¶ 52–54.

The United States District Court for the Western District of New York (Siragusa, J.) dismissed the Complaint for failure to state a claim of disparate impact under Title VII, presumably with prejudice.[1] See Mandala v. NTT Data, Inc. ("Mandala I"), No. 18-CV-6591, 2019 WL 3237361, at *4 (W.D.N.Y. July 18, 2019). The court discounted the "general statistics" cited in the Complaint as "inadequate to show" a

[1] Neither the opinion nor the judgment expressly stated that the dismissal was with prejudice. However, that is the relief NTT sought in its motion to dismiss, and the court granted the motion in its entirety, and then directed the clerk's office to enter judgment for NTT and close the case. The court also declined to exercise supplemental jurisdiction over the state law claims.

"statistical disparity in the numbers of African-Americans arrested and convicted of crimes in proportion to their representative numbers *in the pool of qualified applicants for [NTT's] positions*." Id. at *3–4 (emphasis added). Plaintiffs timely appealed.

A split panel of this Court affirmed. See Mandala v. NTT Data, Inc. ("Mandala II"), 975 F.3d 202 (2d Cir. 2020). The majority agreed with the district court that "the statistical analysis [set forth in the Complaint]" did not "focus on the disparity between appropriate comparator groups," id. at 210 (citing Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 651 (1989))—i.e., individuals who possess the necessary "educational and technical qualifications to work at NTT," id. at 212. Recognizing, however, that such granular data may be impossible to collect without discovery, the majority suggested that the Complaint might have survived dismissal if it had contained allegations explaining "why their chosen national statistics are in fact likely to be representative of NTT's qualified applicant pool." Id. at 212. The dissent countered that "the national statistics and other facts alleged by [P]laintiffs were sufficient" to withstand a motion to dismiss a disparate impact claim; and that the district court (and the majority) erroneously held the Complaint to the higher standards for *proving* such a claim. Id. at 215 (Chin, J., dissenting).

Plaintiffs' subsequent petition for rehearing in banc was denied, eliciting opinions both in support and in

opposition to rehearing.[2] See Mandala v. NTT Data, Inc. ("Mandala III"), 988 F.3d 664 (Mem.) (2d Cir. 2021). Several of the opinions referenced an amicus brief in support of rehearing filed by a group of criminology and sociology professors, which identified a study suggesting that racial disparities in the rates of imprisonment persist as education levels rise. See Br. for Megan C. Kurlychek et al. as Amici Curiae Supporting Appellants at 8–9, Mandala III, 988 F.3d 664 (No. 19-2308). Judges opposing rehearing in banc acknowledged that the amici's data "might have rendered Plaintiffs' claims plausible," but pointed out that the study predated the filing of the Complaint and was publicly available, so Plaintiffs could have cited it. Mandala III, 988 F.3d at 668 (Sullivan and Nardini, JJ., concurring in the order denying rehearing in banc). One dissenting opinion, signed by four judges, encouraged Plaintiffs to seek vacatur and leave to file an amended complaint. Id. at 671 (Pooler, J., dissenting from the order denying rehearing in banc). That is what Plaintiffs did.

In March 2021, just a few weeks after in banc rehearing was denied, Plaintiffs moved the district court to vacate the judgment dismissing the Complaint under Federal Rule of Civil Procedure 60(b) and for leave to file a first amended complaint under Rule 15.[3]

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[2] Five judges concurred by opinion in the denial of rehearing; five judges dissented by other opinions.

[3] As a matter of procedure, "[a] party seeking to file an amended complaint post[-]judgment must first have the judgment vacated or set aside pursuant to Fed. R. Civ. P. 59(e) or 60(b)." Ruotolo v. City of New York, 514 F.3d 184, 191 (2d Cir. 2008) (citation

Plaintiffs sought vacatur under Rule 60(b)(6). The district court, however, viewed the motion as being "premised on their own mistake, inadvertence, and neglect"—the specific grounds listed in Rule 60(b)(1). Mandala v. NTT Data, Inc. ("Mandala IV"), No. 18-CV-6591, 2021 WL 5771154, at *5 (W.D.N.Y. Dec. 6, 2021); see Fed. R. Civ. P. 60(b)(1). This distinction is crucial: while a 60(b)(1) motion to vacate must be filed within one year of entry of the judgment, a 60(b)(6) motion need only be made within a "reasonable time." Fed. R. Civ. P. 60(c)(1). Noting that Plaintiffs' motion came one year and eight months after the judgment of dismissal was entered, the district court denied it as untimely under Rule 60(b)(1). Mandala IV, 2021 WL 5771154, at *5. The court further held that, even if considered under Rule 60(b)(6), the motion would fail on the merits. Id. at *5–6. Plaintiffs challenge both rulings on appeal.

DISCUSSION

"A denial of a motion to vacate a judgment under Rule 60(b) is reviewed for abuse of discretion," Ruotolo, 514 F.3d at 191 (citation omitted), as is a "district court's denial of a post-judgment motion for leave to replead," Metzler Inv. GmbH v. Chipotle Mexican Grill, Inc., 970 F.3d 133, 142 (2d Cir. 2020) (internal quotation marks and citation omitted). "Under this standard, we must affirm the . . . denial of vacatur,

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omitted). Rule 60(b) contains six subsections: (1)-(5) identify specific grounds for reopening a judgment, and (6) is a catchall provision for "any other reason that justifies relief." Fed. R. Civ. P. 60(b).

unless the ruling is based on an erroneous view of the law or on a clearly erroneous assessment of the evidence." Rodriguez v. Mitchell, 252 F.3d 191, 200 (2d Cir. 2001) (internal quotation marks, citation, and alteration omitted). On the facts of this case, we conclude that the district court abused its discretion in analyzing Plaintiffs' vacatur motion under Rule 60(b)(1), and in denying Plaintiffs relief from final judgment under Rule 60(b)(6).

