No. 17-7037

Oral Argument Not Yet Scheduled

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JAMES OWENS, *et al.*, *Plaintiffs-Appellants*, **v.** BNP PARIBAS, SA, *et al.*, *Defendants-Appellees*.	On Appeal from the United States District Court for the District of Columbia Case No. 1:15-cv-01945-JDB

AMICUS CURIAE BRIEF OF THE AMERICAN ASSOCIATION FOR JUSTICE IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 29(c), Amicus Curiae hereby provides the following disclosure statement:

The American Association for Justice ("AAJ"), formerly the Association of Trial Lawyers of America, is a non-profit voluntary national bar association. There is no parent corporation or publicly owned corporation that owns ten percent or more of this entity's stock.

Respectfully submitted this 19th day of June, 2017.

/s/ Jeffrey R. White

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Legislative Material

Other Authorities

IDENTITY AND INTEREST OF AMICUS CURIAE

The American Association for Justice ("AAJ")[1] is a national, voluntary association of trial lawyers who specialize primarily in representing plaintiffs in personal injury, discrimination, and other tort causes of action.

AAJ is particularly interested in this case due to the district court's extremely narrow interpretation of "direct" proximate cause, which would deprive many injured victims of their access to the courts.

[1] All parties have consented to the filing of this *amicus curiae* brief. Undersigned counsel for *Amicus Curiae* affirms, pursuant to Federal Rule of Appellate Procedure 29(a)(4), that no counsel for a party authored this brief in whole or in part, and no person or entity other than AAJ, its members, and its counsel contributed monetarily to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

1. In this case, AAJ is primarily concerned by the district court's very narrow interpretation of "direct" proximate causation in a cause of action that Congress intended to employ general tort law principles. Plaintiffs in this case clearly alleged that they were injured "by reason of" the embassy bombings, which were a direct result of BNPP's illegal conduct in assisting the government of Sudan to evade U.S sanctions and U.S. trade embargo.

2. The district court in this case erred in requiring that plaintiffs, pleading a private cause of action under the Anti-Terrorism Act, must plead that banks which enabled the government of Sudan to evade United States sanctions and a United States trade embargo "directly" aided the terrorists who were responsible for the bombings of United States embassies in Kenya and Tanzania in 1998.

The generally recognized principles of tort law do not cut off liability after the first in a sequence of causes and effects. Nor do tort law principles shield BNPP from liability where there is no "secondary plaintiff," injured because a primary tort victim has sustained injury.

In this case, plaintiffs are the primary victims of BNPP's criminal misconduct.

3. This case, instead, presents the commonly addressed question of "enabling torts." A defendant may be held liable for enabling a third party's criminal misconduct. The situation in this case most closely resembles the tort of negligent entrustment, where a defendant may be held liable for actively enabling a third party to drive, use a firearm, or otherwise harm a person who is a foreseeable victim of the defendant's misconduct.

ARGUMENT

I. THE DISTRICT COURT ERRONEOUSLY DISMISSED PLAINTIFFS' STATUTORY CAUSE OF ACTION FOR FAILURE TO PLEAD PROXIMATE CAUSATION.

This case is about egregious wrongdoing and about the remedy that Congress created specifically for the victims of such wrongdoing. Even before the attacks on September 11, 2001, Congress recognized that Americans were targets of international terrorists. To complement existing criminal sanctions against those responsible for such attacks, Congress enacted a civil cause of action for victims.

The Anti-Terrorism Act of 1990 ("ATA") provides:

> Any national of the United States injured in his or her person . . . by reason of an act of international terrorism, or his or her estate, survivors, or heirs, may sue therefor in any appropriate district court of the United States and shall recover threefold . . . damages. . . .

18 U.S.C. § 2333(a).

This legislation's sponsors described its purpose as providing both "civil relief to the victims of terrorism" and a means of combatting international terrorism. 136 Cong. Rec. S4568-01 (April 19, 1990) (statement of Sen. Chuck Grassley). To accomplish this, Congress enacted a statutory cause of action to "codify general common law tort principles and to extend civil liability for acts of international terrorism *to the full reaches of traditional tort law." Boim v. Quranic Literacy Inst. & Holy Land Found. for Relief and Dev.*, 291 F.3d 1000, 1010 (7th Cir. 2002), *overruled on other grounds*, 549 F.3d 685, 690–91 (7th Cir. 2008) (emphasis added).

The ATA, mirroring traditional tort law, "opens the courthouse door to victims of international terrorism." S. Rep. 102–342, at 45 (1992). Section 2333(a) not only provides victims of international terrorism with a legal remedy, it serves to ward off future terrorist

attacks by awarding "compensatory damages, tremble damages, and the imposition of liability at any point along the causal chain of terrorism," so as to "interrupt, or at least imperil, the flow of money" to terrorists. S. Rep. 102-342, at 22.

