No. 16-2119(L)

16-2134(con), 16-2098(con)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

LINDE, et al.,

Plaintiffs-Appellees,

v.

ARAB BANK, PLC,

Defendant-Appellant.

On Appeal from the United States District Court for the
Eastern District of New York, Nos. 04-cv-2799, 04-cv-5449, 04-cv-5564

BRIEF FOR APPELLANT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1(a), Arab Bank, PLC certifies that it does not have a parent corporation and that no publicly held corporation owns more than ten percent of its stock.

The plaintiffs in these consolidated appeals are: (1) Eugene Goldstein; Lorraine Goldstein; Barbara Goldstein-Ingardia; Chana Freedman; Richard Goldstein; and Michael Goldstein (*Linde v. Arab Bank, PLC*, 04-CV-2799 (E.D.N.Y.)); (2) Philip Litle, on his own behalf and for the estate of Abigail Litle; Heidi Litle; Hannah Litle; Josiah Litle; Elishua Litle; and Noah Litle (*Litle v. Arab Bank, PLC*, 04-CV-5449 (E.D.N.Y.)); and (3) Rachel Shaked (née Rachel Laham), individually and on behalf of the state of Eli Laham; Yossef Cohen; Ayelet Attias; Yehuda Eliyahu a/k/a Jeff Elliot (*Almog v. Arab Bank, PLC*, 04-CV-5564 (E.D.N.Y.)).

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INTRODUCTION

The Plaintiffs in these consolidated actions sued Arab Bank under 18 U.S.C. §2333(a), part of the civil Anti-Terrorism Act ("ATA"), for terrorist attacks perpetrated by Hamas. But the Bank played no role in Hamas' senseless violence. On the contrary, in this very case, the United States has described the Bank as "a constructive partner" in the fight *against* terrorism. Indeed, the Bank has been at the forefront of implementing policies to block terrorist access to the financial system and complies with the applicable counterterrorism laws in every country where it operates, including the United States. But the jury heard none of this.

Instead, the District Court pre-ordained the outcome of this case through three fundamental errors. *First*, the court's jury instructions misconstrued §2333(a)'s intent requirement. The statute required the jury to resolve whether the Bank's ordinary banking activities were "acts dangerous to human life" that "appear[ed] to be intended" to terrorize civilians or governments. 18 U.S.C. §2331(1)(A)-(B). But the court flatly refused to instruct the jury on the statute's essential elements, and instead substituted a less demanding *mens rea* standard from an unrelated criminal statute. *Second*, the court eschewed the statute's requirement of proximate and but-for causation, despite this Court's repeated admonition that the statutory language requires proof of both. *Third*, the court compounded these errors by imposing outcome-determinative sanctions because the Bank was unable to comply with all

of Plaintiffs' discovery demands. But the applicable privacy laws in the countries where the Bank operates strictly precluded the Bank from producing the evidence and made such disclosures a criminal offense. The risk of prosecution was far from hypothetical—those countries informed the District Court that they would prosecute the Bank and its employees for disclosing the requested information—and the District Court's disregard of those foreign laws was error, as this Court just recently reaffirmed in *In re Vitamin C Antitrust Litigation*. Nonetheless, the District Court imposed crippling sanctions on the Bank for complying with the laws of the foreign countries in which it operates. Even after the Solicitor General explained that the sanctions have already harmed the United States' relationships with important allies and undermined American national security, the District Court was undeterred. Thus, after hopelessly skewing the facts against the Bank through its sanctions order, the District Court misconstrued the law in instructing the jury as to §2333's intent and causation requirements. Unsurprisingly, the jury imposed liability, and the Bank faces massive damages.

The District Court's failures are not just run-of-the-mill legal errors. If courts may refuse to apply §2333(a)'s basic requirements and impose outcome-determinative sanctions for adherence to foreign law, it will be virtually impossible to operate a bank in the Middle East without incurring crushing liability. That unworkable regime will hurt American counterterrorism efforts that depend on

government-to-government cooperation and the existence of legitimate financial institutions in the Middle East. And the ramifications extend far beyond that uniquely sensitive region. As the stream of recent ATA suits make clear, American businesses inside and outside the financial industry face the same risks if the District Court's view prevails.

Thus, although these cases arise under the Anti-Terrorism Act, they are fundamentally not about terrorism. They are about whether the statute effectively imposes strict liability on businesses for their customers' unlawful behavior and whether a legitimate financial institution can be sanctioned into liability for declining to violate the criminal laws of other nations. The District Court's reckless sanctions and capacious view of the statute are inconsistent with the ATA, American interests, and common sense. The decision below should be reversed.

JURISDICTION

The District Court had jurisdiction under 28 U.S.C. §1331 and the Anti-Terrorism Act, 18 U.S.C. §2333. That court entered final judgment with respect to Plaintiffs in this appeal pursuant to Federal Rule of Civil Procedure 54(b), and the Bank filed a timely notice of appeal from the District Court's final order. This Court has appellate jurisdiction under 28 U.S.C. §1291.

STATEMENT OF THE ISSUES

1. Whether the District Court erred by failing to instruct the jury that Plaintiffs must satisfy all four elements of the Anti-Terrorism Act's definition for an "act of international terrorism," under 18 U.S.C. §2333(a), and by substituting inapposite intent standards from 18 U.S.C. §2339B's criminal liability provision.

2. Whether the District Court erred by failing to instruct the jury that Plaintiffs must prove but-for causation and by applying a diluted proximate causation standard inconsistent with this Court's precedents.

3. Whether the District Court's sanctions order, which punished the Bank for complying with the applicable privacy laws of the jurisdictions in which it operates, violated principles of international comity and due process.

STATEMENT OF THE CASE AND FACTS

Arab Bank appeals from a judgment entered by the United States District Court for the Eastern District of New York (Cogan, J.) finding the Bank liable under 18 U.S.C. §2333(a). The District Court's post-trial order denying the Bank's motions for judgment as a matter of law or a new trial is reported at 97 F.Supp.3d 287 (E.D.N.Y. 2015).

A. Statutory Background

Congress enacted §2333(a) of the Anti-Terrorism Act to hold terrorists accountable for their actions, by permitting "[a]ny national of the United States injured in his or her person, property, or business by reason of an act of international

terrorism, … [to] sue therefor" in federal court. *Antiterrorism Act of 1990: Hearing on S. 2465 Before the Subcomm. on Courts and Admin. Practice of the S. Comm. on the Judiciary*, 101st Cong. 2-3 (1990) ("ATA.Hr'g."). Congress crafted §2333(a) to require proof both that the defendant intended to participate in terrorism and that the defendant's acts directly caused the plaintiff's injuries. The ATA thus defines an "act of international terrorism"—an essential element of any §2333(a) claim—as activities that (1) "involve violent acts or acts dangerous to human life that" (2) violate U.S. law; (3) "*appear to be intended* to intimidate or coerce a civilian population[,] to influence the policy of a government by intimidation or coercion[,] or to affect the conduct of a government by mass destruction, assassination, or kidnapping"; and (4) "occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries." 18 U.S.C. §2331(1) (emphasis added). And by providing damages only for injuries that occur "*by reason of* an act of international terrorism," 18 U.S.C. §2333(a) (emphasis added), the Act consciously borrowed the causation standard from RICO and the Clayton Act, which have been interpreted to require both proximate and but-for causation. *Rothstein v. UBS AG*, 708 F.3d 82, 95 (2d Cir. 2013).

In this respect, §2333(a)'s civil remedy is markedly different from criminal anti-terrorism statutes. In the latter, Congress empowered prosecutors to use their discretion to pursue criminal convictions for "material support" of terrorist

organizations, even when the defendant disapproves of the organization's violence. *See Holder v. Humanitarian Law Project*, 561 U.S. 1, 10-11 (2010); 18 U.S.C. §2339B. Section 2333(a), by contrast allows a private plaintiff to recover damages only for actions that objectively "appear intended" to further terrorist violence. And although Congress very recently added §2333(d) to create civil liability for supporting a terrorist organization, that change occurred after the jury was instructed below, and the newly-created liability is limited to defendants who "aid[ed] or abet[ted]" or "conspir[ed]" to commit an "act of international terrorism." 18 U.S.C. §2333(d)(2). *See infra* Part I.B.

A host of other laws govern financial institutions' unique role in the global economy. Numerous U.S. laws aim to prevent terrorist access to the financial system, including the U.S. Patriot Act and sanctions programs administered by the Office of Foreign Assets Control ("OFAC"). *E.g.*, 31 C.F.R. §§595-597. And the Bank complies with anti-money laundering and counterterrorism laws in other countries where it operates. The U.S. and allied countries also have various bank privacy laws. *E.g.*, 12 U.S.C. §3401 *et seq*. Other nations' privacy laws often prevent a financial institution from sharing customer information even within its own global branch network, if doing so would disseminate the information outside of the customer's country of residence. JA3551-54. Although they sometimes allow government-to-government cooperation, these laws otherwise require financial

institutions to treat customer information as confidential, including in response to discovery requests, and impose criminal sanctions on violators. JA3550, 3820-27.

B. Parties

Plaintiffs-Appellees in these consolidated appeals are victims of three terrorist attacks perpetrated by Hamas in Israel.[1] Yet, Plaintiffs have not sued Hamas, its financial backers, or the individuals who committed the attacks. Instead, they have sued Arab Bank to recover for their injuries.

But the Bank is not a terrorist organization. It is a major international financial institution with 600 offices, across five continents, including in New York, London, Dubai, Singapore, Geneva, Paris, Frankfurt, Sydney and Bahrain. The Bank was recently named "Best Bank in the Middle East" by Global Finance.[2] While it is impossible for any bank, let alone one based in the Middle East, to guarantee that it will never process a financial transaction involving anyone secretly planning clandestine attacks, the Bank consciously avoids dealing with known terrorists. Indeed, the United States has described the Bank as a "lead[er] … in … combatting the financing of terrorism." Brief of United States as Amicus Curiae 20, *Arab Bank,*

[1] The three attacks were a March 2002 bombing at Café Moment in Jerusalem; a March 2003 suicide bombing attack on Bus No. 37 in Haifa; and a June 2003 shooting attack on Route 60 near Jerusalem.