I

"Rule 60(b)(1) and Rule 60(b)(6) are 'mutually exclusive,' such 'that any conduct which generally falls under the former cannot stand as a ground for relief under the latter.'" Stevens v. Miller, 676 F.3d 62, 67 (2d Cir. 2012) (quoting United States v. Cirami, 535 F.2d 736, 740 (2d Cir. 1976)). Thus, "[w]here a party's Rule 60(b) motion is premised on grounds fairly classified as mistake, inadvertence, or neglect, relief under Rule 60(b)(6) is foreclosed." Id. (citing Klapprott v. United States, 335 U.S. 601, 614 (1949)). Proper characterization of Plaintiffs' Rule 60(b) motion is a threshold issue because, as previously explained, the two provisions are subject to different filing limitations: Rule 60(b)(1) has a one-year window that runs from the entry of judgment; Rule 60(b)(6) requires only that the motion be brought within a "reasonable time." Fed. R. Civ. P. 60(c)(1).

The district court construed Plaintiffs' vacatur motion as "premised on their own mistake, inadvertence, and neglect" because their Complaint "did not meet a well-settled standard." Mandala IV, 2021 WL 5771154, at *5. Although the Complaint was

found to have failed to state a claim, insufficient pleading is not categorically a "mistake," and Plaintiffs' belief that their Complaint satisfied the standards for pleading a disparate impact claim was well-founded, even if ultimately erroneous.

To start, the ground for dismissing the Complaint—that racial disparities in national arrest and incarceration rates do not necessarily persist among persons with the skill set required for the jobs in question—is not self-evident. Skills are acquired by adults; nobody is born with a resume. Every qualified candidate for employment was once a kid, youngster, and teenager. Plaintiffs reasonably could have assumed that they need not allege the persistence of disparate patterns of arrest and conviction among people seeking skilled employment, because even skilled persons are assumed to have lived life before becoming credentialed.

Plaintiffs likewise could have assumed that they did not need to search out and plead a study to that effect, because it is abnormal to require the pleading of evidence in a complaint. See Arista Records LLC v. Doe 3, 604 F.3d 110, 120 (2d Cir. 2010) (stating plausibility "simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegality") (alteration omitted) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556 (2007)); Deravin v. Kerik, 335 F.3d 195, 200 (2d Cir. 2003) ("[T]his Court has repeatedly warned that the pleading requirements in discrimination cases are very lenient, even de minimis." (internal quotation marks and citation omitted)); Gordon v. City of New York, No. 14

Civ. 6115, 2016 WL 4618969, at *4 (S.D.N.Y. Sept. 2, 2016) ("A plaintiff need not plead facts sufficient to establish a prima facie case in his complaint in order to survive a motion to dismiss." (internal quotation marks and citation omitted)); see also Adkins v. Morgan Stanley, No. 12 Civ. 7667, 2013 WL 3835198, at *10 (S.D.N.Y. July 25, 2013) ("Plaintiffs' allegations . . . are sufficient to give notice to [defendant] of[ ]a plausible claim of disparate impact. Whether those statistics may prove insufficient at a later date is not now a question before this court."); Jenkins v. N.Y.C. Transit Auth., 646 F. Supp. 2d 464, 469 (S.D.N.Y. 2009) ("It would be inappropriate to require a plaintiff to produce statistics to support her disparate impact claim before the plaintiff has had the benefit of discovery." (citation omitted)).

Moreover, as far as we can tell, no Second Circuit case decided prior to Plaintiffs' suit had applied the standard requiring granular statistical comparators at the pleading stage of a Title VII disparate impact suit. It appears that every Supreme Court and Second Circuit case discussing the subject had been decided after discovery or even after trial.[4]

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[4] See City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (bench trial); Wards Cove, 490 U.S. at 648 (bench trial); Dothard v. Rawlinson, 433 U.S. 321 (1977) (three-judge bench trial); Hazelwood Sch. Dist. v. United States, 433 U.S. 299 (1977) (bench trial); Chin v. Port Auth. of N.Y. & N.J., 685 F.3d 135 (2d Cir. 2012) (post-trial judgment as a matter of law); Wharff v. State Univ. of N.Y., 413 F. App'x 406 (2d Cir. 2011) (summary order) (summary judgment); Lomotey v. Ct.-Dep't of Transp., 355 F. App'x 478 (2d Cir. 2009) (summary order) (summary judgment); Malave v. Potter, 320 F.3d 321 (2d Cir. 2003) (summary judgment);

And when this Court was called upon to review the sufficiency of the Complaint, our decision affirming dismissal elicited a vigorous dissent, which argued, among other things, that "the national statistics and other facts alleged by [P]laintiffs were sufficient . . . to meet [the] minimal burden" of pleading a disparate impact claim. Mandala II, 975 F.3d at 215 (Chin, J., dissenting). The denial of Plaintiffs' petition for rehearing in banc was also closely contested, with five judges of this Court arguing in favor of rehearing. See Mandala III, 988 F.3d at 664.