Much in this case is not in dispute. Plaintiffs are victims and family members of victims of the 1998 terrorist bombings of the U.S. embassies in Kenya and Tanzania carried out by al Qaeda and Hezbollah. Defendants are banks that enabled Sudan and Sudanese banks to obtain U.S. dollars through the international financing system despite U.S. sanctions and U.S. trade embargo. *Owens v. BNP Paribas S.A.*, No. CV 15-1945, 2017 WL 394483, at *2-3 (D.D.C. Jan. 27, 2017) ("*BNP Paribas*"). *See also Owens v. Republic of Sudan*, 826 F. Supp. 2d 128 (D.D.C. 2011) (detailing findings of fact and conclusions of law as to Sudan's liability for the 1998 bombings).

As detailed in Plaintiffs' complaint, in 1993 the United States designated Sudan as a state sponsor of terrorism for its support of al Qaeda and other terrorist organizations. Complaint at ¶ 47-48. In 1997, the United States also imposed a trade embargo, including a prohibition on processing financial transactions, aimed at preventing

Sudan from selling its oil and other commodities on the open market. Consequently, Sudan encountered great difficulty in providing financial support to terrorist organizations. *BNP Paribas*, 2017 WL 394483, at *2; Complaint at ¶¶ 63–66.

This court, in *Owens v. Republic of Sudan*, 531 F.3d 884 (D.C. Cir. 2008), found plaintiffs' allegations that Sudan provided material support to al Qaeda, without which al Qaeda could not have carried out the embassy bombings, were sufficient to support plaintiffs' claim under 28 U.S.C.§ 1605(a)(7) (since repealed). "Appellees' factual allegations and the reasonable inferences that can be drawn therefrom show a reasonable enough connection between Sudan's interactions with al Qaeda in the early and mid–1990s and the group's attack on the embassies in 1998 to meet § 1605(a)(7)'s jurisdictional causation requirement." *Owens*. 531 F.3d at 895.

Defendants enabled Sudan to provide that support by conducting financial transactions on Sudan's behalf that hid Sudan's connection with sales and payments. *BNP Paribas*, 2017 WL 394483, at *2; Complaint at ¶¶ 15–16; 90-92. Thus, Sudan was able to obtain millions of U.S. dollars, out of which it contributed funds that al Qaeda and

Hezbollah needed to carry out their attacks. Complaint at ¶¶ 13-16, 73 & 86. The district court properly found that "Sudanese government support was critical to the success of the 1998 embassy bombings." *Owens v. Republic of Sudan*, 826 F. Supp. 2d 128, 146 (D.D.C. 2011). Without defendants' assistance, plaintiffs allege, Sudan and Sudanese entities could not have provided that financial assistance to al Qaeda and Hezbollah and the embassy attacks would not have occurred. *BNP Paribas*, 2017 WL 394483, at *2; Complaint at ¶¶ 70, 107-110, 118 and 123.

Plaintiffs clearly pled that they suffered injuries "by reason of" the embassy bombings, which were a direct result of BNPP's illegal conduct in assisting the government of Sudan to evade U.S sanctions and trade embargo.

II. THE DISTRICT COURT ERRONEOUSLY DISMISSED PLAINTIFFS' COMPLAINT IN THIS CASE BASED ON AN INAPPROPRIATELY NARROW INTERPRETATION OF PROXIMATE CAUSE THAT IS NOT CONSISTENT WITH GENERAL TORT LAW PRINCIPLES.

A. Plaintiffs' Complaint Sufficiently Alleged That Plaintiffs Suffered Harm Proximately Caused By Defendants.

The district court properly held that § 2333(a) of the ATA requires a plaintiff to show that his or her harm was proximately caused by defendants' misconduct. *BNP Paribas*, 2017 WL 394483, at *7-8. Indeed, both parties agree that the tort law standard of proximate cause applies. *Id.* at *7. The district court further held that "§ 2333 requires a showing of proximate cause, as that term is typically defined. . . . [that] the injury is the natural and probable consequence of the negligent or wrongful act and ought to have been foreseen in light of the circumstances.'" *BNP Paribas*, 2017 WL 394483, at *9 (quoting *Burnett v. Al Baraka Inv. & Development Corp.*, 274 F. Supp. 2d 86, 105–07 (D.D.C. 2003)).

Plaintiffs' complaint clearly meets this standard. Accepting the complaint's factual allegations as true, defendants enabled Sudan and its controlled entities to evade sanctions that the United States put in

place specifically because of the clear danger that money obtained by Sudan would be used to fund international terrorism and result in precisely the type of injuries plaintiffs allege. Thus, plaintiffs' harms are a natural and probable consequence of defendants' criminal misconduct and were plainly foreseeable.