[2] Global Finance, Best Banks By Region 2016 (Mar. 15, 2016), http://bit.ly/1q2z4B7.

PLC v. Linde, 134 S.Ct. 2869 (2014) (JA5234) ("U.S.Br."). To prevent terrorists from using its services, the Bank has consistently sought to comply with the applicable regulatory schemes in the countries where it operates and to align its systems with international standards for combatting terrorism, including checking transaction and customer records against applicable terror watch-lists.

For example, in the U.S., Arab Bank of New York ("ABNY") implemented policies and procedures to comply with regulations prohibiting U.S. banks and U.S. branches of foreign banks from engaging in transactions with individuals and entities on the OFAC blacklist. JA6727-28, 7017-18. It also utilized an automated "OFAC filter" to screen all parties to electronic money transfers processed by or through ABNY, which automatically stopped any flagged transaction. *Id.* The Bank appointed a dedicated Compliance Officer to oversee U.S. Know-Your-Customer requirements, ensure compliance with U.S. regulations, and file suspicious activity and currency transaction reports with U.S. authorities. CA725-26, 531-714. In addition, beginning in 2000, ABNY volunteered to participate in a pilot program to create a software monitoring application designed to detect suspicious banking behavior. CA768-69. Outside the U.S., the Bank complies with the requirements of the countries where it operates. It performs Know-Your-Customer due diligence on prospective customers and screens account applicants against blacklists provided by local regulatory authorities. CA479-80, 492-97, 501, 525.

The Bank was the first in the Middle East to implement automated technology that allows every branch to check account applicants and transactions in real time against the blacklists in all other jurisdictions where it operates, including the Palestinian Territories. CA515-16. OFAC regulations do not apply to foreign banking operations outside of the U.S., and, at the time Arab Bank introduced its new screening system, other foreign banks did not apply the OFAC list to foreign transactions outside the U.S. JA7029; U.S. Dep't of Treasury, "*Basic Information on OFAC and Sanctions*," #11, http://tinyurl.com/h8bc9ke. Indeed, Israeli banks generally began incorporating the OFAC list into their automated screening systems in 2010—six years after Arab Bank. JA4048. In all events, nearly all transactions at issue at trial were checked against the OFAC list because they were routed through the Bank's New York branch.

C. Claims

In 2004, Plaintiffs filed a civil suit alleging that the Bank violated §2333(a) by knowingly providing material support to Hamas. The crux of Plaintiffs' complaint was not that the Bank was involved in the planning, funding, or commission of the attacks that caused their injuries. Instead, Plaintiffs claim that the Bank maintained accounts and processed transactions for persons and charities affiliated with Hamas, and processed transactions from the Saudi Committee in Support of the Intifada al Quds ("Saudi Committee"), an arm of the Saudi Arabian

government responsible for providing foreign aid in Palestine, which, according to Plaintiffs, provided charitable payments to the families of wounded or killed terrorists. JA1354, 1358. But the Committee was not even a customer of the Bank. The Committee's bank lacked a branch in Palestine, and under a pre-existing correspondent-banking agreement, Arab Bank merely executed payment instructions from the Committee's bank—as it (and all banks) do for correspondent banks. CA897, 901-06.

Moreover, all the banking services that Plaintiffs challenged were subject to regulatory oversight and the Bank's compliance regime. Indeed, many of the transactions also passed through the compliance checks of major American financial institutions. JA584, 650, 763, 864, 1189, 1199, 7115, 7116-17, 7122. Of the twenty-four individuals who planned and perpetrated the three attacks at issue, there was *no* evidence that they received financial services from the Bank, and *none* was identified on any government watch-list (including OFAC's) at the time. Nor during the relevant period did any of the twelve charities identified by Plaintiffs as Hamas "fronts" appear on any government watch-list, including the OFAC list, in the countries where the Bank operated. Indeed, nine of the charities were vetted by the U.S. government and received U.S. taxpayer support. JA6229, 6426, 6445, 6455, 6390, 6397, 6403, 6392-93, 6422. There is also no dispute that the charities provided the social services that they claimed to offer, such as healthcare and food. JA6226,

6249-50. Moreover, then-Secretary of State Colin Powell described the Saudi Committee as a charitable effort to "tak[e] care of people in need."[3]

In the rare instances where the Bank (in conjunction with other banks) processed transactions for designated terrorists, it was because the names of the listed transaction parties did not match the names on any government watch-list, or because of some other similar error. For example, in one instance, the designated recipient was "Yasin**e**, Ahmad **Ismail**" not "Yasin, **Shaykh** Ahmad," the person designated as a terrorist, and the Bank's terror screening software processed the transaction without human intervention. JA6950, 580, 796 (emphases added).[4] On another occasion, the Bank self-reported an incident where a low-level employee in New York misunderstood a direction from his supervisor and released a transaction that had been stopped for further review. JA6771-72.

D. Procedural History

1. During discovery, Plaintiffs sought numerous account documents, most of which were located in Jordan, Lebanon, and the Palestinian Territories. Among other things, Plaintiffs demanded "[a]ll documents concerning payments made through

[3] JA4253, 4257, 4299-4301; NBC, *Meet the Press* (May 5, 2002) http://2001-2009.state.gov/secretary/former/powell/remarks/2002/9940.htm

[4] OFAC screening is necessarily done by computers, because banks process millions of transactions per year and the OFAC blacklist includes thousands of entries. JA6698, 7027-29.

Arab Bank by or on behalf of the Saudi Committee," including "account applications, signature cards, account statements, customer files, correspondence, death certificates, photographic identification . . . incarceration data [and] medical records" for tens of thousands of individuals, without regard to whether they had any links to terrorism. JA 3294; CA895. Complying with these demands was legally impossible. As the magistrate overseeing discovery recognized, and foreign governments confirmed, disclosure of the requested records "would violate the laws of foreign jurisdictions and expose not only the Bank, but its employees, to criminal sanctions." SPA66; JA3820-27. Indeed, Lebanon's Finance Minister informed the District Court that Lebanon was poised to prosecute the Bank and its employees if it complied with Plaintiffs' discovery requests. JA3820-21.

The Bank did everything within its power to fulfill Plaintiffs' request without subjecting itself and its employees to prosecution, including petitioning foreign governments and seeking waivers from account holders. JA3438-78. Through these efforts, the Bank was able to produce much of the information Plaintiffs requested. The Bank secured the Saudi Committee's consent to disclose 180,000 documents, including every single transfer record on which the Saudi Committee was a party. *E.g.* JA865-948. The Bank obtained permission from Lebanese authorities to produce documents relating to a specific account identified by Plaintiffs. JA3485-93. And the Bank was able to provide Plaintiffs with documents previously

produced to the U.S. government, including during its prosecution of the now-defunct "Holy Land Foundation." SPA85.

Other attempts to provide Plaintiffs with the documents they sought were less successful. The Bank petitioned the Jordanian courts to allow it to disclose records covered by Jordan's financial privacy law and obtained a favorable ruling, but that decision was reversed after an account holder appealed. JA3438-49. And the Bank's numerous petitions to other government authorities were largely rejected. JA3477, 3549, 3554, 3718-34. Ultimately, the only requested records not produced were those for which the Bank and its employees would face criminal liability for unauthorized disclosure.

Plaintiffs refused to cooperate in the Bank's efforts. As they told the District Court: "If [the Bank] can't produce, it's … [the Bank's] problem. It's not our problem." JA2046. Accordingly, Plaintiffs asked for a jury instruction that the missing documents would have proven the Bank's liability. The magistrate, informed by thirteen hearings and his oversight of the discovery process, rejected this proposal and crafted a limited sanction permitting the jury to infer that some of the Bank's customers had ties to terrorism, but *not* that the Bank had any knowledge of those ties, because Plaintiffs had not shown "that the withheld evidence would be likely to provide direct evidence of the knowledge and intent of the Bank" to support terror. SPA71.

More than a year later, and without holding a hearing, Judge Gershon rejected the magistrate's measured approach and imposed onerous sanctions. She ruled that Plaintiffs were entitled to an adverse inference that withheld materials "would have demonstrated that defendant acted with a culpable state of mind" and precluded the Bank from introducing any evidence of its state of mind to the extent such evidence "would find proof or refutation in the withheld documents." SPA94, 96. Despite the significant foreign policy implications of this extraordinary ruling, the District Court repeatedly refused to invite the views of the United States and cursorily dismissed the views of the foreign governments whose laws precluded compliance. And at the same time that Judge Gershon sanctioned the Bank for refusing to violate the criminal laws of Jordan, Lebanon, and other countries, the magistrate rejected the Bank's subpoenas for account documents from Israeli banks involved in the transactions at issue, because producing the documents would "undermine important Israeli interests[] in[] maintaining the privacy rights of bank clientele …." JA3671.

2. Because of the devastating and one-sided nature of the ruling, the Bank filed a mandamus petition seeking to vacate the sanctions. A panel of this Court denied the petition, concluding that the Bank could wait until after final judgment to seek review of the order and emphasized that its denial of mandamus "should not be read … to preclude a future court from holding that the district court erred in imposing the sanctions." *Linde v. Arab Bank, PLC*, 706 F.3d 92, 108 (2d Cir. 2013).

The Bank then petitioned for certiorari, and the Supreme Court called for the views of the Solicitor General. The Solicitor General informed the Court that, in the view of the United States, the sanctions order was deeply flawed, because it "fail[ed] adequately to consider the broad range of United States foreign-relations and anti-terrorism interests … [and] fail[ed] to accord sufficient weight to the foreign jurisdictions' interests in enforcing their bank secrecy laws." U.S.Br.8. The Solicitor General ultimately recommended against certiorari, to give the lower courts an opportunity to reconsider the sanctions in light of the United States' now-stated views. But the Solicitor General noted that, "[i]f [the Bank] is found liable," this Court and the Supreme Court should give the sanctions order "close scrutiny on appeal of a final judgment." U.S.Br.22. The Supreme Court denied certiorari.

