IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

JUANA DOE I et al.,	§	
	§	
Plaintiffs,	§	
	§	
vs.	§	
	§	C.A. No. 17-1494-JFB-SRF
INTERNATIONAL FINANCE CORPORATION, and IFC ASSET MANAGEMENT COMPANY, LLC,	§	
	§	
	§	
	§	
Defendants.		

DEFENDANTS' OPENING BRIEF IN SUPPORT OF THEIR RENEWED MOTION TO DISMISS OR TRANSFER THE FIRST AMENDED COMPLAINT

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NATURE & STAGE OF THE PROCEEDINGS

Plaintiffs served IFC Asset Management Company, LLC ("IFC AMC") on October 31, 2017. D.I. 7. IFC AMC moved to stay the deadline for filing a motion to dismiss pending resolution of a motion to transfer. D.I. 17. On December 18, IFC AMC moved to transfer the case to Washington, D.C. D.I. 23. On January 8, 2018, the Court denied IFC AMC's motion to stay briefing. D.I. 27. On February 16, IFC AMC moved to dismiss. D.I. 34. On March 8, Plaintiffs filed the First Amended Complaint, adding the International Finance Corporation ("IFC") as a defendant. D.I. 38. On April 12, IFC and IFC AMC moved to dismiss the First Amended Complaint. D.I. 41, 42. On June 1, the Court approved a joint stipulation to stay the litigation pending the Supreme Court's decision in *Jam v. IFC*, No. 17-1011 and denied the motion to dismiss without prejudice. D.I. 49. The Supreme Court issued its decision in *Jam* on February 27, 2019, and the case was reactivated on March 6. D.I. 51.

SUMMARY OF ARGUMENT

This case has been stayed for the last ten months awaiting the Supreme Court's decision in *Jam v. Int'l Fin. Corp.*, 139 S. Ct. 759 (2019). Two years after Plaintiffs filed the initial complaint against IFC and IFC AMC in Washington, D.C., and with the benefit of the Supreme Court's decision in *Jam*, it is now more clear than ever that these claims—brought by foreign plaintiffs for torts allegedly committed by agents of a foreign company that IFC and IFC AMC directly and indirectly invested in—have no place in this Court. The final pages of *Jam* provide a straightforward roadmap for resolving this motion to dismiss on the basis of IFC and IFC AMC's immunity under the International Organizations Immunities Act of 1945 ("IOIA"). Plaintiffs principally argue that IFC and IFC AMC are not immune because this case qualifies for the commercial activities exception, an exception to immunity when the claims are "based upon"

commercial activity, such that the commercial activity is the "gravamen" of the lawsuit. *Id.* at 772 (citing *OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390 395–96 (2015)). In *Jam*, the Supreme Court noted that the federal government at oral argument expressed "serious doubts" that tort suits brought against multilateral development banks based on alleged tortious conduct abroad are truly based upon commercial activity and could therefore qualify for the exception. *Id.* The federal government's "serious doubts" are well-founded because tort claims based on injuries allegedly caused by rogue private security contractors are not claims based upon the investment activities of institutions like IFC and IFC AMC. This means that the commercial activities exception does not apply to this case and, because there has not been a waiver of immunity, IFC and IFC AMC are immune from suit, subject-matter jurisdiction is lacking, and the First Amended Complaint should be dismissed.

On the basis of the roadmap the Supreme Court offered in *Jam* or any of the numerous other distinct grounds for dismissal, this Court should dismiss the First Amended Complaint with prejudice. *First*, IFC and IFC AMC are immune under the IOIA because the commercial activities exception does not apply and there has not been a waiver. *Second*, the addition of IFC as a defendant in the First Amended Complaint means that Delaware is no longer a proper venue for this suit. This venue defect is grounds for dismissal, particularly where Plaintiffs have shown a history of forum shopping and have had ample notice of the problems with their chosen forum. *Third*, Plaintiffs have failed to include numerous other necessary parties to this suit, including those whom they alleged inflicted their injuries. Because these necessary parties cannot be joined, dismissal is warranted on this basis. *Fourth*, at a minimum, IFC must be dismissed because it lacks *any* true contacts with this forum. *Fifth*, turning to the merits of the alleged claims, Plaintiffs have

failed to state any plausible claims for relief against IFC and IFC AMC under either Delaware or Honduran law. *Sixth and finally*, Plaintiffs claims are time-barred and tolling is not available.