B. The District Court Imposed An Additional Restriction On ATA Causation That Is Not Supported By the Tort Doctrine Of Proximate Cause, By Limiting Liability To Only "Direct" Consequences Of Defendants' Criminal Conduct.

The district court nevertheless granted defendants' motion to dismiss, accepting defendants' argument "defin[ing] proximate cause as requiring a 'direct' connection between defendants' conduct and plaintiffs' injuries." *BNP Paribas,* 2017 WL 394483, at *7 (quoting *Siegel v. SEC*, 592 F.3d 147, 159 (D.C. Cir. 2010)). A "direct" connection does not, of course, necessarily require that an action immediately produce the harmful result; the action could set in motion a foreseeable sequence of events. However, the district court adhered to the very narrow view urged by defendants and held that, while aid directly to terrorist organizations might give rise to liability under § 2333(a), aid to the government of Sudan which in turn aided the

terrorists was too indirect or remote. "Based on plaintiffs' allegations," the court concluded, "there is simply not enough to sustain a sufficiently direct causal connection between defendants' conduct and the embassy bombings that injured plaintiffs." *BNP Paribas*, 2017 WL 394483, at *10 (emphasis added).

1. Limiting proximate causation to the immediate direct effects of defendants' criminal conduct, ignoring the more remote, but natural and foreseeable indirect consequences, is not consistent with tort principles.

At the outset, it should be noted that 18 U.S.C. § 2333(a) precisely specifies the range of possible plaintiffs, but in no way restricts the range of possible defendants. Any such restriction must therefore arise from the policies Congress intended to serve. For example, the Supreme Court's conclusion that Congress incorporated common-law proximate cause into the Sherman Act's the private cause of action for harm suffered "by reason of" a defendant's antitrust violation was not based on a "literal reading of the statute," but rather on "the larger context in which the entire statute was debated." *Associated Gen. Contractors of Cal. Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 529 & 530 (1983).

The term "proximate cause" is itself "notoriously confusing," *CSX Transp., Inc. v. McBride*, 564 U.S. 685, 701 (2011). A court must look to the policies underlying Congress's statutory cause of action to ascertain whether a broad or restrictive view is appropriate. *Id.* at 692 (Congress's humanitarian and remedial goals in enacting the FELA cause of action for injured railroad workers supports broad interpretation of proximate causation in such actions).

"Proximate cause" at the close of the nineteenth century was a relatively recent invention in the law of torts and was narrowly interpreted by some courts to protect America's fledgling industries, notably the railroads, from too heavy a burden of liability for the harms they cause. *See* Lawrence M. Friedman, A History of American Law 409-11 (1973); Morton J. Horwitz, The Transformation of American Law, 1870-1960 85-89 (1977); Stuart Speiser, Lawsuit 124-28 (1980). As the California Supreme Court recognized "'concepts of duty and proximate cause, [provided] a convenient instrument of control over the jury, by which the liabilities of rapidly growing industry were curbed and kept within bounds.'" *Am. Motorcycle Ass'n*

v. Superior Court, 578 P.2d 899, 904-05 (Cal. 1978) (quoting William Prosser, *Comparative Negligence*, 41 Cal. L. Rev. 1, 4 (1953)).

Based on such protective policies, some courts limited tort recoveries to those harms very directly caused by defendant's negligence. A famous example is *Ryan v. New York Central Railroad Co.*, 35 N.Y. 210 (1866), where defendant's locomotive set a wood shed on fire, which spread to plaintiff's house 130 feet away. The New York court held that the destruction of plaintiff's house was too remote and was therefore not proximately caused by defendant's negligence. To hold otherwise would create a liability "that no private fortune would be adequate" to meet. *Id. See also Pennsylvania R. Co. v. Kerr*, 62 Pa. 353 (1870) (similar facts and holding). *Cf.* Friedman, *supra* at 410-11, criticizing *Ryan* as a conspicuous example of judicial protectiveness of American industry.

It is doubtful that this extremely narrow view of "direct" proximate cause commanded a majority following. *See* Victor E. Schwartz, Kathryn Kelly & David F. Partlett, Prosser, Wade and Schwartz's Torts: Cases and Materials 291-92 (10th ed. 2000); William L. Prosser, Palsgraf *Revisited* 52 Mich. L. Rev. 1, 12 & n.47 (1953). For