3. When the Bank asked the court to reconsider the sanctions in light of the views of the United States, Judge Cogan (to whom the case had been transferred) dismissed the Solicitor General's views as "dictum" and reaffirmed the sanctions order *in toto*. SPA197. Then, before the first liability trial commenced, the District Court gave effect to its sanctions order by summarily granting nearly all of the Plaintiffs' motions *in limine*, without any briefing. *See, e.g.*, JA4596.

The result was a trial in which obviously relevant facts were excluded and wild speculation from Plaintiffs was the norm. For example, Plaintiffs were able to tell the jury that the Bank had eleven customers who were designated by the U.S. as

terrorists, but the Bank was barred from demonstrating that it screened all account openings against applicable terror watch-lists, and closed the accounts of any customers placed on the lists. JA6916, 6975-77, 7005-08. In the one instance where the Bank was permitted to inform the jury about the closing of an account held for an individual designated to be a terrorist, Plaintiffs were permitted to tell the jury that the Bank returned the balance of the closed account ($8,677.92) to its former customer. JA6663-64. But the District Court prevented the Bank from explaining that it reported the closure to authorities in Lebanon, where the account was located, and that the Bank was required by law to return the funds after Lebanese authorities declined to act. JA6662-64. Meanwhile, throughout trial, Plaintiffs' counsel and witnesses repeatedly claimed that the Bank "hid" the unproduced records because they were "incriminate[ing]," JA7136, Plaintiffs even suggested that the Bank had called the head of Hamas to say "Hey Sheik, you got some money down here. Come on down." JA7131. The truth is that the records were not produced because of threats of criminal prosecution, and the phone call was entirely fictional. But, under the District Court's sanctions order, the Bank was required to stand mute as to both.

After tilting the evidentiary field against the Bank, the District Court gave further effect to the sanctions order by instructing the jury that it could infer from the unproduced records that the Bank "provided financial services to Hamas, and to

individuals affiliated with Hamas," and that the Bank "did these acts knowingly." SPA143.

5. The District Court also refused to instruct the jury on §2333(a)'s essential elements. Rather than instructing the jury on §2331(1)'s definition of an "act of international terrorism"—which §2333(a) requires for liability—the court instructed the jury on the requirements of §2339B, an unrelated criminal statute with a lower *mens rea* requirement. SPA146, 209-13; JA7067-68. And despite §2333(a)'s limitation of civil liability to injuries suffered "by reason of" the defendant's conduct, the court did not require Plaintiffs to prove that the Bank's actions were both the proximate and but-for causes of their injuries, as this Court has required. SPA201-08. The jury returned a verdict finding the Bank liable under §2333(a) for all twenty-four attacks. SPA161-64.

6. After the liability verdict, the Bank moved for judgment as a matter of law under Rule 50 or, in the alternative, a new trial under Rule 59. The District Court substantially denied both motions. SPA228.[5]

7. Following the court's ruling, the parties began to prepare for a bellwether damages trial for the victims of three of the attacks addressed in the first liability

[5] The District Court granted the Bank's motion for judgment as a matter of law that two of the twenty-four attacks were perpetrated by organizations other than Hamas. SPA209. Those attacks are not at issue in this appeal.

trial. Before that trial began, however, the parties reached a settlement agreement that preserved the Bank's right to pursue an appeal from a final judgment on sixteen plaintiffs' ATA claims arising from the three bellwether attacks. On May 24, 2016, the District Court entered final judgment on those claims pursuant to Federal Rule of Civil Procedure 54(b). SPA234-37. No other claims or plaintiffs are at issue in this consolidated appeal.

SUMMARY OF ARGUMENT

The judgment below is premised on three plain legal errors. *First*, the District Court inexplicably refused to instruct the jury on §2333(a)'s intent element. A defendant is liable under the ATA if it commits an "act of international terrorism," 18 U.S.C. §2333(a), defined as "acts dangerous to human life" that violate U.S. criminal laws and, among other things, "*appear to be intended* … to affect the conduct of a government by mass destruction, assassination, or kidnapping." *Id.* at §2331(1) (emphasis added). The District Court never even mentioned that standard to the jury. Instead, it instructed jurors that they could find the Bank liable if they found that it violated 18 U.S.C. §2339B, an entirely different statute that criminalizes the provision of "material support … to a foreign terrorist organization." While the violation of a criminal statute is *one* element of §2331's definition, it is alone insufficient to establish the statute's separate intent requirement. And §2339B's

mens rea standard is much less demanding than §2333(a)'s. Because the jury was not instructed on the proper legal standard, its verdict cannot stand.

Even had it been properly instructed, no reasonable jury could have found that the Bank's routine banking activities appeared intended to further terrorist ends. Just the opposite: As the Solicitor General emphasized to the Supreme Court, the Bank is a "constructive partner" in *fighting* terrorism. Plaintiffs' attempts to suggest otherwise rely primarily on testimony that some Bank customers were terrorists. But no financial institution supports the goals of all its customers, and no bank can do a better job than governments at identifying suspected terrorists. In the handful of cases where an existing customer was designated a terrorist, the Bank closed the account.

Second, the District Court ignored the ATA's causation requirements. In violation of this Court's clear precedents, it allowed Plaintiffs to proceed on a diluted theory of proximate causation. Section 2333(a) limits recovery to those injuries that occurred "by reason of" a defendant's conduct, and this Court has interpreted that statutory phrase to require proof of a close link between the defendant and the terrorist attacks. Plaintiffs offered nothing of the sort. For two of the three attacks at issue in this appeal, Plaintiffs made no effort to connect the Bank's services to the attacks whatsoever. None. Their theory was pure guilt-by-association: Hamas committed the attacks; some of the Bank's customers were affiliated with Hamas;

therefore the Bank was responsible for the attacks. Q.E.D. For the third attack, Plaintiffs' theory turned on the fact that the Bank processed payments to two of the attackers' relatives, *two-and-a-half years before* the attack, with no evidence connecting the payments or the relatives to the attacks. The ATA does not empower private plaintiffs to obtain treble damages on such attenuated theories. And this Court has repeatedly rejected the notion "that providing routine banking services to organizations and individuals said to be affiliated with [a terrorist group] … proximately caused the [group's] attacks." *In re Terrorist Attacks on Sept. 11, 2001*, 714 F.3d 118, 124 (2d Cir. 2013); *Rothstein*, 708 F.3d at 97.

In addition, the District Court completely absolved Plaintiffs of their statutory burden to prove but-for causation, categorically refusing to instruct the jury that it was required. This Court and the Supreme Court have repeatedly held that the phrase "by reason of" requires proof of *both* proximate and but-for causation. Yet, the District Court simply refused to instruct the jury on the latter. That failure is outcome determinative here because Plaintiffs admitted the attacks would have occurred and Plaintiffs would have been injured, whether or not the Bank performed any of the alleged acts. Thus, the Bank is entitled to not just a new trial, but to judgment in its favor.

Third, the District Court imposed an unjustified sanctions order that violated basic principles of international comity and due process. The Bank and its

employees faced criminal prosecution by foreign authorities if they produced many of the records Plaintiffs demanded. Nevertheless, the District Court imposed sanctions (1) instructing the jury that it could infer that the Bank knowingly provided services to terrorists, (2) precluding the Bank from contesting whether it knew that any given customer was a terrorist, unless the Bank could produce the full account record for that customer, and (3) barring the Bank from explaining why it had failed to produce the documents. The Bank was thus prohibited from disputing nearly all of Plaintiffs' factual claims and the jury was all but instructed to find the Bank liable. As the Solicitor General informed the Supreme Court, these sanctions violate international comity and undermine cooperation in counterterrorism efforts. The District Court greeted that representation with a shrug and doubled down on sanctions that effectively decided the litigation and deprived the Bank of due process. The Bank is entitled to a new trial based on facts and evidence, not judge-made inferences and wild speculation.

The net effect of these errors sweeps far beyond this case. The District Court's expansion of §2333(a) would make it virtually impossible to bank in unstable regions without incurring massive liability. And the logic of Plaintiffs' claims extends to legitimate American businesses whose customers might turn out to be terrorists. The natural result of that strict liability regime will not be to reduce violence, but instead to drive legitimate institutions out of unstable areas, leading to

further instability. The U.S. and other nations would thus be left with fewer partners in their effort to combat terrorist financing, and bad and clandestine actors will fill the void. Surely that is not what Congress had in mind when it enabled victims of terrorism to sue those actually responsible for terrorist attacks.

STANDARDS OF REVIEW

The District Court's interpretation of the ATA is a legal question that this Court reviews *de novo*. *See Barlow v. Liberty Mar. Corp.*, 746 F.3d 518, 524 n.9 (2d Cir. 2014). This Court reviews the District Court's discovery sanctions "for abuse of discretion, mindful that a district court necessarily abuses its discretion when it imposes sanctions without due process" or otherwise in violation of law. *Reilly v. Natwest Mkts. Grp. Inc.*, 181 F.3d 253, 270 (2d Cir. 1999).

ARGUMENT

I. The District Court Failed To Require Plaintiffs To Prove The Statutory Elements Of Their Section 2333(a) Action.

The plain text of the ATA's civil provisions require plaintiffs to prove that the defendant committed an "act of international terrorism" by engaging in criminal "acts dangerous to human life" that "appear intended" to "intimidate" or "coerce" foreign populations or governments. 18 U.S.C. §§2331(1), 2333(a). But the District Court flatly refused to instruct the jury on these essential elements. Instead, it instructed the jury that any violation of 18 U.S.C. §2339B—a criminal law allowing prosecutors to pursue "material support" to terrorist organizations—satisfies all of

§2331(1)'s requirements and constitutes a *per se* "act of international terrorism" under 18 U.S.C. §2333(a). That error broadly expanded the statute's scope and ignored the legislative judgment embodied in its text and structure. Indeed, under the District Court's capacious view, it is all but impossible to operate a bank—or virtually any service business—in the Middle East without risking liability under §2333(a). Clearly that is not what Congress intended. "Because the jury was not correctly instructed on the" statute's requirements, the Bank is entitled to a new trial—at a minimum. *McDonnell v. United States*, 136 S. Ct. 2355, 2375 (2016). And because Plaintiffs' evidence fell woefully short of satisfying §2333(a)'s requirements, this Court should enter judgment in the Bank's favor.