FACTUAL AND STATUTORY BACKGROUND

I. IFC AND IFC AMC

IFC is a public international organization whose purpose is to "further economic development by encouraging the growth of productive private enterprise in member countries." Ex. A, Articles of Agreement of the International Finance Corporation, art. I (as amended through June 27, 2012) ("Articles of Agreement"). IFC is a member of the World Bank Group, a blanket term for five closely-associated, but distinct, international organizations: (1) the International Bank for Reconstruction and Development; (2) the International Development Association; (3) the International Finance Corporation; (4) the Multilateral Investment Guarantee Agency; and (5) the International Centre for Settlement of Investment Disputes. *See* The World Bank, *Who We Are*, https://www.worldbank.org/en/who-we-are. The United States was a founding member of IFC and the President has designated IFC through Executive Order as a "public international organization entitled to enjoy the privileges, exemptions, and immunities conferred" by the IOIA. Exec. Order No. 10,680, 21 Fed. Reg. 7647 (Oct. 5, 1956).

IFC AMC is a wholly-owned subsidiary of IFC established in 2009 to raise money to invest alongside IFC in private enterprise and to manage funds from IFC and other institutional investors. Ex. B, Springsteen Decl. ¶ 4. IFC's CEO chairs IFC AMC's board, and IFC approves the appointment of all IFC AMC board members. *Id.* ¶ 8. IFC AMC investments must comply with IFC's requirements, including environmental and social performance standards. *Id.* ¶ 10. Investments are processed, executed, and managed jointly by IFC and IFC AMC investment teams. *Id.* IFC AMC raises and manages funds from a variety of institutional investors, as well as from

IFC. *Id.* ¶ 6. As of June 2018, IFC AMC had $10.1 billion in funds, including $2.3 billion in funds from IFC. *Id.*

II. PLAINTIFFS' ALLEGATIONS

According to the First Amended Complaint, Plaintiffs are farmers and residents of the Bajo Aguán area of northeastern Honduras. D.I. 38 ¶ 106. Beginning in the 1970s, farmer cooperatives obtained title to farmland in the area and began cultivating oil palms, a plant used to produce palm oil. *Id.* ¶¶ 106, 126. In the 1990s, the Honduran government instituted land modernization laws that permitted the sale or lease of the farmlands. *Id.* ¶ 135. During this period, Miguel Facussé, a Honduran businessman and landowner, allegedly used coercive and aggressive tactics to purchase dozens of farms from the cooperatives and organized these holdings into large palm plantations. *Id.* ¶ 139. Facussé's company, Cressida, owned and managed the plantations. *Id.* ¶ 163. Soon after Facussé acquired the farmlands in the 1990s, the farmer cooperatives began challenging the propriety of the land transfers. The cooperatives filed lawsuits in 1998 seeking to annul the title transfers, although plaintiffs abandoned many of the lawsuits. *Id.* ¶ 160–62. The cooperatives also began pressuring the government to resolve the conflict and used the tactic of occupying disputed parcels of land. *Id.* ¶¶ 164, 208–09. After Facussé sold most of Cressida's assets and product lines (excluding the palm plantations), Cressida became Corporación Dinant ("Dinant"). *Id.* ¶ 163.

In or about 2009, the land conflict between the farmer cooperatives and Dinant intensified. *Id.* ¶¶ 230–33. In particular, Plaintiffs allege that Dinant's security forces were responsible for a campaign of violence against Plaintiffs and the farmer cooperatives. *Id.* ¶¶ 508–24. Plaintiffs define Dinant's security forces to include its own security guards, third-party security contractors, the Honduran military, the Honduran police, and "paramilitary death squads." *Id.* ¶ 104. Based on the sale of the farmland in the 1990s and the alleged acts of violence committed by Dinant's security forces, Plaintiffs assert against IFC and IFC AMC claims for wrongful death, battery,

assault, intentional infliction of emotional distress, false imprisonment, negligent infliction of emotional distress, negligence, trespass, and unjust enrichment.