example, the California Supreme Court was "confident, considering the long dry season of California and the prevalence of certain winds in our valleys, that it may be left to a jury to determine whether the spreading of a fire from one field to another is not the natural, direct or proximate consequence of the original firing." *Henry v. Southern Pac R.R.*, 50 Cal. 176, 183 (1875). The following year, the U.S. Supreme Court, emphatically rejected Ryan and stated "The true rule is, that what is the proximate cause of an injury is ordinarily a question for the jury," which may find that "the proximate cause of a disaster . . . may operate through successive instruments." *Milwaukee & St. Paul R. Co. v. Kellogg*, 94 U.S. 469, 474 (1876). See also William L. Prosser, *Proximate Cause in California*, 38 Cal. L. Rev. 369, 399 (1950) (Undue focus on "direct" causation "has been damned, and rightly so, as artificial, illogical and calling for unreal and refined hair-splitting."). The district court in this case, however, viewed "direct" proximate cause as limiting the liability of banks under the ATA to those only those banks who send money directly into the coffers of terrorist organizations. *BNP Paribas*, at *8.

The district court relied heavily on *Rothstein v. UBS AG*, 708 F.3d 82 (2d Cir. 2013). Plaintiffs in that case were harmed by terrorist attacks in Israel carried out by Hezbollah and Hamas, with financial support from Iran. The Second Circuit court of appeals held that plaintiffs failed to state a cause of action under the ATA against UBS, which had provided Iran with millions of U.S. dollars in cash. *Id.* at 93. The court held that plaintiffs "failed to allege proximate cause sufficiently to state a claim on which relief can be granted." *Id.* at 94. Specifically, the court indicated that their complaint "does not allege that UBS provided money to Hezbollah or Hamas" directly, but only transferred U.S. currency to Iran. *Id.* at 97.

The district court below saw a close parallel to this case:

> The Rothstein defendants, like the bank defendants here, were thus one step further removed from the acts that caused the plaintiffs' injuries, separated by a sovereign state that was not simply a funnel to provide money to terrorists, but that may well have used the funds processed for any number of legitimate purposes.

BNP Paribas, 2017 WL 394483, at *8. "Here, defendants are accused of providing financial services to Sudan, not to al Qaeda or to any terrorist directly." *Id.* at *9. "Processing funds for Sudan," the court

concluded, "is not the same as processing funds for a terrorist organization or a terrorist front." *Id.* at *10.

Ruling that defendants who were "one step further removed" from the embassy bombings could not, as a matter of law, proximately cause plaintiffs' injuries essentially resurrects the rejected *Ryan* view. Moreover, there is not, as was the case in *Ryan*, any legitimate policy to be served by shielding the financiers of terrorism from liability. Indeed, as Judge Posner has pointedly stated, requiring defendants with money to pay for the harms they cause by financing terrorist organizations "makes good sense as a counterterrorism measure. Damages are a less effective remedy against terrorists and their organizations than against their financial angels." *Boim v. Holy Land Found. for Relief & Dev.,* 549 F.3d 685, 690–91 (7th Cir. 2008). Suits against terrorists and terrorist organizations who may not be answerable in damages, "can have no deterrent or incapacitative effect, whereas suits against financiers of terrorism can cut the terrorists' lifeline." *Id.* at 691. For this reason, Congress intended to incorporate the broad view of proximate causation so as to impose liability "at any point along the causal chain of terrorism." *Wultz v.*

Islamic Republic of Iran, 755 F. Supp. 2d 1, 56 (D. D.C. 2010) (quoting S. Rep. 102-342, at 22 (1992)).

The district court's heavy reliance on *Rothstein* is ill-considered for several reasons. First, the Second Circuit emphasized that providing cash to Iran, which in turn provided funds to terrorist organizations, did not establish proximate cause because the government of Iran "has many legitimate agencies, operations, and programs to fund." 708 F.3d at 97. Nothing in the ATA suggests that liability may arise only from financial assistance to entities that engage only in terrorism. Indeed, some terrorist organizations also engage in legitimate activities. For example, Hamas regularly "engaged not only in terrorism but also in providing health, educational, and other social welfare services." *Boim*, 549 F.3d at 698.

Noting "the fungibility of money," the court stated, "the fact that you earmark it for the organization's nonterrorist activities does not get you off the liability hook." 549 F.3d at 698. Similarly, the Supreme Court in *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010) upheld imposition of criminal penalties under 18 USC § 2339B for providing material assistance to foreign terrorist organizations,

including assistance directed to the lawful or legitimate activities of those organizations. "Such support frees up other resources within the organization that may be put to violent ends. It also importantly helps lend legitimacy to foreign terrorist groups—legitimacy that makes it easier for those groups to persist, to recruit members, and to raise funds—all of which facilitate more terrorist attacks." 561 U.S.. at 29.

