ORAL ARGUMENT NOT YET SCHEDULED

No. 21-7097

In the United States Court of Appeals
for the District of Columbia Circuit

Keren Kayemeth LeIsrael - Jewish National Fund; Asher Goodman; Batsheva Goodman; Ephriam Rosenfeld; A. R., By and through his parents and guardians Ephriam and Kineret Rosenfeld; B. R., By and through his parents and guardians Ephriam and Kineret Rosenfeld; H. R., By and through her parents and guardians Ephriam and Kineret Rosenfeld; Bracha Vaknin; S. M. V., By and through his parents and guardians Bracha and Yosef Vaknin; E. V., By and through his parents and guardians Bracha and Yosef Vaknin; M. V., By and through her parents and guardians Bracha and Yosef Vaknin; S. R. V., By and through her parents and guardians Bracha and Yosef Vaknin; A. V., By and through her parents and guardians Bracha and Yosef Vaknin,
Plaintiffs – Appellants
v.
Education for a Just Peace in the Middle East, doing business as US Campaign for Palestinian Rights,
Defendant – Appellee

On Appeal from the United States District Court for the District of Columbia, 1:19-cv-03425-RJL

FINAL REPLY BRIEF OF APPELLANTS

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GLOSSARY OF ABBREVIATIONS

Justice Against Sponsors of Terrorism Act ("JASTA")

INTRODUCTION

After appellants filed a Notice of Appeal in this case but before the principal brief was due to be filed, this Court issued a 61-page opinion in another case squarely rejecting the grounds stated by the District Judge for dismissing a complaint in an anti-terrorism lawsuit concerning American military in Iraq. *Atchley v. Astrazeneca UK Limited,* 22 F.4th 204 (D.C. Cir. 2022). This case concerns international terrorism against different victims in a different country – from Gaza against civilians in Israel. Nonetheless, the District Judge copied verbatim word-for-word his grounds for dismissal of this complaint from the opinion he issued that this Court reversed in *Atchley*. Compare the text of *Atchley v. Astrazeneca UK Limited*, 474 F. Supp.3d 194, 202, 208-214 (D.D.C. 2020), with the text of *Keren Kayemeth LeIsrael-Jewish National Fund*, 530 F. Supp.3d 8, 11-15 (D.D.C. 2021).

In these unusual circumstances appellee might have acknowledged that the District Judge's ruling, based on reasoning rejected by this Court, was erroneous and that the District Judge's dismissal in this case has to be vacated and the case returned for further proceedings in the District Court. Instead of accepting that consequence, the appellee has chosen to dissect the complaint and has asserted multiple times in its brief that the complaint had "inadequate allegations" or "no factual allegations" on details that remain to be discovered and proved.

This Court held in *Aktieselskabet AF 21, November 2001 v. Fame Jeans, Inc.*, 525 F.3d 8, 15-16 (D.C. Cir. 2008), that the Supreme Court did not impose "heightened pleading requirements" or require "a specific quantity of facts" when it decided *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). See also *Gordon v. United States Capitol Police*, 778 F.3d 158, 161-162 (D.C. Cir. 2015). This Court observed in its *Aktieselskabet* opinion (525 F.3d at 16) that the liberal notice pleading standard articulated in *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 511-512 (2002), had been explicitly confirmed by the Supreme Court in its *Twombly* opinion. 550 U.S. at 569-570.

This case does not have a threadbare complaint. Its 271 paragraphs do far more than "identify the 'circumstances, occurrences, and events' giving rise to the claim" – which is all that is required to overcome a Rule 12(b)(6) motion to dismiss. 525 F.3d at 16 (quoting *Twombly*). Particularly in anti-terrorism actions – where the evidence is deliberately hidden by the defendants and can only be unearthed during discovery – it would abort many meritorious lawsuits at birth if plaintiffs were expected to allege details that have been deliberately concealed by the defendants.

SUMMARY OF ARGUMENT

1. The appellee concedes that the complaint alleged that the US Campaign for Palestinian Rights sponsored a group including five designated terror organizations including Hamas and that it promoted the marches in Gaza from which the incendiary kites and balloons were launched. These allegations suffice to withstand a motion to dismiss the appellants' claim of direct liability for harm caused by international terrorism.

2. The appellants' claim of secondary liability is far more compelling in this case than in *Atchley* because the defendants in *Atchley* were pharmaceutical companies accused of providing free goods and cash bribes and not, as in this case, the direct sponsors or perpetrators of the terrorist acts.

3. Anti-terrorism lawsuits should not be aborted at the complaint stage because essential evidence cannot in such cases be obtained without discovery and depositions.

ARGUMENT

I.

THE COMPLAINT'S ALLEGATIONS OF SPONSORSHIP AND ACTIVE PROMOTION JUSTIFY DIRECT LIABILITY FOR THE INCENDIARY BALLOONS AND KITES

Appellee acknowledges in its brief that appellants' complaint made "two relevant factual allegations: that the US Campaign served as the U.S. fiscal sponsor of the Boycott National Committee . . . and it referenced the Great Return March in an email and on social media." Brief of Appellee, p. 11; see also *id.* at pp. 16, 30. These conceded allegations, together with Paragraphs 87, 99-102, 104-105, and the photographs in paragraphs 104-105 of the complaint that show the incendiary balloons before they were launched (JA35, 37, 38-40), were far more than is needed to "link the US Campaign to the burning kites and balloons . . . that allegedly caused Plaintiffs' injuries." Brief of Appellee, p. 11. These are not, as appellee asserts, "legal conclusions and inferences." They are allegations of fact.