The circumstances distinguish this case from the typical Rule 60(b)(1) cases, which characteristically involve mistakes that amount to a fumble. See, e.g., Miller, 676 F.3d at 65, 68 (government let its time to appeal expire due to failure to check docket); Warren v. Garvin, 219 F.3d 111, 114–15 (2d Cir. 2000) (plaintiff failed to raise claim within statute of limitations window due to neglect); see also Arrieta v. Battaglia, 461 F.3d 861, 864–65 (7th Cir. 2006) (plaintiff voluntarily moved to dismiss an action that then could not be refiled due to the expiration of the statute of limitations). Plaintiffs' decision to stand by a pleading deemed to be sufficient by several judges of this Court cannot seriously be considered a mistake within the meaning of Rule 60(b)(1).

Guardians Ass'n of N.Y.C. Police Dep't, Inc. v. Civil Serv. Comm'n of City of N.Y., 630 F.2d 79 (2d Cir. 1980) (bench trial); Jones v. N.Y.C. Human Res. Admin., 528 F.2d 696 (2d Cir. 1976) (bench trial).

Finally, even if we were to accept the district court's view that Plaintiffs' vacatur motion arises from a legal mistake based on insufficient pleading, Rule 60(b)(1) would be inapplicable. When post-judgment relief is sought for the purpose of curing a pleading deficiency, this Court typically applies Rule 60(b)(6) to consider whether the circumstances warrant vacatur. See, e.g., Ind. Pub. Ret. Sys. v. SAIC, Inc., 818 F.3d 85, 92–93 (2d Cir. 2016) (vacating in part denial of motion under Rule 60(b)(6) where plaintiff's proposed amendment to bolster securities claim would not have been futile); LeBlanc v. Cleveland, 248 F.3d 95, 100 (2d Cir. 2001) (vacating denial of motion under Rule 60(b)(6) where movant sought amendment to drop non-diverse co-plaintiff); see also Strategic Cap. Dev. Grp., Ltd. v. Sigma-Tau Pharms., Inc., Nos. 98-7144, 99-7364, 1999 WL 973313, at *1 (2d Cir. Sept. 23, 1999) (unpublished) (vacating denial of vacatur motion under Rule 60(b)(6) where plaintiff sought first opportunity to replead soon after entry of judgment). So, while some kinds of legal error are properly analyzed under 60(b)(1), see, e.g., Nemaizer v. Baker, 793 F.2d 58, 62 (2d Cir. 1986) (plaintiff did not contemplate or understand the breadth of his voluntary stipulation of dismissal), a vacatur motion that seeks to rectify a deficient pleading warrants consideration of the circumstances under 60(b)(6).

We therefore conclude that Plaintiffs' motion to vacate the judgment of dismissal in order to file a first amended complaint cannot fairly be classified as falling within the scope of Rule 60(b)(1) rather than Rule 60(b)(6). See United Airlines, Inc. v. Brien, 588 F.3d 158, 176 (2d Cir. 2009) (holding vacatur motion "is not

easily categorized as 'mistake' or 'inadvertence' under Rule 60(b)(1), and it should therefore be allowed to proceed under Rule 60(b)(6)"). The district court thus clearly erred in denying the motion as untimely under the one-year limit of 60(b)(1).

II

A

Rule 60(b)(6) "grants federal courts broad authority to relieve a party from a final judgment upon such terms as are just, provided that the motion is made within a reasonable time and is not premised on one of the grounds for relief enumerated in clauses (b)(1) through (b)(5)." Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 863 (1988) (internal quotation marks and citation omitted). "[I]t constitutes a grand reservoir of equitable power to do justice in a particular case." Matarese v. LeFevre, 801 F.2d 98, 106 (2d Cir. 1986) (internal quotation marks and citation omitted). "But that reservoir is not bottomless." Miller, 676 F.3d at 67. Relief under Rule 60(b)(6) is reserved for cases that present "extraordinary circumstances." Liljeberg, 486 U.S. at 863–64 (quoting Ackermann v. United States, 340 U.S. 193 (1950)).

When vacatur is sought in order to obtain leave to file an amended complaint, special considerations come into play. See Williams v. Citigroup Inc., 659 F.3d 208, 212 (2d Cir. 2011) (per curiam). "In the ordinary course, the Federal Rules of Civil Procedure provide that courts 'should freely give leave' to amend a complaint 'when justice so requires.'" Id. (quoting Fed. R. Civ. P. 15(a)(2)). "Where, however, a party does not

seek leave to file an amended complaint until after judgment is entered, Rule 15's liberality must be tempered by considerations of finality." Id. at 213. So, on a post-judgment motion for vacatur and leave to amend, "due regard" must be given to *both* the "philosophy favoring finality of judgments and the expeditious termination of litigation," and the "liberal amendment policy of Rule 15(a)." Id. (internal quotation marks and citations omitted). After all, the "'whole purpose' of Rule 60(b) 'is to make an exception to finality,'" Buck v. Davis, 580 U.S. 100, 126 (2017) (quoting Gonzalez v. Crosby, 545 U.S. 524, 529 (2005)), and the Rule is "designed to afford parties an opportunity to resolve a dispute on its merits," Nemaizer, 793 F.2d at 63.