This court in *Kilburn v. Socialist People's Libyan Arab Jamahiriya,* 376 F.3d 1123, 1130 (D.C. Cir. 2004), held that a plaintiff stated a claim under the terrorism exception to the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(7), by alleging that Libya provided material support to a terrorist organization that kidnapped and murdered an American. This court rejected Libya's argument that plaintiff was required to prove that Libya directly funded the terrorist operation: "Money, after all, is fungible." *Kilburn*, 376 F.3d at 1130. *See also Strauss v. Credit Lyonnais, S.A.*, No. CV-06-0702, 2006 WL 2862704, at *17–18 (E.D.N.Y. Oct. 5, 2006) ("Because money is fungible, it is not generally possible to say that a particular dollar caused a particular act or paid for a particular gun. If plaintiffs were

required to make such a showing, § 2333(a) enforcement would be difficult [and Congress's] stated purpose would be eviscerated.").

Second, the *Rothstein* court's conclusion that plaintiffs' allegations that the bank's currency transfer to Iran was a remote and speculative cause of the attacks by Iran-supported terrorists was largely based on the undisputed fact that Iran at that time already had acquired "billions of dollars in its reserves from multiple sources," making it difficult to trace the funds provided to terrorists back to USB. 708 F.3d at 96. By contrast, Sudan during the early 1990s was heavily in debt, with a shrinking economy. Khalid Hassan Elbeely, *Sudan's Unsustainable Debt: The Way Out*, 5 Int'l J. Bus. & Soc. Res. 1, 1-2 (2015). A jury could reasonably infer that, without BNPP's aid in obtaining international financing, the 1998 embassy bombings could not have taken place.

At the very least, plaintiffs should be afforded the opportunity to make the more specific factual allegation called for by the district court with the aid of discovery. As district judge Robertson pointed out in an action seeking to impose liability on banks and other entities that provided material support for the September 11 terrorist attacks,

dismissal is not appropriate "unless it appears beyond doubt that the [plaintiffs] can prove no set of facts in support of their claim" that defendants' support went to terrorist activities rather than legitimate purposes. *Burnett,* 274 F. Supp. at 107 (quoting *Boim*, 291 F.3d at 1025). Relying on both the Supreme Court's decision in *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002) and this Court's decision in *Sparrow v. United Air Lines, Inc.*, 216 F.3d 1111 (D.C. Cir. 2000), Judge Robertson properly concluded that greater specificity as to causation "cannot be required at the pleading stage." *Burnett,* 274 F. Supp. at 107.

Finally, *Rothstein* is readily distinguishable from the case before this Court. Plaintiffs in *Rothstein* alleged that UBS transferred a large amount of U.S. currency to Iran. Whether that currency actually found its way into the coffers of Hezbollah and Hamas was a substantial question for those plaintiffs. By contrast, plaintiffs in this case allege that BNPP processed financial transactions in a manner that hid Sudan's connection, thereby enabling Sudan and Sudanese banks to obtain billions of dollars from sales of oil and other commodities on the international market. Essentially, defendants did not hand over a bag

of money to Sudan; they gave Sudan a key to almost unlimited and untraceable funds which Sudan could hand over to al Qaeda for its terrorist purposes. Because it is undisputed that Sudan gave financial assistance to al Qaeda and Hezbollah, and plaintiffs alleged that nearly all other international banks enforced the U.S. sanctions, a jury could reasonably infer that at least some of the funds BNPP enabled Sudan to obtain went to those organizations.

2. The district court required "direct" proximate cause in reliance on precedents addressing "secondary plaintiffs"

The district court also relied on *Holmes v. Sec. Investor Protection Corp.*, 503 U.S. 258 (1992), in requiring that plaintiffs allege proximate cause. *BNP Paribas*, 2006 WL 2862704, at *8. In support of its narrow definition, the district court quoted from this Court's opinion in *Siegel v. SEC*, 592 F.3d 147, 159 (D.C. Cir. 2010) ("Proximate causation . . . is normally understood to require a *direct relation* between conduct alleged and injury asserted" (quoting *Holmes*, 503 U.S. at 268) (emphasis in original).

Although *Holmes* and *Siegel* did require some direct relation between the injury asserted and the misconduct alleged, those precedents were concerned with claims made by an "indirectly injured

victim." *Holmes*, 503 U.S. at 274. In *Holmes*, the Securities Investor Protection Corporation (SIPC) alleged that defendant, a stock broker-dealer, had engaged in a fraudulent stock manipulation scheme that failed, leaving defendant unable to meet his obligations to customers and triggering SIPC's statutory duty to reimburse those customers for their losses. The Supreme Court held that secondary plaintiffs such as SIPC could not establish proximate cause. Justice Souter, for the Court, quoted Justice Holmes' observation that "The general tendency of the law, in regard to damages at least, is not to go beyond the first step." *Holmes*, 503 U.S. at 271-72 (quoting *Southern Pacific Co. v. Darnell–Taenzer Lumber Co.*, 245 U.S. 531, 533 (1918)).