This is not a case like many other current valid anti-terrorism lawsuits against "deep-pocket" defendants such as international banks that unlawfully facilitate international terrorism while also engaging in lawful commercial activity in many other spheres. The appellee is an entity with a single objective – the realization of Palestinian rights. To achieve this objective, it solicits tax-deductible charitable contributions and transmits the funds to the Boycott National

Committee, whose membership includes Hamas and four other designated terror organizations (Complaint para. 24, JA22). The Boycott National Committee describes the appellee as its "most important and strategic ally and partner in the U.S." (Complaint paras. 130, 131, JA46).

Hence this case concerns the direct and primary benefactor of, and contributor to, Hamas' international terrorism, not a peripheral accessory. The benefactor's active participation in Hamas' launching of incendiary kites and balloons is its promotion and encouragement of the Great Return March (Complaint paras. 132-137, JA47-49), during which the unlawful terrorist devices are dispatched (Complaint paras. 104, 105, JA38-40).

Consequently, the allegations of appellants' complaint place this case squarely within the decision in *Boim v. Holy Land Foundation for Relief & Development*, 549 F.3d 685 (7th Cir. 2008) (*en banc*). Just as the Holy Land Foundation, which was the prime defendant in *Boim,* gathered and dispatched funds that were ultimately utilized by Hamas assassins to violate US law by murdering an American citizen, the appellee has been soliciting and transmitting money that it is sending to Hamas for terrorism, including the launch of incendiary kites and balloons. The *Boim* decision held that the conduct of the defendants in that case – even if that conduct also served some legitimate charitable objectives – subjected them to direct liability under Section 2333(a). By the same token, the US

Campaign for Palestinian Rights is directly liable for the damage inflicted on Americans by the incendiary balloons and kites even if it also finances lawful activity.

The Seventh Circuit held in *Boim* that "[g]iving money to Hamas" is "like giving a loaded gun to a child" (549 F.3d at 690) and is, therefore, the commission of a violent act covered by Section 2331(1)(A). The same is true of being the "fiscal sponsor" (*i.e.*, the source of money) and the "strategic ally" of Hamas – as the complaint alleges the US Campaign for Palestinian Rights to be.

II.

THE COMPLAINT'S ALLEGATIONS REGARDING THE THREE ELEMENTS AND SIX FACTORS IDENTIFIED IN *HALBERSTAM v. WELCH* JUSTIFY AIDER AND ABETTOR LIABILITY

In addressing secondary liability under JASTA, appellee's brief attempts to distinguish this case from *Atchley* by arguing that the Iraqi Ministry of Health and Jaysh al-Mahdi were more proximately responsible for the terrorist acts that harmed American servicemen than was appellee responsible for launch of the incendiary kites and balloons. Brief of Appellee, pp. 31-33, 37-38, 43-45. This argument overlooks the fact that the principal defendants in *Atchley* were "large medical supply and manufacturing companies" (22 F.4th at 209), not the Iraqi Ministry or Jaysh al-Mahdi. Can there be any serious doubt that the appellee was more "generally aware" and provided more "knowing assistance" to the terrorist

acts in this case than did Johnson & Johnson, Pfizer, AstraZeneca, and the other pharmaceutical companies that were held potentially liable in *Atchley* when they supplied US-made medical goods?

Beyond this plainly flawed contention, the appellee argues again that details not required in a complaint should have been alleged in the appellants' complaint. Appellee claims that only a "conclusory allegation" supports appellants' assertion that the Boycott National Committee was "integrally involved" with the Great Return Marches during which the incendiary balloons and kites are launched. Paragraphs 116 and 117 of the complaint (JA42-44) contain detailed allegations of integral involvement by the Boycott National Committee – financed by the appellee – in the Great Return March. These go well beyond the requirements of a "short and plain statement of the claim" required by Rule 8 of the Federal Rules of Civil Procedure.

Appellants' principal brief details at pages 19-24 how the complaint satisfies the standards articulated in *Halberstam v. Welch*, 705 F.2d 472 (D.C. Cir. 1983). These standards govern aider-and-abettor liability under Section 2333(d)(2). Details that appellee claims are missing from the complaint such as (a) the precise dollar amounts sent by the appellee to Hamas, (b) how long that assistance has been provided, (c) how the funds were transferred, and (d) how much involvement

and knowledge appellee had of how the money was spent are matters known to the the appellees and will all be the subjects of discovery.

III.

IN AN ANTI-TERRORISM CASE DISCOVERY IS THE ESSENTIAL MEANS OF GATHERING FACTS TO BE PRESENTED AT TRIAL

Appellee's brief tellingly proves how essential it is that claims of injury caused by terrorist acts be permitted to proceed past the initial complaint. If appellee's claim that details must be alleged in a complaint is right, victims of international terrorist acts would be unable to proceed with litigation until they had in hand all the facts that would entitle them to judgment – an impossible task when facts have deliberately been concealed.

In *Kilburn v. Socialist People's Libyan Arab Jamahiriya*, 376 F.3d 1123, 1129, 1130 (D.C. Cir. 2004), Judge Garland confirmed in his opinion for a unanimous court that "'material support' of terrorist acts by . . . state sponsors . . . is difficult to trace," and that "terrorist organizations can hardly be counted on to keep careful bookkeeping records." Only if depositions are taken and documents are produced in litigation can an American national injured by international terrorism collect the factual evidence needed to prove the claim to a jury.

The appellants must be allowed to proceed with this lawsuit to implement Congress' goal of effectively deterring international terrorism.

CONCLUSION

For the foregoing reasons and those presented in the Brief of Appellants the judgment dismissing appellants' complaint should be reversed and the case remanded for further proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, counsel for Appellants and a member of the Bar of this Court, certify that pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B) that the foregoing Brief is proportionately spaced, has a typeface of 14 points or more, and contains 1,695 words.

s/ Nathan Lewin
Nathan Lewin