A. The Statute's Plain Text Requires Intent to Participate in Terrorism.

To be liable under §2333(a), the defendant must have committed an "act of international terrorism," as defined in §2331(1). As this Court has explained, "[f]or an act to constitute 'international terrorism,' it must satisfy *four separate* [*statutory*] *requirements*." *Licci ex rel. Licci v. Lebanese Canadian Bank, SAL*, 673 F.3d 50, 68 (2d Cir. 2012) (emphasis added); *Waldman v. Palestine Liberation Organization*, __ F.3d __, 2016 WL 4537369 at *14 (2d Cir. 2016). Among those requirements, plaintiffs must prove that the defendant committed a criminal act that is "dangerous to human life" and that "*appear*[*s*] *to be intended*" to influence a government or intimidate a populace through terrorism. 18 U.S.C. §2331(1)(B) (emphasis added).

Rather than instruct the jury on the actual statutory elements of Plaintiffs' claim, the District Court bypassed §2331(1)'s demanding intent requirement through "a complicated series of [implicit] incorporations by reference" to other criminal statutes. SPA201. The District Court held that a violation of 18 U.S.C. §2339B—which criminalizes the provision of "material support" for terrorist organizations—constitutes a *per se* "act of international terrorism" under §2331(1) and thus renders a party liable under §2333, even in the absence of an act by the defendant "dangerous to human life" that "appears intended" to terrorize. SPA200-01.

Nothing in §2331, §2333, or §2339B remotely supports this intent-diluting shortcut. To be sure, an "act of international terrorism" must be, among other things, a violation of the "criminal laws of the United States," and §2339B is a criminal statute. But that is only one of four statutory elements. Nothing about §2339B suggests that violating it *ipso facto* satisfies the other elements of §2331. On the contrary, this Court's decisions have repeatedly made clear that to satisfy §2331(1)'s definition of "international terrorism"—that is, to satisfy §2333(a)—a defendant's acts must not only violate a criminal statute, but must also "involve violent acts or acts dangerous to human life" and "must also appear to be intended (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping." *Waldman*, 2016 WL 4537369, at *14; *see*

also Licci, 673 F.3d at 68. Yet, the District Court refused to instruct the jury on those essential elements.

Congress plainly required a plaintiff seeking civil damages to prove that the defendant had the requisite intent as detailed above. It did not simultaneously undermine its explicit judgment through the remarkably subtle stratagem of incorporating §2339B as a *per se* violation of §2333(a), without ever mentioning §2339B in the statute. In fact, the intent requirements of §2333(a) and §2339B are very different. Section 2339B provides: "[t]o violate this paragraph, a person must have knowledge that the organization [to which the person provided material support] is a designated terrorist organization…." In *Humanitarian Law Project*, the Supreme Court held that there is no need to prove that a party providing material support to a terrorist organization intended to support violence. 561 U.S. at 17. Supporting a terrorist organization is enough, and it is no defense that the support was intended to be limited to the organization's non-terrorist activities. *Id.* Indeed, the Supreme Court contrasted that provision's near strict liability regime with statutes that "*do* refer to intent to further terrorist activity." *Id.* (emphasis added). Section 2333(a) is plainly in the latter camp.

Moreover, the ATA's structure confirms that Congress explicitly chose *not* to incorporate §2339B into §2333(a). The civil provisions of RICO and the Clayton Act—which are in other ways similar in structure to the ATA—each predicate

liability *solely* on a violation of other specified criminal statutes, while §2333(a) imposes additional requirements. The RICO Act provides that "[a]ny person injured in his business or property by reason of *a violation of section 1962 of this chapter* may sue therefor…." 18 U.S.C. §1964(c). Likewise, the Clayton Act provides that "any person who shall be injured in his business or property by reason of *anything forbidden in the antitrust laws* may sue therefor." 15 U.S.C. §15(a). But the ATA is markedly different. It provides that U.S. nationals injured "by reason of an act of international terrorism … may sue therefor," not that those injured by reason of a violation of §2339B may sue therefor. And the Act defines "international terrorism" to include four separate elements, only one of which is a violation of "the criminal laws of the United States." By holding that a §2339B violation is a *per se* "act of international terrorism," the District Court struck those additional requirements from the statute.

Congress also used noticeably different definitions of "terrorism" in §2333(a) and §2339B. Rather than adopt the four-element definition of "international terrorism" in §2333(a) and §2331, §2339B defines the terms "terrorist organization," "engage[] in terrorist activity," and "engage[] in terrorism" by explicitly referencing *other* statutes. 18 U.S.C. §2339B(a). "If, in fact, [§2339B and §2333(a)] were meant to have … interrelated interpretations, it is peculiar that there is no explicit

indication of this in the text of either provision." *Murphy v. Millennium Radio Grp. LLC*, 650 F.3d 295, 303 (3d Cir. 2011).

The absence of any express cross-reference between §2333 and §2339B is conspicuous, given that §2333 cross-references *other* criminal statutes. Section 2333(b) provides for offensive collateral estoppel where the defendant has been convicted under one of a number of criminal statutes, including statutes prohibiting the murder of U.S. citizens abroad (18 U.S.C. §1203). But §2339B is not listed in §2333(b). And even for the criminal statutes that *are* listed in §2333(b), Congress did not create *per se* liability. Rather, §2333(b) prevents the defendant from "denying the essential allegations of the criminal offense," but does not establish every element of an "act of international terrorism." It is inconceivable that a violation of §2339B, which is mentioned nowhere in §2333, could accomplish more.

B. The District Court's Interpretation of the ATA Ignores Its Statutory History and Frustrates its Legislative Purpose.

The District Court's conflation of §2333(a) and §2339B also squarely conflicts with the history of the Anti-Terrorism Act. Nothing in the statute's history suggests that Congress intended § 2339B to have the dramatic effect conferred by the District Court. Indeed, §2339B was passed four years *after* §2333, in a bill that made no modifications to §2333. Neither §2339B nor §2333 references the other. And nothing in the history of §2339B remotely suggests that it was intended to substantially expand the scope of §2333. On the contrary, §2339B was enacted

"without any explicit connection to civil liability" at all. Jack Goldsmith & Ryan Goodman, *U.S. Civil Litigation and International Terrorism*, *in* Civil Litigation Against Terrorism 109, 122 (John Norton Moore ed., 2004).

Indeed, Congress has since rejected the District Court's reading of §2333(a). On September 28, 2016, while this appeal was pending, Congress passed (over President Obama's veto) the Justice Against Sponsors of Terrorism Act, which allows Plaintiffs to bring aiding and abetting and conspiracy claims under the newly-created §2333(d). In doing so, Congress said nothing about incorporating §2339B into §2333(a), which would have obviated the need to add the new §2333(d). Moreover, unlike the District Court's dramatic dilution-via-incorporation, §2333(d) does not dilute §2333(a)'s intent requirement. Aiding and abetting and conspiracy are specific intent crimes. *United States v. Ogando*, 547 F.3d 102, 108 (2d Cir. 2008). The use of those common law concepts in §2333(d) only re-affirms that §2333 limits liability to persons who intend to further terrorist violence. And this Court has rejected the notion that "generalized [financial] assistance" to a tortfeasor can trigger aiding-and-abetting or conspiracy liability, even if the defendant knows that its assistance will further the tort. *Bigio v. Coca-Cola Co.*, 675 F.3d 163, 175 (2d Cir. 2012).

In contrast to Congress' modest amendment in §2333(d), the District Court's sweeping expansion of §2333(a) via §2339B is breathtaking. Section 2339B

criminalizes virtually any contact with a terrorist organization, even "legal training" and "political advocacy" done with the sole intent to further lawful ends. *Humanitarian Law Project*, 561 U.S. at 10. The Justice Department recognizes the breadth of §2339B and attempts to prevent overreaching even by trained prosecutors who do not personally benefit from a favorable verdict by requiring that U.S. Attorneys seek permission from the Assistant Attorney General for National Security before bringing *any* §2339B prosecutions. U.S. Dep't of Justice, *United States Attorneys' Manual* §9-2.136.H. The District Court's ruling, however, effectively places enforcement of this statute in the hands of private lawyers motivated by the possibility of sharing in treble damages. If Congress had intended §2333(a) to confer such enormous power on the plaintiffs' bar, one would expect some evidence in the statute, or at least its legislative history. There is none.

The legitimate businesses and international organizations that are at risk under the District Court's reading of the statute are legion. Twitter, Facebook, and Google are currently facing suits alleging that the use of their services by terrorists violates §2339B. *Fields v. Twitter, Inc.*, No.16-cv-00213 (N.D. Cal.); *Force v. Facebook, Inc.* 16-cv-05158 (E.D.N.Y.); *Gonzalez v. Twitter, Inc., Google, Inc., Facebook, Inc.*, 16-cv-03282 (N.D. Cal.); *Cohen v. Facebook, Inc.*, 16-cv-04453 (E.D.N.Y.). In another §2333(a) suit, the victim of a terrorist organization sued a company threatened by the organization, on the theory that the defendant's payment of

extortion money violated §2339B. *Stansell v. BGP, Inc.*, No. 8:09-cv-2501-T-30AEP, 2011 WL 1296881, at *9 (M.D. Fla. Mar. 31, 2011). And many other legitimate banks have been sued under myriad ATA theories.