Holmes is not like the case before this court, but is an example of the "secondary plaintiff" problem. Under the doctrine of proximate cause applied by common-law courts, "a plaintiff who complained of harm flowing merely from the misfortunes visited upon a third person by the defendant's acts was generally said to stand at too remote a distance to recover." *Holmes*, 503 U.S. at 268-69. The Supreme Court gave several reasons supporting this view. "First, the less direct an injury is, the more difficult it becomes to ascertain the amount of a

plaintiff's damages attributable to the violation." Second, "recognizing claims of the indirectly injured would force courts to adopt complicated rules apportioning damages among plaintiffs removed at different levels of injury from the violative acts, to obviate the risk of multiple recoveries." Finally, "directly injured victims can generally be counted on to vindicate the law as private attorneys general." *Id.* at 269-70. *See also Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451 (2006) (RICO plaintiff who alleged that competitor's fraudulent failure to charge state sales tax allowed it to unfairly reduce its prices was a secondary plaintiff under Holmes factors and could not show losses were proximately caused "by reason of" defendant's misconduct.).

This Court applied the *Holmes* factors in *Service Employees Int'l Union Health & Welfare Fund v. Philip Morris Inc.*, 249 F.3d 1068, 1073–74 (D.C. Cir. 2001). In that case, several labor-management health trust funds brought a RICO action against Philip Morris, alleging that the cigarette maker's fraud and manipulations resulted in the funds' payments for their participants' smoking-related health care costs. This Court reversed the denial of the company's motion to dismiss, stating first that such damages are highly speculative and

difficult to calculate, that, second, such claims would create a risk of multiple recoveries and problems of apportionment among plaintiffs, and, third, that the primary victims, those who suffered smoking-related illnesses, could be counted on to vindicate the public's interest by bringing their own lawsuits. *Id.* at 1073-74.

In contrast, the Supreme Court found no "secondary plaintiff" problem in *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639 (2008). Plaintiffs there were regular participants at a public auction held by Cook County to sell its tax liens on delinquent taxpayers' property. Plaintiffs brought a RICO suit against one bidder who allegedly filed false documents that hid its illicit submission of multiple simultaneous bids on parcels of property. The Supreme Court held that plaintiffs' complaint sufficiently alleged proximate causation. This was not a secondary plaintiff case like Holmes, according to the Court, even though the misrepresentations were not made directly to the plaintiffs. "Respondents' alleged injury—the loss of valuable liens—is the direct result of petitioners' fraud. It was a foreseeable and natural consequence of petitioners' scheme to obtain more liens for themselves." The Holmes factors thus had no applicability. *Id.* at 657-

58. "A contrary holding would ignore Holmes instruction that proximate cause is generally not amenable to bright-line rules." *Id*. at 659.

The *Holmes* factors similarly have no place in this case. Plaintiffs are the primary victims of BNPP's actions in enabling Sudan, a state sponsor of terrorism, to obtain cash on the international market.

III. TRADITIONAL TORT PRINCIPLES SUPPORT AN ATA CIVIL ACTION AGAINST DEFENDANTS WHO ENABLE THE FORESEEABLE CRIMINAL MISCONDUCT OF OTHERS, WHICH IN TURN CAUSES PLAINTIFFS' INJURIES.

A. Under general common law tort principles, this case presents an issue of liability for harm caused by foreseeable criminal misconduct of third parties, where the issue is not "directness," but foreseeability.

The district court's overemphasis on "direct" causation led the court to misanalyse the proximate cause issue in this case. As stated above, proximate cause in tort law does not cut off liability after the first in a sequence of causes and effects. Nor does this case present the "secondary plaintiff" situation where the "directness" requirement in *Holmes* precludes liability for harm caused by harm to another. Instead, this case presents a fairly straightforward question of

superseding or intervening causation that may be addressed under general principles of tort law.

The district court here discounted the importance of foreseeability as an essential factor in proximate causation, stating that "plaintiffs cannot simply equate the transfer of money to Sudan with the transfer of money to al Qaeda. It is not sufficient to merely allege that it was "foreseeable" that if defendants processed transactions for Sudan, Sudan might give some of that money to al Qaeda." *BNP Paribas,* 2017 WL 394483, at *10.

When Congress creates a federal statutory tort, "we start from the premise" that Congress "adopts the background of general tort law." *Staub v. Proctor Hospital*, 562 U.S. 411, 417 (2011). Under general tort law principles, a defendant may be held liable for the harm caused to plaintiff by another's criminal conduct where the harm to the plaintiff was a foreseeable consequence of defendant's misconduct. The Seventh Circuit correctly noted that "[f]oreseeability is the cornerstone of proximate cause, and in tort law, a defendant will be held liable only for those injuries that might have reasonably been anticipated as a natural consequence of the defendant's actions." *Boim*

v. Quranic Literacy Inst. & Holy Land Found. For Relief And Dev., 291 F.3d 1000, 1012 (7th Cir. 2002).