"In the post-judgment context, we have . . . given 'due regard' to 'the liberal spirit of Rule 15' by ensuring plaintiffs at least one opportunity to replead." Metzler, 970 F.3d at 146 (quoting Williams, 659 F.3d at 213–14). In most if not all Second Circuit cases denying post-judgment leave to replead, the plaintiff had already taken at least one shot at amendment. See id. at 145 (affirming denial of motion to file third amended complaint); see also Schwartz v. HSBC Bank USA, N.A., 750 F. App'x 34, 35 (2d Cir. 2018) (summary order) (affirming denial of motion to file third amended complaint); Smith v. Hogan, 794 F.3d 249, 256 (2d Cir. 2015) (affirming denial of motion seeking reconsideration for the second time and leave to file a second amended complaint). This makes sense: when a plaintiff already had multiple chances to state a claim, there is little risk of manifest injustice in denying yet another go. See Metzler, 970 F.3d at 147

("[A] plaintiff afforded attempt after attempt . . . might one day succeed in stating a claim[,] [b]ut the federal rules and policies behind them do not permit such limitless possibility.").

Plaintiffs here seek to file a first amended complaint. In that event, "it is an abuse of discretion to deny" post-judgment relief, Metzler, 970 F.3d at 144, "without any justifying reason," such as "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [or] futility of amendment," Foman v. Davis, 371 U.S. 178, 182 (1962).[5]

B

In denying the vacatur motion, the district court "applied a standard that overemphasized considerations of finality at the expense of the liberal amendment policy embodied in the Federal Rules of Civil Procedure" and this Court's "strong preference for resolving disputes on the merits." See Williams, 659 F.3d at 210, 212–13 (internal quotation marks and citation omitted). Prior to the filing of the vacatur motion, Plaintiffs had neither requested nor been afforded a first opportunity to replead, and the district court had dismissed their Complaint under Rule

[5] The dissent argues that the district court did indeed provide a "justifying reason" for denying leave to amend. In circular fashion, it identifies the "justifying reason" for denying post-judgment relief as the failure to demonstrate adequate grounds for relief under Rule 60. Q.E.D.

12(b)(6) with prejudice. Rather than weighing this posture as a factor that favors relief from judgment, the district court faulted Plaintiffs for failing to seek such relief earlier. The court reasoned that Plaintiffs were on notice of the potential insufficiency of their allegations based on the arguments "raised both in NTT's motion papers and during oral argument" on the motion to dismiss, but Plaintiffs made a "strategic decision" "to stand by their original complaint" and "test the theory of law that they believed to be proper." Mandala IV, 2021 WL 5771154, at *6–8. Second Circuit precedent makes clear, however, that the failure to seek leave to amend pre-judgment, standing alone, does not constitute undue delay or otherwise justify denying relief from judgment for a plaintiff seeking to file a first amended complaint. See Williams, 659 F.3d at 214.

In Williams, the district court dismissed the original complaint with prejudice for failure to state a claim, and the plaintiff then filed a motion seeking relief under Rules 60 and 15 to remedy the pleading defects identified in the dismissal order. Id. at 211–12. The requested relief was denied principally on the grounds that the plaintiff failed to "explain why she should be granted leave to replead at this stage when she failed to request an opportunity to replead in the first instance." Id. at 212. On appeal, we ruled that the court's reasoning could not be reconciled with the Supreme Court's decision in Foman v. Davis. Id. at 214. Although the Foman plaintiff had not sought leave to file an amended complaint prior to the district court's entry of judgment, the Supreme Court held that the denial of the plaintiff's post-judgment motion to replead

lacked any "justifying reason" and vacated the lower court's ruling. 371 U.S. at 182. Consistent with Foman, Williams concluded that the denial of relief solely for failure to seek amendment pre-judgment was "not a proper exercise of the district court's discretion." 659 F.3d at 214.

This Court has applied Williams and Foman in the Rule 15 context to hold that, in the absence of a valid rationale like undue delay or futility, it is improper to simultaneously dismiss a complaint with prejudice under Rule 12(b)(6) and deny leave to amend when the district court has not adequately informed the plaintiffs of its view of the complaint's deficiencies. See Loreley Fin. (Jersey) No. 3 Ltd. v. Wells Fargo Sec., LLC, 797 F.3d 160, 189–90 (2d Cir. 2015) (vacating denial of leave to amend); Cresci v. Mohawk Valley Cmty. Coll., 693 F. App'x 21, 25 (2d Cir. 2017) (summary order) (reversing denial of leave to amend); see also Noto v. 22nd Century Grp., Inc., 35 F.4th 95, 107 (2d Cir. 2022) ("[T]his circuit strongly favors liberal grant of an opportunity to replead after dismissal of a complaint under Rule 12(b)(6)." (internal quotation marks and citation omitted)); Attestor Value Master Fund v. Republic of Argentina, 940 F.3d 825, 833 (2d Cir. 2019) (noting the Second Circuit has been "particularly skeptical of denials of requests to amend when a plaintiff did not previously have a district court's ruling on a relevant issue"); 421-A Tenants Ass'n, Inc. v. 125 Court St. LLC, 760 F. App'x 44, 51 (2d Cir. 2019) (summary order) (stating "it is often improper to deny leave to amend" when "the plaintiff lacks the benefit of a ruling from the court" (internal quotation marks and citation omitted)).