Numerous marquee American companies also have provided services that, under the District Court's reading of the ATA, could subject them to liability. For example, leading American banks were involved in the transactions at issue in this lawsuit. JA7115-17. And the FBI has disclosed that a Marriott hotel in Philadelphia once provided facilities for a two-day conference hosted by a convicted terror-front organization.[6] If a violation of §2339B is a *per se* "act of international terrorism," for purposes of §2333(a), then all of those actions are grounds for civil liability and treble damages under §2333(a). Indeed, under the District Court's theory, even the Red Cross or Doctors Without Borders could be brought within the ambit of §2339B. *See Boim v. Holy Land Found. for Relief & Dev.*, 549 F.3d 685, 710-12 (7th Cir. 2008) (*Boim III*) (Rovner, J., dissenting). But under the statute Congress actually wrote, plaintiffs must satisfy a far more demanding intent requirement.

Eliminating §2333(a)'s intent requirement also disrupts the international financial system and the work of bank regulators. As the Treasury Department has

[6] Elizabeth J. Shapiro, *The Holy Land Foundation for Relief and Development: A Case Study*, *in* 62 U.S. Attorneys' Bulletin 23, 24 (2014); Glenn R. Simpson, *Holy Land Foundation Allegedly Mixed Charity Money With Funds for Bombers*, Wall St. J. (Feb. 27, 2002) http://www.wsj.com/articles/SB101476025597651120.

recognized, "it is not possible or practical for a financial institution to detect and report every single potentially illicit transaction that flows through the institution."[7] But that unworkable "zero-tolerance" regime is precisely what the District Court has imposed through §2333(a). *Id.* The U.S. and allied governments spend billions of dollars each year and have thousands of employees dedicated to intelligence and counterterrorism. Private organizations lack similar resources and thus necessarily rely on government determinations, such as the OFAC list. That is precisely what the Bank did here. Yet, in the District Court's view, banks and other businesses must do a better job than the U.S. government at identifying terror organizations, or face treble damages. That cannot be the law.

Under the District Court's regime, businesses have few options to protect themselves. Without the resources to do serious intelligence work to identify terrorist customers, businesses will be tempted to use crude proxies for assessing customer risk, such as race, religion, or country of origin. Or worse yet, many would respond by cutting off services to customers outside the developed world. That is already happening in Myanmar, Angola, Iraq, and Somalia.[8] Arab Bank is one of

[7] David. S. Cohen, Under Sec'y, U.S. Dep't of Treasury, Remarks at the ABA/ABA Money Laundering Enforcement Conference (Nov. 10, 2014), http://www.treasury.gov/press-center/press-releases/Pages/jl2692.aspx.

[8] Copeland & deRose, *The Risks of De-Risking*, Program on Corporate Compliance & Enforcement (2016), *available at* http://bit.ly/2daLIMl; Saperstein &

the few banks linked to the international financial system that still operates in the Palestinian Territories, and it is already under pressure to exit as a result of the legal risks associated with the region (including these lawsuits).[9] If legitimate businesses that cooperate with the U.S. and other governments' investigations leave the region, only bad actors will remain. Clearly, the ATA was never meant to deprive the U.S. government of constructive partners to fight terrorist financing and ordinary people of legitimate financial services.

C. Neither This Court's Nor Any Other Circuit's Precedents Support The District Court's Misreading of the Act.

The District Court placed most of its weight on the Seventh Circuit's decision in *Boim III*. But that case did not equate §2333(a) with §2339B. Rather, the Seventh Circuit concluded that §2333(a) liability can be premised on a violation of §2339A. And the difference between the two provisions is critical: §2339A supplies its own more demanding intent requirement by criminalizing the provision of "material support" to any person with the "know[ledge] or inten[t] that [the support is] to be *used in preparation for, or in carrying out*" acts of terrorism. (emphasis added). Thus, setting aside whether or not *Boim III* correctly interpreted §2333(a) vis-à-vis

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Sant, *Account Closed: How Bank 'De-Risking' Hurts Legitimate Customers*, Wall Street J. (Aug. 12, 2015), http://on.wsj.com/2exuklj.

[9] Marouf Hasian, Jr., *A Postcolonial Critique of the* Linde et al. v. Arab Bank, PLC, *"Terrorism" Bank Cases* 2, 54 (2015).

§2339A, the plaintiff there still had to establish that the defendants' acts were intended to support international terrorism.[10] Indeed, the *Boim III* court stressed that the defendant "must have known that the money would be used in preparation for or in carrying out the killing or attempted killing of, conspiring to kill, or inflicting bodily injury on, an American citizen abroad." 549 F.3d at 690-92. The same is not true of the District Court's incorporation of §2339B, which lacks the intent requirement of §2339A.

The District Court also mistakenly read this Court's decision in *Weiss v. National Westminster Bank PLC*, 768 F.3d 202, 208 (2d Cir. 2014), as compelling the conclusion that §2339B constitutes a *per se* act of international terrorism. But *Weiss* did not even consider that question. Instead, it addressed the much narrower issue of whether the defendant had sufficient knowledge under §2339B to satisfy §2331(1)(A)'s requirement that the defendant engaged in activities that violate U.S. criminal laws—*i.e.*, to satisfy the first of §2331(1)'s four statutory elements. *Weiss* never suggested that answering that question affirmatively was enough. In fact, just the opposite: *Weiss* expressly did "not address whether [a violation of §2339B] fulfilled" the ATA's additional requirement that a defendant's conduct "appear to be

[10] Prior to trial, Plaintiffs elected not to "pursue claims based on §§2339A and/or 2339C" and "limit[ed] their claims … to the Bank's alleged violations of 18 U.S.C. §2339B(a)(1)…." *Linde*, 04-cv-2799 ECF No. 1017 at 1.

intended" to further terrorist ends. *Id.* at 207 n.6.; 18 U.S.C. §2331(1)(B). And to read *Weiss* as the District Court did would put it on a collision course with this Court's decisions in *Licci* and *Waldman*, both of which held that a plaintiff must satisfy *all* of the "four separate requirements" under §2331(1). *Licci*, 673 F.3d at 68; *Waldman*, 2016 WL 4537369, at *14.

D. Under the Proper Intent Framework, Plaintiffs Failed to Meet Their Burden of Proof.

As the foregoing makes clear, the District Court's jury instruction simply misstated the law and thus the Bank is entitled to a new trial, at the very least. *See McDonnell*, 136 S. Ct. at 2375. But there is no need to burden the District Court or the parties with a new trial, because no properly instructed jury could find the Bank civilly liable under §2333(a).

The record objectively demonstrates that the Bank has not engaged in international terrorism. On the contrary, the U.S. government has described the Bank as "a constructive partner" that dutifully "report[s] suspicious financial activities to the government" and "is a lead[er] … on anti-money laundering and combatting the financing of terrorism." U.S.Br.20. This alone is proof that the Bank's actions did not "appear to be intended" to support terror. But the Bank also proffered evidence that it voluntarily began screening its non-U.S. customers and transactions against the U.S. terror blacklist *years* before its regional peers and without any legal obligation to do so, and that it instituted a sophisticated world-

wide anti-terror compliance program, including electronic customer profiles, visits to customer sites, and regular reports to government authorities. CA476-81, 484, 487-90, 495-97, 501-04, 515, 522-24, 724, 748, 757. No reasonable observer could conclude that the Bank intended to engage in terrorism.

The District Court obscured these facts by excluding most of the Bank's evidence regarding its compliance program as irrelevant, *e.g.*, JA4627, 6880, and allowing Plaintiffs to present a wildly inaccurate caricature of the Bank as Hamas' financier. Plaintiffs argued that the Bank maintained accounts for eleven designated terrorists. But the Bank was forbidden from telling the jury that it screened all account openings against the local country terror watch-list and *closed* all accounts of designated as terrorists. JA6916, 6975-77, 7005-08. Plaintiffs told the jury that the Bank transferred more than $8,000 to a terrorist former customer. But the Bank could not tell the jury that it had reported the account to government authorities and was *compelled by law* to return the money after they failed to act. JA6663. And Plaintiffs' experts expressed their opinions at length that twelve of the Bank's non-profit customers were Hamas fronts and that the Saudi Committee was funneling money to suicide bombers. But none of the charities was designated at the time—indeed, nine of the twelve had been approved by USAID—and the District Court excluded the Bank's evidence about the Saudi Committee, including an endorsement by the Secretary of State. JA4299, 4301; SPA224-25. In short, the *actual* evidence

in this case plainly demonstrates that the Bank *rejected* terrorism and worked to prevent it. Thus, without the District Court's erroneous evidentiary rulings (which were premised on its erroneous legal rulings), the Bank is entitled to judgment as a matter of law under §2333(a) as it existed at trial and now with the new §2333(d). *See Weisgram v. Marley Co.*, 528 U.S. 440, 457 (2000).

II. The District Court Failed To Apply The Statute's Causation Standards.

In addition to requiring proof of intent to engage in terrorism, §2333(a) requires plaintiffs to prove a tight causal relationship between the defendant's act and the plaintiff's injury. And for good reason: eschewing such a relationship would subject defendants to liability for attacks they had no role in perpetrating. Congress clearly indicated that §2333(a) incorporates the familiar doctrines of proximate and but-for causation, and plaintiffs must prove *both* elements. But Plaintiffs have not made the kind of proximate causation showing required by this Court's precedents and openly admit they cannot prove but-for causation. The jury's verdict must therefore be reversed and judgment should be entered for the Bank.

A. This Court's Decisions Foreclose Any Finding of Proximate Cause.

"When a court evaluates a … claim for proximate causation, the central question it must ask is whether the alleged [action] led directly to the plaintiff's injuries." *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 461 (2006). There can be

no doubt that the ATA requires a showing of proximate causation and that Plaintiffs' attenuated theories of causation fail to meet that standard.