A modern text explains the generally accepted principle in the law of torts:

> Professional usage almost always reduces proximate cause issues to the question of foreseeability. The defendant must have been reasonably able to foresee the kind of harm that was actually suffered by the plaintiff (or in some cases to foresee that the harm might come about through intervention of others).

Dan B. Dobbs, Paul T. Hayden and Ellen M. Bublick, The Law of Torts § 199 (2d ed.). Stated another way:

> The doctrine of superseding cause is ... applied where the defendant's negligence in fact substantially contributed to the plaintiff's injury, but the injury was actually brought about by a later cause of independent origin *that was not foreseeable.*

1 T. Schoenbaum, Admiralty and Maritime Law § 5–3, pp. 165–166 (2d ed.1994), *quoted in Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 837 (1996) (emphasis added).

The black-letter rule, as distilled by the Restatement, is:

> Where the negligent conduct of the actor creates or increases the foreseeable risk of harm through the intervention of another force, and is a substantial factor in causing the harm, such intervention is not a superseding cause.

Restatement (Second) of Torts § 442A (1965). The Restatement further states that intervention by a third party does not cut off the defendant's liability if "at the time of his negligent conduct [the defendant] should have realized that a third person might so act. Restatement (Second) of Torts § 447 (1965).

It is foreseeability, not the notion of "directness," that is the key to resolving this case. True, the misconduct in question is Sudan's financial support of the terrorists who were behind the embassy bombings, criminal misconduct. Nonetheless, the tort law principle remains: a defendant may be liable for setting in motion a sequence of events that the law was designed to prevent, including criminal misconduct. Indeed, "[t]he distinction between direct and indirect causes could very well be abolished" by focusing on "whether the injury that occurred was within the [foreseeable] risk created by the defendant. Indeed, the [decided] cases as a whole may have that effect." Dobbs, *supra*, at § 201. Professor Dobbs continues,

> The great majority of cases hold negligent defendants liable only for harm of the same general kind that they should have reasonably foreseen and should have acted to avoid. The same principle holds defendants liable only to plaintiffs who are in the same general class of people who

> were at risk from his negligence. These rules make liability congruent with risk or foreseeability.

Id. at § 202.

In this case, quite obviously, defendants set in motion a sequence of events whereby BNPP enabled Sudan and Sudanese banks to acquire U.S. funds to pass on to al Quaeda and other terrorist organizations to carry out the bombings of U.S. embassies.

B. The Principles of Intervening Criminal Conduct

The intervening conduct in this case is criminal conduct. Defendants' illegal conduct enabled Sudan's assistance to al Qaeda and Hezbollah, in clear violation of U.S. law. Nevertheless, the tort principle respecting proximate cause remains the same: intervening criminal conduct that results in harm to the plaintiffs is not a superseding cause that cuts off a defendant's liability where that harm was reasonably foreseeable and within the scope of the risk of harms that the statute prohibiting financial assistance to terrorists was intended to prevent.

As the Restatement declares:

> The act of a third person in committing an intentional tort or crime is a superseding cause of harm to another resulting therefrom, although the actor's negligent conduct created a situation which afforded an opportunity to the

> third person to commit such a tort or crime, *unless* the actor at the time of his negligent conduct realized or *should have realized the likelihood that such a situation might be created, and that a third person might avail himself of the opportunity to commit such a tort or crime.*

Restatement (Second) of Torts § 448 (1965) (emphasis added). Where the defendant should have realized that his wrongful misconduct might create a situation "likely to lead to the commission of fairly definite types of crime," the criminal act of the third person "is not a superseding cause that relieves the [defendant] from liability. *Id.* at cmt. b. The Restatement further explains that a defendant may be liable if he "realizes or should realize that [his conduct] involves an unreasonable risk of harm to another through the conduct of . . . a third person which is intended to cause harm, even though such conduct is criminal." Restatement (Second) of Torts § 302B (1965). Such a defendant may be liable to a foreseeable plaintiff "where the defendant's "own affirmative act has created or exposed the other to a recognizable high degree of risk of harm through such [criminal] misconduct." Restatement (Second) of Torts § 302B, cmt. e (1965).

Accordingly, this Court has stated, "Where an injury is caused by the intervening criminal act of a third party, . . . liability depends

upon a more heightened showing of foreseeability." *Briggs v. Washington Metro. Area Transit Auth.*, 481 F.3d 839, 841 (D.C. Cir. 2007) (quoting *District of Columbia v. Beretta, U.S.A., Corp.*, 872 A.2d 633, 641 (D.C.2005) (en banc)).