Loreley is instructive. There, at a pre-motion conference on the motion to dismiss, the district court "presented [the] [p]laintiffs with a Hobson's choice: agree to cure deficiencies not yet fully briefed and decided or forfeit the opportunity to replead." 797 F.3d at 190. Solely because the plaintiffs opted not to amend their complaint at that point, the district court rendered its judgment of dismissal with prejudice. Id. On appeal, we concluded that the court exceeded the bounds of discretion in denying plaintiffs an opportunity to amend: "[w]ithout the benefit of a ruling, many a plaintiff will not see the necessity of amendment or be in a position to weigh the practicality and possible means of curing specific deficiencies." Id. This is especially so when (as here) the "pleading defects" are "borderline, and hence subject to reasonable dispute." Id. at 191. We thus held that the court clearly erred by "treat[ing] Plaintiffs' decision to stand by the complaint after a preview of Defendants' arguments—in the critical absence of a definitive ruling—as a forfeiture of the protections afforded by Rule 15." Id. at 190.

As the foregoing cases demonstrate, Plaintiffs had no obligation to "seek leave to replead . . . immediately upon answering the motion to dismiss the complaint (without yet knowing whether the court w[ould] grant the motion, or, if so, on what ground) . . . ." Williams, 659 F.3d at 214. The district court thus erred in relying on that procedural fact to justify denying Plaintiffs' motion for vacatur and leave to amend.

Likewise, Plaintiffs cannot be foreclosed from obtaining post-judgment relief solely because they

chose to appeal rather than seek vacatur immediately upon dismissal of their claim. True, in both Foman and Williams, the plaintiff moved to vacate the judgment directly after the court's dismissal of the suit. But we have found relief from judgment to be warranted in cases involving more circuitous paths. SAIC is one example. There, the district court dismissed in part the first amended complaint and gave the plaintiffs leave to amend the dismissed claims. 818 F.3d at 91. The plaintiffs elected to forgo that option and to proceed with their surviving claims. Id. On the defendant's motion for reconsideration, the court reversed course and dismissed the complaint in full, with prejudice. Only then did plaintiffs seek leave to amend their complaint. Id. The district court denied the requested post-judgment relief, and we reversed, holding the proposed amendments were not futile. Id. at 92–94.

In the same way, these Plaintiffs diligently prosecuted their case at all times. Given the wording of the district court's opinion on the motion to dismiss, Plaintiffs could have reasonably believed that it would have been impossible to cure the pleading deficiencies to the court's satisfaction without discovery. The district court ruled that "general statistics are inadequate to show a relationship between the pool of applicants who are Caucasian versus African American[] and their respective rates of felony convictions," and "[t]he statistics Plaintiffs cite in the complaint do not indicate whether the individuals in the general population cited shared qualifications that would make them viable candidates for either of the positions offered to Plaintiffs." Mandala I, 2019 WL 3237361, at *3–4. The court gave no indication that

this deficiency could be remedied through anything less than data corresponding to the actual characteristics of NTT's employees—information known only to NTT.

It wasn't until this Court's decision on appeal that it became clear what other types of information might suffice at the pleading stage. In affirming the district court's dismissal of the Complaint, we agreed that Plaintiffs failed to demonstrate "that the general population statistics on which they rely might accurately reflect NTT's pool of qualified job applicants." Mandala II, 975 F.3d at 211 (internal quotation marks, citation, and alteration omitted). But we also acknowledged that "Plaintiffs are undoubtedly working from an informational disadvantage at this early point in the proceedings." Id. at 212. Given that Plaintiffs lack "access to more granular data" at the pleading stage, we explained that they might instead be able to state a claim for disparate impact by "provid[ing] additional allegations to explain why their chosen national statistics are in fact likely to be representative of NTT's qualified applicant pool," or by "identify[ing] other publicly available information that could plausibly support a Title VII claim." Id.

Plaintiffs then timely filed a petition for rehearing in banc, requesting, in the alternative to reversal, that we remand the case to permit Plaintiffs a first opportunity to seek leave to amend their Complaint. When, four months later, this Court denied rehearing, Plaintiffs promptly sought relief in the district court. Although Plaintiffs' vacatur motion ultimately came one year and eight months after the judgment of

dismissal, the timing was reasonable given the procedural history.

Finally, there are no "justifying reason[s]," Foman, 371 U.S. at 182, for depriving Plaintiffs of the chance to obtain relief from judgment and file an amended complaint for the first time. There is no plausible contention of bad faith or dilatory motive, nor that vacatur would unduly prejudice the Defendant. There was no undue delay, for the reasons explained above. And the district court did not conclude that Plaintiffs' proposed amendments would be futile. To the contrary, the court acknowledged the relevance of the amici's data indicating that racial disparities in criminal outcomes persist at higher levels of education, and noted that in the in banc memoranda, several judges of this Court "suggested these statistics 'might' have rendered Plaintiffs' claims plausible had they been included in the original pleadings." Mandala IV, 2021 WL 5771154, at *2 (quoting Mandala III, 988 F.3d at 668). This is the sort of case in which it is "appropriate . . . to take into account the nature of the proposed amendment in deciding whether to vacate the previously entered judgment." Williams, 659 F.3d at 213 (quoting Ruotolo, 514 F.3d at 191).

The district court seemingly gave no weight to the viability of Plaintiffs' proposed amendment because it was based on information that was publicly available for years prior to the filing of the Complaint. Even assuming the information was obtainable, standing alone that is not a basis for depriving Plaintiffs of a first opportunity to add allegations that render their claim plausible. As the Supreme Court has explained,

when "the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits." Foman, 371 U.S. at 182; see also Branum v. Clark, 927 F.2d 698, 705 (2d Cir. 1991) (reversing denial of pro se plaintiff's Rule 60(b) motion, noting courts "should not dismiss without granting leave to amend at least once when a liberal reading of the complaint gives any indication that a valid claim might be stated").