This Court's decision in *Rothstein* compels reversal on this point. The plaintiffs in *Rothstein*, who were victims (or their survivors) of Iran-funded terrorist attacks, sued UBS under §2333(a) based on allegations that UBS furnished U.S. currency to Iran. But this Court rejected the plaintiffs' attempt, like Plaintiffs' here, to presume causation based solely on allegations that the defendant provided funds to a terror organization. That sweeping "*post hoc, ergo propter hoc* proposition," this Court explained, "would mean that any provider of U.S. currency to a state sponsor of terrorism would be strictly liable for injuries subsequently caused by a terrorist organization associated with that state." 708 F.3d at 96. "If Congress had intended to impose" such an onerous regime, there is "no doubt that it would have found words more susceptible to that interpretation, rather than repeating the language it had used in other statutes to require a showing of proximate cause." *Id.*

This Court reaffirmed those holdings in *In re Terrorist Attacks*, 714 F.3d at 123. The plaintiffs there claimed that the defendants, including some banks, "provided funding to purported charity organizations known to support terrorism that, in turn, provided funding to al Qaeda and other terrorist organizations." *Id.* at 124. But this Court held that those "allegations [we]re insufficient … for the same reasons the allegations in *Rothstein* fell short." *Id.* Of particular relevance here, the

Court was "not persuaded that providing routine banking services to organizations and individuals said to be affiliated with al Qaeda … proximately caused the September 11, 2001 attacks or plaintiffs' injuries." *Id.* *Rothstein* and *Terrorist Attacks* indisputably establish that merely engaging in business with supporters of terrorism does not satisfy §2333(a)'s proximate causation standard. Yet, the court allowed Plaintiffs to proceed on the same watered down proximate causation theory that this court has twice rejected.

Indeed, because Plaintiffs' evidence clearly failed under this Court's precedents, judgment should be entered for the Bank. With respect to two of the three relevant attacks, Plaintiffs adduced *zero* evidence connecting the Bank to anyone who planned, executed, or otherwise participated in the attacks. With respect to the Route 60 attack, Plaintiffs' allegation was that, two-and-a-half years before the attack, the Bank processed two payments from the Saudi Committee to relatives of attack participants. JA878; JA896. But there was no evidence connecting those relatives or the payments to Hamas, or even terrorism more generally, let alone to the specific attack.

Without any evidence connecting the Bank to the attacks at issue, Plaintiffs resorted to a theory that providing financial services to individuals and entities allegedly affiliated with terrorist groups can proximately cause a terror attack. But that argument reads "proximate" out of "proximate cause" and is precisely the sort

of attenuated theory that this Court rejected in *Rothstein* and *Terrorist Attacks*. Even assuming that some of the Bank's clients had an undisclosed affiliation with Hamas, notwithstanding the Bank's substantial compliance efforts to prevent such cases, simply providing routine banking services to such clients does not proximately cause any terrorist attack those clients commit, let alone attacks committed by third parties who share an affiliation with Hamas.

In fact, Plaintiffs' causation theories are even more attenuated than those this Court has already rejected, and if endorsed, they would devastate the international financial system. There is no dispute that numerous other international banks provided the same financial services to the same individuals. Plaintiffs made no effort to distinguish the Bank's services from those of other banks or to connect the Bank's services to the specific attacks at issue here. Rather, with respect to the allegedly Hamas-controlled charities (which received U.S. government funding) Plaintiffs argued that Hamas received intangible benefits from its affiliation with these charities, by winning the "hearts and minds" of needy Palestinians. JA6265. That convoluted chain of intangibles is nowhere near the proximate causation required by the statute.

The Saudi Committee payments likewise played no causal role in these attacks, let alone a proximate one. The donations (none of which came from the Bank) were made to alleviate a dire humanitarian crisis, and consisted of gifts to

individuals, principally a monthly subsistence stipend of approximately $130. CA891, 903. Since Plaintiffs cannot link any of the payments to the attacks at issue, they claim that the *possibility* of such payments for the families of deceased terrorists motivated their attacks. But, on this theory, processing *any* financial payments that provide *any* charity to *any* Palestinian proximately causes terrorism. That is absurd.

B. The District Court Erroneously Absolved Plaintiffs of Their Statutory Burden to Prove But-For Causation.

The problems with Plaintiffs' causation theory run deeper still. Not only did Plaintiffs lack evidence to satisfy the demanding proximate causation standard, they openly admitted that they could not demonstrate but-for causation because the attacks would have occurred even if the Bank had not processed any of the payments at issue. *See, e.g.*, JA4468. Because it is black letter law that the statute's language requires proof of *both* forms of causation, that admission should have been fatal. Plaintiffs only escaped the consequences of their concession because the District Court entirely excused them from proving but-for causation. That error requires reversal, and Plaintiffs' own admission entitles the Bank to judgment in its favor.

But-for causation "requires proof that the harm would not have occurred in the absence of—that is, but for—the defendant's conduct." *Burrage v. United States*, 134 S. Ct. 881, 887-88 (2014) (quotation marks omitted). It is, "in other words, a requirement of *actual* causality." *Id.* at 887 (emphasis added). Although "courts have not *always* required strict but-for causality" in common law tort cases, §2333(a)

is not a common law tort and the statutes' use of the phrase "by reason of" requires a showing of but-for causation. *Id.* at 890 (emphasis in original).

Here, too, *Rothstein* is controlling. As this Court explained, the ATA was modeled on and imports the well-developed causation scheme under RICO and the Clayton Act. 708 F.3d at 95. All three statutes provide that a person injured "by reason of" specified conduct "may sue therefor" in federal court. *Id.* In *Rothstein*, this Court held that "[t]he 'by reason of' language [in the ATA] had a well-understood meaning," which the Supreme Court had consistently interpreted as "requir[ing] a showing that the defendant's violation … was a 'but for' … [and] proximate cause" of plaintiff's injuries. *Id.* The borrowed language thus "brings the old soil" of those statutes "with it." *Sekhar v. United States*, 133 S. Ct. 2720, 2724 (2013) (quotation marks omitted).

The District Court viewed *Rothstein*'s holding as limited to proximate cause, and considered itself unbound by what it called *Rothstein*'s "passing reliance" on Supreme Court cases holding that "by reason of" language requires "but-for" causation. SPA202. But there can be no doubt that *Rothstein*'s holding includes a but-for causation requirement—because it expressly said so. And this Court spoke in but-for language when dismissing the case. Because the plaintiffs in *Rothstein* failed to allege that "the moneys UBS transferred to Iran were in fact sent to Hizbollah or Hamas or that Iran would have been unable to fund the attacks by

Hizbollah and Hamas without the cash provided by UBS" they failed to allege adequate causation. 708 F.3d at 97. So too here. Plaintiffs admit (as they must) that, even without the Bank's financial services, Hamas would have been able to fund and carry out the attacks at issue. Under *Rothstein*, that concession is fatal.

Furthermore, even if *Rothstein* had not addressed the issue, there would be no doubt that but-for causation is required. The Supreme Court has consistently held that statutory phrases such as "because of," "based on," and "by reason of" require "at least a showing of 'but-for' causation." *Burrage*, 134 S. Ct. at 889. The Court has endorsed this rule not only under RICO and the Clayton Act, *Hemi Grp., LLC v. City of New York*, 559 U.S. 1, 9 (2010); *Holmes v. Sec. Inv'r Prot. Corp.*, 503 U.S. 258, 268 (1992), but also under Title VII's anti-retaliation provision, *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2525 (2013), the Age Discrimination in Employment Act, *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 176 (2009), and the Controlled Substances Act, *Burrage*, 134 S. Ct. at 889. And courts—including this Court—have interpreted the phrase "by reason of" to require but-for causation in numerous other contexts, including in the Jury System Improvement Act, *e.g.*, *Rogers v. Bromac Title Servs.*, 755 F.3d 347, 351-52 (5th Cir. 2014), the Labor Management Relations Act, *e.g.*, *Titan Tire Corp. v. United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union*, 734 F.3d 708, 721 (7th Cir. 2013), contracts, *e.g.*, *Pac. Ins. Co. v. Eaton Vance Mgmt.*, 369 F.3d 584,

589-91 (1st Cir. 2004), and IRS regulations, *e.g.*, *Robinson Knife Mfg. Co. v. Comm'r*, 600 F.3d 121, 131-32 (2d Cir. 2010).

The District Court eschewed this wall of authority in favor of a reading of the statute that it believed comported with better policy. The court reasoned that it is "impossible" to establish but-for causation against anyone but terrorists themselves; terrorists are insolvent; and the ATA must create liability for a solvent defendant; *ergo* but-for causation is not an element of the ATA. SPA202. In short, the Bank must be liable, because—in the infamous words of Willie Sutton—"that's where the money is." This reasoning is flawed at every level.

To begin with, even if it were somehow relevant to causation, the District Court was simply wrong that terrorists themselves are not amenable to suit. The very incident that inspired the ATA, the high-jacking of the cruise-liner *Achille Lauro*, resulted in a *successful* suit against the PLO.[11] Others have successfully collected judgments from persons or entities directly involved in terror. *E.g.*, *Stansell v. FARC*, 771 F.3d 713, 748 (11th Cir. 2014); *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1316-19 (2016). And the U.S. Treasury has $2.3 billion worth of frozen terrorist assets (including Hamas assets) available under the Terrorism Risk

[11] Benjamin Weiser, *A Settlement With P.L.O. Over Terror on a Cruise*, N.Y. Times (Aug. 12, 1997).

Insurance Act for Plaintiffs who proceed against terrorists themselves.[12] Thus, even if the lack of a solvent defendant could be an excuse for ignoring text and precedent, it would not apply here.

Moreover, the District Court's "there-must-be-a-solvent-defendant" reasoning turns the normal principles of statutory interpretation and causation on their head. Tort liability and the meaning of statutory text do not expand to ensure a deep pocket for every plaintiff. The ATA provides a tort remedy, not an insurance scheme. And but-for causation is designed to *cut-off* liability when, despite a plaintiff's attempt to reach a deep pocket, the same injury would have occurred with or without the defendant's actions.