C. Causation in cases of Negligent Entrustment

Based on these principles, courts have imposed tort liability for harm to a plaintiff caused by the criminal actions of a third party in a wide variety of circumstances. These cases fall within the category of what one scholar has aptly termed "enabling torts." Robert L. Rabin, *Enabling Torts*, 49 DePaul L. Rev. 435 (1999). While numerous examples could be cited to this Court, a sampling may serve to demonstrate the broad acceptance of the proximate cause principle in such cases: A defendant may be held liable for creating an increased risk of foreseeable criminal harm by negligently entrusting a potentially dangerous instrumentality to one who is likely to put that instrument to criminal misuse. In such cases, Professor Rabin has emphasized, "the touchstone is foreseeability." *Id.* at 447.

One category of enabling torts that is closely analogous to the case at bar concerns negligent entrustment. *See Boim v. Holy Land*

Found. for Relief & Dev., 549 F.3d 685, 693 (7th Cir. 2008) (drawing analogy between providing material assistance to terrorist organizations and negligent entrustment).

The prevailing rule of law in such cases is:

> One who supplies directly or through a third person a chattel for the use of another whom the supplier knows or has reason to know to be likely . . . to use it in a manner involving unreasonable risk of physical harm . . . is subject to liability for physical harm resulting to [others].

Restatement (Second) Torts § 390 (1965).

The "paradigm case of negligent entrustment involves the car owner who allows an unlicensed or perhaps intoxicated individual to drive his car, and as a consequence, an innocent plaintiff, a pedestrian for example, is injured. Despite the intervening misconduct of the errant driver, the courts have had no difficulty in holding the car owner responsible." Rabin, *supra*, at 438. *See, e.g., Schneider v. Midtown Motor Co.*, 854 P.2d 1322 (Colo. Ct. App. 1992) (automobile dealer liable based on sale to unlicensed driver); *Alexander v. Alterman Transp. Lines Inc.*, 387 So. 2d 422 (Fla. Dist. Ct. App. 1980) (entrustment by employer to intoxicated employee); *Vilas v. Steavenson*, 496 N.W.2d 543 (Neb. 1993) (entrustment by employer to

unlicensed employee); *Lombardo v. Hoaq*, 566 A.2d 1185 (N.J. Super. Ct. 1989) (entrustment to intoxicated friend); *See generally* Karen L. Ellmore, Annotation, *Negligent Entrustment of Motor Vehicle to Unlicensed Driver*, 55 A.L.R. 4th 1100 (1997).

In an application of negligent entrustment principles that most closely resembles the case before this Court, the Arkansas Supreme Court has noted that "negligent entrustment can also arise when the incompetent, instead of being given the automobile, is *given funds to buy it*." *Arkansas Bank & Trust Co. v. Erwin*, 781 S.W.2d 21, 23 (Ark. 1989) (emphasis added) (citing *Bugle v. McMahon*, 35 N.Y.S.2d 193 (1942). *See also Vince v. Wilson*, 561 A.2d 103, 106 (Vt. 1989) (defendant may be liable for providing funds to enable relative who had no driver's license and who had failed driver's exam several times to purchase automobile); *see also West v. E. Tennessee Pioneer Oil Co.*, 172 S.W.3d 545, 551–52 (Tenn. 2005) (convenience store liable for "selling gasoline to an obviously intoxicated driver and/or assisting an obviously intoxicated driver in pumping gasoline into his vehicle creat[ing] a foreseeable risk to persons on the roadways, including the plaintiffs"). *See also Cruz v. Middlekauf Lincoln-Mercury, Inc.*, 909

P.2d 1252 (Utah 1996), in which defendant car dealer left the keys in the ignitions of cars on its auto sales lot. A thief stole one of the cars and ran into the plaintiffs while trying to evade pursuing police; Cornelius J. Peck, *An Exercise Based Upon Empirical Data: Liability for Harm Caused by Stolen Autos*, 1969 Wis. L. Rev. 909, 911. The negligent entrustment principle is, of course, not limited to automobiles. *See, e.g.*, *Earsing v. Nelson*, 212 A.D.2d 66, 629 N.Y.S.2d 563 (App. Div. 1995) (plaintiff injured by BB gun stated negligent entrustment claim against seller of gun to plaintiff's thirteen-year-old playmate).

CONCLUSION

For the foregoing reasons, Amicus respectfully urges this Court to reverse the decision by the district court below.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(d) because this brief contains 6,311 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii). I further certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Century Schoolbook type style.

June 19, 2017

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 19th day of June, 2017, I electronically filed the foregoing document with the Clerk of Court using CM/ECF. I also certify that the foregoing document is being served on this day on all counsel of record listed below via transmission of the Notice of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronic Notices of Electronic Filing.

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