In sum, this is one of the exceptional cases necessitating relief from judgment: Plaintiffs have yet to be afforded a single opportunity to amend their pleading; the original dismissal of the Complaint was premised on grounds subject to reasonable, actual, and vigorous debate; Plaintiffs diligently prosecuted their case at all times; and Plaintiffs' proposed amendments address the sole pleading deficiency identified by the district court. On these facts, the court's contrary holding was not a proper exercise of discretion.

CONCLUSION

For these reasons we **REVERSE** the denial of Plaintiffs' motion to vacate the judgment of dismissal and for leave to file a first amended complaint, and **REMAND** for further proceedings consistent with this opinion.

A True Copy
Catherine O'Hagan Wolfe, Clerk
United States Court of Appeals, Second Circuit
/s/ Catherine O'Hagan Wolfe
[SEAL]

RICHARD J. SULLIVAN, *Circuit Judge*, dissenting:

I dissent from the majority's decision because I cannot agree that the district court abused its discretion in concluding that Federal Rule of Civil Procedure 60(b)(1), as opposed to Rule 60(b)(6), applies to Plaintiffs' motion to vacate the district court's judgment of dismissal. But even if it could be argued that Rule 60(b)(6) applies in this case, I would still affirm because I agree with the district court that Plaintiffs failed to demonstrate extraordinary circumstances warranting relief. For these reasons, I would affirm the district court's order denying Plaintiffs' motion to vacate the judgment.

As an initial matter, I emphasize that the standard of review in this appeal is abuse of discretion. *See ExxonMobil Oil Corp. v. TIG Ins. Co.*, 44 F.4th 163, 172 (2d Cir. 2022). A district court abuses its discretion only when "its decision [(1)] rests on an error of law or a clearly erroneous factual finding; or (2) cannot be found within the range of permissible decisions." *Id.* (internal quotation marks omitted). The relevant inquiry is therefore not whether Plaintiffs might have "reasonably . . . assumed that they need not allege" certain facts in their complaint in order to state a claim, Maj. Op. at 11, but rather whether the district court's decision is erroneous or cannot be found within the range of permissible decisions. Given this deferential standard of review, I am hard pressed to see how the district court's decision could constitute an abuse of discretion.

In my view, the district court did not err in construing Plaintiffs' motion as one for relief under

Rule 60(b)(1) rather than Rule 60(b)(6). Recognizing the concern that "parties may attempt to use Rule 60(b)(6) to circumvent the one-year time limitation in other subsections of Rule 60(b)," we have long recognized that "Rule 60(b)(1) and Rule 60(b)(6) are mutually exclusive, such that any conduct which generally falls under the former cannot stand as a ground for relief under the latter." *Stevens v. Miller*, 676 F.3d 62, 67 (2d Cir. 2012) (internal quotation marks omitted). "Where a party's Rule 60(b) motion is premised on grounds fairly classified as mistake, inadvertence, or neglect, relief under Rule 60(b)(6) is foreclosed." *Id.* at 67–68 (citing *Klapprott v. United States*, 335 U.S. 601, 614 (1949)).

In their motion to vacate, Plaintiffs asserted that the pleading standard "for relief under Title VII . . . was previously unclear," and the supposed clarifications set forth in the Court's opinions on appeal and in connection with the denial of *en banc* review justify vacatur of the district court's judgment. J. App'x at 106–07. But in concurring with the denial of *en banc* review, the majority of this Court's active members *explicitly* rejected the contention that the Court's decision on appeal, *Mandala v. NTT Data, Inc.*, 975 F.3d 202 (2d Cir. 2020), clarified or otherwise changed the plausibility standard for Plaintiffs' claims. *See Mandala v. NTT Data, Inc.*, 988 F.3d 664, 665 (2d Cir. 2021) (Sullivan, J., and Nardini, J., concurring) (noting that the panel majority opinion reflected "a heartland application of the plausibility pleading standard that has been the law of this Circuit for more than a decade"). Therefore, Plaintiffs' contention that these proceedings provided "much-needed clarity" regarding

the requisite pleading standard, J. App'x at 109; *see also id.* at 96, 106–07, evinces a misunderstanding of our prior opinions in this case, as well as the well-established law of this Circuit, *see Malave v. Potter*, 320 F.3d 321, 326 (2d Cir. 2003) (explaining that general population statistics are permissible only when such statistics "accurately reflect the pool of qualified job applicants" for the positions in question (internal quotation marks omitted)); *see also Vega v. Hempstead Union Free Sch. Dist.*, 801 F.3d 72, 87 (2d Cir. 2015) (applying the plausibility standard to a Title VII disparate-treatment claim); *Littlejohn v. City of New York*, 795 F.3d 297, 310–11 (2d Cir. 2015) (same). Plaintiffs' mistaken understanding as to the law places their motion squarely within the ambit of Rule 60(b)(1). *See Nemaizer v. Baker*, 793 F.2d 58, 62 (2d Cir. 1986) (explaining that "we have *consistently* declined to relieve a client under [Rule 60(b)(1)] of the burdens of a final judgment entered against him due to the mistake or omission of his attorney by reason of the latter's *ignorance of the law*" (emphasis added and internal quotation marks omitted)). As such, there can be no dispute that the district court properly denied the motion as untimely, since it was made more than a year after the judgment was issued. *See* Fed. R. Civ. P. 60(c)(1); J. App'x at 3 (docket reflecting judgment in favor of NTT dated July 19, 2019, Dist. Ct. Doc. No. 28, and Plaintiffs' motion to vacate judgment dated March 31, 2021, Dist. Ct. Doc. No. 35).[1]