On this question, the District Court once again invoked the Seventh Circuit's decision in *Boim III*. There, Judge Posner drew upon the classic law school hypothetical in which multiple arsonists' fires combine to destroy a plaintiff's house. 549 F.3d at 695. Although it is impossible to establish that any one arsonist was the but-for cause of the hypothetical plaintiffs' injuries, according to Judge Posner, each actor is equally liable. So too for the terrorist front organizations in *Boim III*.

[12] Terrorism Risk Insurance Act, codified as note to 28 U.S.C. §1610; U.S. Treasury Dep't, *Terrorist Assets Report* (2016), https://www.treasury.gov/resource-center/sanctions/Programs/Documents/tar2015.pdf.

But here, again, *Boim III* and its hypothetical is off-point. If Hamas, Al Qaida, and the PLO simultaneously bomb the same building, perhaps the victims can sue all three, because, as in the fire hypothetical, each is an independently sufficient cause of the plaintiffs' injuries. But nothing in the arson hypothetical allows the victims to sue every gas station where the arsonists purchased the gasoline they used to ignite the fire. The station owners would be neither the but-for nor the proximate cause of the injuries inflicted by the arsonists. And the links to the Bank here are far more attenuated. Plaintiffs have never traced the money provided by the Bank to the specific attacks, let alone proved that financing was critical to the attacks, or would not have been obtained elsewhere. To the contrary, Plaintiffs have admitted Hamas would have inflicted the same damage with or without the Bank. Under the statute, that concession is fatal, and the District Court's excision of but-for causation from the statute cannot stand.

Finally, the District Court found support for Plaintiffs' attenuated theories of causation in *Paroline v. United States*, 134 S. Ct. 1710, 1725 (2014). But *Paroline* stands alone among the Supreme Court's cases and allows an unusual causation theory for an unusual set of facts. There, the Supreme Court held that convicted users of child pornography could be required to pay restitution to those portrayed in the pornography for the users' apportioned share of the harm, notwithstanding the "atypical" causal process by which the ongoing distribution of the pornography

harms the victims. *Id.* at 1722. Whatever the merit of *Paroline*'s causal theory within the unique "context of criminal restitution," *Paroline* unequivocally rejects the remedy Plaintiffs seek here: 100% recovery from the Bank for treble damages. *Id.* at 1724. Even in *Paroline*, the Supreme Court limited the defendant's liability to his apportioned share of the injury and refused to impose joint and several liability because the defendant had "no legal or practical avenue for seeking contribution." *Id*. at 1725-26. Such an approach, the Court warned "is so severe it might raise questions under the Excessive Fines Clause of the Eighth Amendment." *Id*.; *see also Cooper Indus. v. Leatherman Tool Grp.*, 532 U.S. 424, 433-435, 442 (2001).

The effects are even more troubling here. The District Court rejected the Bank's claim of contribution against the other banks which processed the very same transactions because §2333(a) is similar to RICO and the Clayton Act, which do not permit contribution claims. 611 F. Supp. 2d 233, 240 (E.D.N.Y. 2009). But Plaintiffs and the District Court cannot have it both ways. The District Court cannot import the RICO and Clayton Act's no-contribution rule while rejecting the statutes' causation scheme, and Plaintiffs cannot take advantage of *Paroline*'s relaxed causation scheme while rejecting its limitation on damages. Indeed, there is no escaping that the Bank is being held trebly "liable for millions of dollars in losses collectively caused by thousands of independent actors" without any means of

seeking contribution. 134 S.Ct. at 1726. That result comports with neither the text of the ATA, nor due process, and is exactly what *Paroline* sought to avoid.

* * *

The upshot of the District Court's failure to apply §2333(a)'s intent and causation requirements is a *de facto* strict liability regime (with treble damages). But that is precisely what this Court rejected in *Rothstein*: "If Congress had intended to impose strict liability, we have no doubt that it would have found words more susceptible to that interpretation." *Rothstein*, 708 F.3d at 96. Under the District Court's misreading of §2331(1), banks can be liable no matter what policies they implement to stop the flow of money to terrorist groups, and under its diluted causation scheme even a single transfer can render a bank liable for hundreds of terror attacks occurring into the indefinite future, even if that transfer played no role in those attacks. Such sweeping and virtually unavoidable liability is manifestly inconsistent with the Act, Congress' intent in passing it, and simple common sense.

III. The District Court's Sanctions Order Violated The Bank's Due Process Rights And Undermines U.S. Foreign Relations.

The legal errors of the District Court's instructions were exacerbated by its unjustified and reckless sanctions order. Because the privacy laws of Arab Bank's home country and many of the countries in which it operates prohibited the Bank from complying with discovery demands that ran into the teeth of those binding foreign laws, the District Court imposed sweeping sanctions on the Bank. But as the

Solicitor General informed the Supreme Court, those sanctions were unfounded and have already harmed the United States' relationships with "key regional partners in the fight against terrorism." U.S.Br.19. They punish Arab Bank for obeying the law and foreign sovereigns for cooperating with U.S. government investigations. They disregard the interests of foreign sovereigns in enforcing their laws in their own territories against their own subjects. And they ignore the enormous foreign policy consequences of an order that threatens the existence of one of the most important financial institutions of a key U.S. ally. In short, they place Plaintiffs' desire for discovery and the District Court's interests in facilitating litigation above the interests of foreign sovereigns, the United States, and the anti-terrorism concerns the ATA seeks to protect.

A. The Sanctions Order Violates Foundational Comity Principles.

Most fundamentally, the sanctions order misapplies the required comity analysis. When issuing a discovery order seeking documents that are located abroad and covered by foreign legal protections, a court must consider whether the order is consistent with "the demands of comity." *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Ct. for S.D. Iowa*, 482 U.S. 522, 543-544, 546 & n.27 (1987). Among the factors relevant to this comity analysis are:

> (1) the importance to the … litigation of the documents or other information requested; (2) the degree of specificity of the request; (3) whether the information originated in the United States; (4) the availability of alternative means of securing the information; and (5)

> the extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine important interests of the state where the information is located.

Id. at 544 n.28. And when considering the United States' interests, a court must account for long-term interests, as well as the specific interests at stake in a particular matter. *See id.* at n.29.

Here, the District Court failed at its task. The Bank's home country and many of the countries in which it operates impose financial confidentiality restrictions that prohibit the Bank from releasing customer information. While those rules limit the civil discovery available against the Bank—and every other financial institution operating in those countries—they exist for good reason. Personal banking records can reveal a person's most sensitive information, from political and religious affiliations (through donations), to health (through payments to doctors), and, most obviously, financial condition. Such records should not be handed over to anyone who asks, and every nation provides for the protection of financial privacy, including the United States. *E.g.*, Right to Financial Privacy Act, 12 U.S.C. §§3401-22.

Although Plaintiffs claim that "terrorists" have no right to financial privacy, they demanded that the Bank turn over the full account records for more than 15,000 customers for whom Plaintiffs offered no evidence of any connection with terror, including every beneficiary of the Saudi Committee food stipends. CA895; JA6971; JA3291-3304. And regardless of how the United States might balance financial

privacy against other legitimate concerns, there is no dispute that Jordan and numerous other countries choose to value financial privacy over civil discovery and impose criminal sanctions against banks who violate their laws. Thus, producing every document Plaintiffs requested would have violated the rights of thousands of individuals and subjected the Bank and its employees to criminal liability. As the Supreme Court has explained, a party's inability to produce because of the constraints of foreign law is a "weighty excuse." *Societe Internationale Pour Participations Industrielles Et Commerciales, S. A. v. Rogers*, 357 U.S. 197, 211 (1958).

The District Court, however, dismissed those facts, and instead concluded that "there is nothing in the record indicating that defendant faces a real risk of prosecution" because there was no evidence to "show that defendant or its employees have been prosecuted for the Bank's *voluntary* productions" to the U.S. government in a prior criminal investigation of third-parties. SPA89. But this Court recently rejected the very same reasoning from the very same District Court. In *In re Vitamin C Antitrust Litigation*, __ F.3d __, 2016 WL 5017312, at *9 (2d Cir. Sept. 20, 2016), this Court reversed a $147 million antitrust jury verdict because the defendant's allegedly unlawful actions were compelled by foreign law. Critically, this Court dismissed "factual evidence of [a foreign government's] unwillingness or inability to enforce [its laws] as [ir]relevant," because it would be inappropriate for

U.S. courts to "inquir[e] into the acts and conduct of the officials of the foreign state, its affairs and its policies and the underlying reasons and motivations for the actions of the foreign government." *Id.* at *11.

Here, the District Court not only inquired into whether foreign nations would actually enforce their laws against the Bank—precisely what *Vitamin C* prohibits—it did so in the face of those nations' stated intentions to the contrary. Lebanon's Finance Minister bluntly told the District Court: "Lebanon will … institut[e] legal action against Arab Bank and its employees if it attempts to comply with the" court's discovery orders. JA3820. The court was "bound to defer to those statements," *Vitamin C*, 2016 WL 5017312, at *9, but it did the opposite. In other words, the District Court asked the wrong question by inquiring into whether the foreign privacy laws would actually be enforced, and then ignored evidence that should have been given conclusive effect. That is the same abuse of discretion this Court corrected in *Vitamin C*.

Indeed, this case demonstrates the substantial problems posed by district courts inserting themselves into international affairs. Jordan and Lebanon described the District Court's order as an "affront," that "violate[d] principles of mutual respect," and constituted a "grave threat to [their] stability and prosperity." JA3820, 4572. And the Solicitor General made clear that the sanctions are at odds with U.S. interests because they penalized both the Bank and the foreign nations in which it

operates for cooperating with multi-national efforts to stop terrorist financing. Rather than view that cooperation as evidence of a commitment to fight terrorism, the District Court treated it as selective compliance with privacy laws and evidence of the Bank's culpability. But that view mistakenly equates private litigation with coordinated multi-government investigations. U.S.Br.12-13. And the District Court's order actually "undermine[s] important United States law-enforcement and national-security interests by deterring private entities and foreign jurisdictions from cooperating" with the United States. *Id.*

Law enforcement, diplomatic engagement, and military action—not civil litigation—are the principal means by which the U.S. and the international community combat terrorism. Although the ATA certainly reflects an interest in compensating victims, domestic civil litigation is hardly the primary or most effective tool for fighting global terror and the District Court seriously miscalculated when it equated discovery in this lawsuit with combating terrorism. Indeed, the drafters of the ATA understood that it was not to be the *ne plus ultra* of anti-terrorism policy, when they expressly recognized that ATA plaintiffs will not have access to all the discovery parties normally get in civil litigation and "will have to rely very heavily upon evidence developed in a parallel criminal investigation…." ATA.Hr'g.44. Here, there is no such parallel investigation of the Bank, because the U.S. views it as a partner in the fight against terror.

Finally, the Bank has produced all relevant documents located in its U.S. offices and all foreign documents that were not protected by privacy laws. It was sanctioned simply for obeying the criminal laws of the foreign nations in which it operates and where the remaining documents are located. Those nations seek only to apply their own laws to documents held within their own borders. Yet, the District Court enforced U.S. law extraterritorially.

Indeed, the District Court's approach stands in stark contrast to the Supreme Court's precedents, which emphasize that U.S. law, including "what discovery is available in litigation," should not be applied "incompatib[ly]" with foreign law, or otherwise projected into foreign nations. *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 269 (2010). This Court very recently quashed a warrant in a criminal case because it offended comity principles to "requir[e] a service provider to 'collect' [records] located overseas … belonging to a foreign citizen, simply because the service provider has a base of operations within the United States." *Microsoft Corp. v. United States*, 829 F.3d 197, 221 (2d Cir. 2016). If criminal warrants requested by the United States can be quashed out of deference to the interests of foreign governments, so much more should civil discovery requests from private parties yield to those interests.

All of these errors have a common theme: "the court failed to give adequate weight to United States and foreign sovereign interests that weighed in favor of a

lesser sanction than the one the court imposed." U.S.Br.9. Instead, the District Court elevated concerns about facilitating the litigation pending before it over the comity concerns it was required to consider. While that might be understandable—district courts are well-situated to oversee litigation and poorly-situated to conduct foreign policy—it does not make it right.

B. The Sanctions Order Violated the Bank's Due Process Rights.

Considering the deference due to foreign sovereigns and the need of foreign defendants to comply with the laws of the jurisdictions in which they operate, no sanctions were appropriate in this case. But to the extent that any sanctions were appropriate, due process and basic fairness should have permitted the Bank to explain to the jury why it could not produce the documents. *Shcherbakovskiy v. Da Capo Al Fine*, 490 F.3d 130, 140 (2d Cir. 2007). The jury could then decide what weight to give the Bank's explanation and what to infer about the missing documents from the hundreds of thousands of documents the Bank did produce. That is essentially what the magistrate judge proposed after overseeing the extensive discovery process and witnessing the Bank's efforts to comply with Plaintiffs' requests. Yet, rather than take this balanced approach, the District Court converted the magistrate's "permissive" inferences into irrebuttable presumptions by barring any explanation for the missing documents and leaving the jury no rational basis on which to decline the court's inference.

No other court faced with similar circumstances has taken such a drastic and irrational step. On the contrary, due process requires that juries should decide cases on the merits, not judge-made inferences. When faced with identical requests concerning the identical documents, Judge Weinstein held that the Bank should be permitted "to explain why evidence was withheld" to permit the jury "to reach a decision on the merits." *Gill v. Arab Bank, PLC*, 893 F.Supp.2d 542, 551 (E.D.N.Y. 2012). And this Court has held that when relevant evidence is unavailable, the non-producing party must be permitted to offer "adequate explanation for the non-production" to permit the trier of fact "to judge what weight the non-production should have." *Tupman Thurlow Co. v. S. S. Cap Castillo*, 490 F.2d 302, 308-09 (2d Cir. 1974). "Absent [an] opportunity [for the withholding party to explain why it did not produce the documents], the jury is deprived of sufficient information on which to base a rational decision of whether to apply the adverse inference, and an otherwise permissive inference easily becomes an irrebuttable presumption." *Stevenson v. Union Pac. R.R. Co.*, 354 F.3d 739, 750 (8th Cir. 2004).

Permitting the jury to weigh evidence regarding the justification for missing evidence will cure any prejudice to the opposing party. *See Shcherbakovskiy*, 490 F.3d at 140. Where, as here, a "party makes good faith efforts to comply, and is thwarted by circumstances beyond his control—for example, *a foreign criminal statute prohibiting disclosure of the documents at issue*—an order" that effectively

determines the outcome of the litigation "deprive[s] the party of a property interest without due process of law." *Cine Forty-Second St. Theatre Corp. v. Allied Artists Pictures Corp.*, 602 F.2d 1062, 1066 (2d Cir. 1979) (emphasis added). The District Court flatly contradicted these basic principles.

Even if the District Court believed that the Bank acted in bad faith—and it made no such finding—a reasonable jury certainly may have concluded otherwise, as did the magistrate and the Solicitor General in this very case. SPA66-68, JA2441-42; U.S.Br.12. The Bank did everything it could to produce the documents short of exposing itself and its employees to criminal liability. Indeed, the magistrate called the Bank's production efforts "quite successful." SPA67. The Bank made direct requests to the central bank authorities of Lebanon and the Palestinian Territories, among others, for exceptions from the relevant privacy laws. It sought relief from courts in Jordan and the Palestinian Territories and exhausted its appellate rights. It requested that the District Court issue letters rogatory to numerous countries. JA3477, 3495-3537, 3715-34. And the Bank requested permission from the relevant parties to disclose their records. JA2471-72; SPA67.

In the end, however, the District Court imposed the sanctions all the same, and those sanctions, rather than the evidence, are what decided the case. At trial, the District Court told the jury that because the Bank had "refused to provide certain documents," it could infer:

- "that defendant provided financial services to Hamas, and to individuals affiliated with Hamas;"
- "that defendant processed and distributed payments on behalf of the Saudi Committee to terrorists, including those affiliated with Hamas, the[ir] relatives, or representatives; and"
- "that defendant did these acts knowingly."

SPA143. After the District Court's rulings on scienter and causation stripped the Bank of its principal defenses, these inferences sealed the Bank's fate by satisfying every remaining contested element of Plaintiffs' claims.

Although the District Court described the inferences as "permissive," they were, in practice, unavoidable. Throughout trial, the court and opposing counsel made repeated references to the Bank's "deceit" and its "concealing," "hiding," and "refus[ing] to produce" "incriminat[ing]" bank records, JA5321, 7123, 7124-27, 7128, 7134, SPA143, accusations that, after trial, one juror described as the "smoking gun" that swayed the jury.[13] And the District Court's *post-hoc* attempts to downplay the effect of the sanctions are belied by its earlier, more honest assessment that the sanctions would make the case "very difficult to defend." JA4627.

Not only was the Bank barred from responding to these allegations, it was prohibited from offering *any* evidence regarding its knowledge about a customer's identity unless it had produced every record for the customer's account. SPA96. By

[13] John Marzulli, *Arab Bank Liable for Terror Attacks in Israel on 300 Americans, Brooklyn Jury Finds*, N.Y. Daily News (Sept. 22, 2014), http://nydn.us/2dpKPhK.

also permitting the jury to infer that the Bank's customers were terrorists, and holding that such knowledge alone triggers liability under §2333(a), the District Court effectively flipped the burden of proof and all but instructed the jury to find the Bank liable. As Plaintiffs' counsel told the jury, the sanctions order amounted to this: "you may assume that Arab Bank did everything we told you" it did. JA7129.

Combined with the District Court's other evidentiary rulings, the sanctions order painted a picture for the jury bearing no resemblance to reality. For instance, the District Court refused to let the Bank answer Plaintiffs' accusation that it transferred $2.5 million to designated terrorists, when clear evidence demonstrated that the Bank had closed those accounts. JA6915-16, 7118-21. The District Court also barred the Bank from explaining that when it closed one such account, the law compelled it to return the money to the account holder. The Court barred the Bank from telling the jury about its compliance with the law of the countries where it operates, SPA221-22, while letting Plaintiffs condemn the Bank for allegedly not complying with the law of Israel, where the Bank does *not* operate. *See, e.g.*, JA5980-5988, 6006. And with the Bank entirely muzzled, opposing counsel engaged in wild and inflammatory speculation, even telling the jury that the Bank "probably got on the phone" with the head of Hamas and told him, "Hey Sheik, you got some money down here. Come on down." JA7131.

* * *

If allowed to stand, the sanctions order is likely to have the same effect as the District Court's flawed interpretation of the statute—to discourage legitimate banking in the Middle East and perversely leave a vacuum for bad actors. The sanctions order put the Bank in the untenable position of having to choose between criminal punishment abroad and massive civil liability in the United States. No doubt, enterprising plaintiffs' lawyers have taken note. And all banks in the Middle East are now at risk of facing unfounded civil claims, in which plaintiffs will use foreign privacy laws as a cudgel to obtain sanctions orders and leverage settlements. Under that regime, legitimate institutions, like Arab Bank, will face the choice of whether to cut their ties to the U.S. or to the developing nations in urgent need of legitimate financial services. Either course would be a setback for those opposed to terrorism, and it is not a choice this Court should force on Arab Bank. The District Court's sanctions order should be reversed.

CONCLUSION

For the reasons set forth above, the judgment of the District Court should be reversed and judgment entered for the Bank. In the alternative, this Court should vacate the judgment of the District Court and remand for a new trial.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
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I hereby certify that:

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October 20, 2016

s/ Nicholas T. Matich
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CERTIFICATE OF SERVICE

I hereby certify that, on October 20, 2016, an electronic copy of the foregoing Brief for Appellant was filed with the Clerk of Court using the ECF system and thereby served upon all counsel appearing in this case.

s/ Paul D. Clement
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