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[1] The majority's contention that Rule 60(b)(6) is categorically applicable when "post[]judgment relief is sought for the purpose of curing a pleading deficiency," Maj. Op. at 14, is mistaken. *See, e.g.*, *Johnson v. Univ. of Rochester Med. Ctr.*, 642 F.3d 121, 125 (2d Cir.

But even assuming that Plaintiffs' motion falls under Rule 60(b)(6) and not Rule 60(b)(1), I still cannot see how the district court abused its discretion in concluding that Plaintiffs failed to articulate an "extraordinary circumstance[] justifying relief." *Metzler Inv. Gmbh v. Chipotle Mexican Grill, Inc.*, 970 F.3d 133, 143 (2d Cir. 2020) (internal quotation marks omitted). To the contrary, our precedents and the established facts in the record confirm that there are no extraordinary circumstances here.

First, while discovery may be necessary in some circumstances to identify viable comparators, that is not the case here. As the majority acknowledges, *see* Maj. Op. at 7–8, and as the district court correctly noted, the "statistics that Plaintiffs seek to add to their complaint to correct the deficiencies in their pleadings were publicly available for nearly a decade prior to the filing of the complaint," *Mandala v. NTT Data, Inc.*, No. 18-cv-6591 (CJS), 2021 WL 5771154, at *8 (W.D.N.Y. Dec. 6, 2021); *see also Mandala*, 988 F.3d at 668 (Sullivan, J., and Nardini, J., concurring) ("[T]he

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2011) (affirming district court's order denying Rule 60(b)(1) motion to reconsider denial of request for leave to amend); Fed. R. Civ. P. 60(b)(2) (establishing a separate category of motions for reconsideration based on purportedly "newly discovered evidence"). Nor does *United Airlines, Inc. v. Brien*, 588 F.3d 158 (2d Cir. 2009), lend support to the majority's position on this point, as that case nowhere suggests that postjudgment requests for leave to amend "cannot fairly be classified as falling within the scope of Rule 60(b)(1)." Maj. Op. at 15; *see also Brien*, 588 F.3d at 176 (finding that vacatur motions "based on the potential hardship resulting from inconsistent judgments" are properly brought under Rule 60(b)(6) because such claims are "not easily categorized as 'mistake' or 'inadvertence' under Rule 60(b)(1)").

very figures that might have rendered Plaintiffs' claims plausible not only exist but also are publicly available; Plaintiffs simply failed to include them in their pleadings."). Plaintiffs therefore cannot excuse their inadequate pleading on this basis. *See E.E.O.C. v. Port Auth. of N.Y. & N.J.*, 768 F.3d 247, 258 (2d Cir. 2014) (noting that "imprecise pleading is particularly inappropriate where the plaintiffs necessarily had access, without discovery, to specific information from which to fashion a suitable complaint" (internal quotation marks and alterations omitted)).

Second, even if we were to assume *arguendo* that the Court's prior decisions on appeal somehow clarified the requisite pleading standard for Plaintiffs' claims, the district court *still* would have been justified in concluding that Plaintiffs failed to identify extraordinary circumstances warranting relief. "As a general matter," even a "*change* in decisional law does not constitute an 'extraordinary circumstance' for the purposes of Rule 60(b)(6)." *Tapper v. Hearn*, 833 F.3d 166, 172 (2d Cir. 2016) (emphasis added and internal quotation marks and alterations omitted); *see also Stevens*, 676 F.3d at 68–69. It is therefore difficult to see how a mere *clarification* of decisional law would constitute an extraordinary circumstance here.

Plaintiffs' alternative argument – that the district court announced a *per se* rule that "'general' or national statistics were . . . 'inadequate' to show disparate impact," thereby depriving Plaintiffs of any "way forward" in their case, Plaintiffs' Br. at 8, 18 – is of no moment, since Plaintiffs themselves recognize that *this* Court never adopted such a *per se* rule and, in fact,

described several ways in which Plaintiffs might meet their pleading burden using national statistics, *id.* at 8; *see also* Maj. Op. at 24 (recognizing that the Court's decision on appeal made "clear what other types of information might suffice at the pleading stage"). Rather than seek vacatur and leave to amend at that juncture, Plaintiffs instead opted to file a petition for rehearing *en banc* – a strategic choice that plainly undermines any argument that some aspect of the district court's order was an "extraordinary circumstance" preventing Plaintiffs from pursuing their claims.

Indeed, the record in this case reflects that Plaintiffs made a conscious and informed choice to pursue a particular litigation strategy. Plaintiffs were repeatedly apprised – in NTT's motion to dismiss, at oral argument on NTT's motion, and in the district court's order dismissing Plaintiffs' complaint – of the precise pleading defect that Plaintiffs now seek to remedy. *See* J. App'x at 36–37, 172–73; *Mandala v. NTT Data, Inc.*, No. 18-cv-6591 (CJS), 2019 WL 3237361, at *4 (W.D.N.Y. July 18, 2019). Rather than seek leave to amend at any prior stage, Plaintiffs stood by their pleading and opted to press for a lower pleading standard on appeal. When that too proved unsuccessful, Plaintiffs doubled down on their strategy by filing an *en banc* petition instead of a motion to amend. Plaintiffs' claim that, absent the requested relief, the district court's judgment will subject Plaintiffs to "extreme hardship" is therefore unpersuasive. Plaintiffs' Reply at 4. Because Plaintiffs "made a conscious and informed choice of litigation strategy," they cannot "in hindsight seek extraordinary

relief" when their preferred strategy failed. *United States v. Bank of N.Y.*, 14 F.3d 756, 759 (2d Cir. 1994).

Third, the fact that Plaintiffs believe they are now able to effectively plead their claims does not mean that the district court abused its discretion in declining to vacate its prior judgment. We have held that a district court may not grant a postjudgment motion for leave to amend without first identifying "a valid basis to vacate the previously entered judgment." *Metzler*, 970 F.3d at 142 (internal quotation marks omitted). While it is undoubtedly true that we have a "strong preference for resolving disputes on the merits," *Williams v. Citigroup Inc.*, 659 F.3d 208, 212–13 (2d Cir. 2011) (internal quotation marks omitted), it is equally true that the viability of a party's proffered amended pleading alone is an insufficient basis on which to grant Rule 60(b) relief, *see Metzler*, 970 F.3d at 142. The majority's decision thus undermines the principle that Rule 60(b)(6) affords litigants an *extraordinary* remedy and effectively holds that such relief is available in the ordinary course. *See Ruotolo v. City of New York*, 514 F.3d 184, 191 (2d Cir. 2008) (noting that Rule 60(b) provides a "mechanism for extraordinary judicial relief" that can be invoked only upon a showing of exceptional circumstances (internal quotation marks omitted)); *Motorola Credit Corp. v. Uzan*, 561 F.3d 123, 126 (2d Cir. 2009) (same); *Nemaizer*, 793 F.2d at 61 (explaining that Rule 60(b) "allows extraordinary judicial relief").

Contrary to the majority's suggestion, the district court did not deny Plaintiffs' request for leave to amend "without any justifying reason." Maj. Op. at 18

(internal quotation marks omitted). The district court plainly denied Plaintiffs the opportunity to file an amended complaint because they "failed to demonstrate adequate grounds for relief from the [c]ourt's judgment under Rule 60."[2] *Mandala*, 2021 WL 5771154, at *4. The district court therefore did not need to additionally identify any "undue delay, bad faith or dilatory motive on the part of [Plaintiffs], repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to [NTT] by virtue of allowance of the amendment, or futility of amendment," Maj. Op. at 18 (internal quotation marks and alterations omitted), in denying Plaintiffs' motion. *See Metzler*, 970 F.3d at 142–46 (rejecting the argument that the aforementioned standard applicable to pretrial motions for leave to amend pursuant to Federal Rule of Civil Procedure 15(a)(2) is the governing standard for such motions in the postjudgment context).

The majority's reliance on *Williams v. Citigroup Inc.* is misplaced. *Williams* – which merely held that a district court may not deny a request for leave to amend *solely* on the basis that a plaintiff failed to request leave to replead before judgment was entered – does not stand for the proposition that a party who made a calculated decision to forgo seeking leave to

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[2] The majority boldly contends that it is "circular" to conclude that a district court may deny a motion for relief under Rule 60(b)(6) when a party has failed to demonstrate entitlement to relief under that Rule. Maj. Op. at 18–19 n.5. But it is beyond cavil that a party's failure to demonstrate extraordinary circumstances is *alone* a sufficient justification for denying postjudgment relief under Rule 60(b)(6).

amend in favor of other avenues of relief from judgment may subsequently seek leave to amend at any time and by any means. *See* 659 F.3d at 214. *Williams* therefore does not alter the obvious conclusion that the district court was within its discretion to deny Plaintiffs' motion here. *Id.* at 213 (recognizing that "Rule 15(a) [may not] be employed in a way that is contrary to the philosophy favoring finality of judgments and the expeditious termination of litigation" (internal quotation marks omitted)).

For these reasons, I cannot join the majority in holding that the district court abused its discretion in concluding that Plaintiffs' motion was untimely pursuant to Rule 60(b)(1) and that Plaintiffs otherwise failed to identify extraordinary circumstances warranting relief pursuant to Rule 60(b)(6). More broadly, I fear that the majority's decision will erode the finality of judgments throughout this Circuit, significantly undermine the important purposes served by Rule 60(b), and increase the workload of busy district court judges who carry the heaviest burden in our system of civil justice. I therefore respectfully dissent from the majority's opinion and would affirm the district court's order.

A True Copy
Catherine O'Hagan Wolfe, Clerk
United States Court of Appeals, Second Circuit
/s/ Catherine O'Hagan Wolfe
[SEAL]

APPENDIX I

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Docket No: 22-4

[Filed February 13, 2024]

George Mandala, Charles Barnett, individually and on behalf of all others similarly situated, Plaintiffs-Appellants,	)
v.	)
NTT Data, Inc., Defendant-Appellee.	)

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 13th day of February, two thousand twenty-four.

ORDER

Appellee, NTT Data, Inc., filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk
/s/ Catherine O'Hagan Wolfe
[SEAL]