III. IFC AND IFC AMC'S INVESTMENTS WITH DINANT AND BANCO FICOHSA

The First Amended Complaint makes no suggestion that either IFC or IFC AMC played any role or caused in any way the alleged tortious conduct. Instead, Plaintiffs allege that IFC and IFC AMC are liable for their injuries because IFC and IFC AMC made four investments in Honduras. *First*, in 1997, IFC made a $55 million investment in Cressida. *Id.* ¶¶ 100, 108. The investment consisted of a $45 million loan and a $10 million equity stake. *Id.* ¶ 108. When Cressida was sold to a European conglomerate in 2001, Cressida repaid IFC's loan. *Id. Second*, in April 2009, IFC approved a $30 million loan to Dinant, of which $15 million was disbursed in November 2009. *Id.* ¶¶ 13, 109. *Third*, in 2011, IFC AMC made a $70 million investment in Banco Ficohsa, the largest bank in Honduras. *Id.* ¶ 112. IFC had previously made a $20 million loan to Ficohsa. *Id.* ¶ 111. The 2011 investment comprised an IFC AMC loan to Ficohsa for $38 million and a 10 percent ownership stake for $32 million. *Id.* ¶ 112. In 2014, IFC AMC acquired additional equity in exchange for $5.5 million. *Id.* ¶ 113. *Fourth*, in November 2013, IFC guaranteed $5.3 million in loans that Ficohsa made to Dinant for "intra-firm" trades through Ficohsa's Global Trade Finance Program. *Id.* ¶ 115.

<u>ARGUMENT</u>

I. IFC AND IFC AMC ARE IMMUNE FROM SUIT PURSUANT TO THE IOIA

The First Amended Complaint should be dismissed in its entirety under Rule 12(b)(1) because IFC and IFC AMC are immune from suit and the Court lacks subject-matter jurisdiction. *See Davis v. Wells Fargo*, 824 F.3d 333, 346 (3d Cir. 2016) (standard for Rule 12(b)(1) challenge to jurisdiction). The IOIA provides that "[i]nternational organizations, their property and assets, wherever located, and by whomsoever held, shall enjoy the same immunity from suit and every

form of judicial process as is enjoyed by foreign governments, except to the extent that such organizations may expressly waive their immunity." 22 U.S.C. § 288a(b). In 1956, the President designated IFC as an international organization subject to the immunities provided in the IOIA. Exec. Order No. 10,680, 21 Fed. Reg. 7647 (Oct. 5, 1956); *see also In re Kaiser Grp. Int'l Inc.*, 399 F.3d 558, 560 n.1 (3d Cir. 2005) ("As a public international organization, IFC is entitled to the privileges, exemptions, and immunities conferred by the International Organizations Immunities Act . . . ."). IFC AMC, a wholly-owned subsidiary of IFC, shares in IFC's immunities under the IOIA because IFC AMC is an "asset" of IFC. 22 U.S.C. § 288a(b).

Once IFC and IFC AMC have established that they are subject to the protections of the IOIA, they are entitled to a presumption of immunity and the burden shifts to Plaintiffs to establish that an exception to immunity applies. *See Fed. Ins. Co. v. Richard I. Rubin & Co.*, 12 F.3d 1270, 1285 (3d Cir. 1993). The immunity of IFC and its wholly-owned subsidiary IFC AMC is coextensive with the Foreign Sovereign Immunities Act ("FSIA") and its exceptions. *Jam*, 139 S. Ct. at 772. As such, IFC and IFC AMC are immune from suit unless one of the FSIA's exceptions applies. The only exceptions to immunity that Plaintiffs invoke here are the commercial activities exception and the waiver exception. D.I. 38 ¶¶ 558, 561. Because neither exception applies, IFC and IFC AMC are immune from suit and this Court lacks subject-matter jurisdiction.

A. The commercial activities exception does not apply.

As pertinent here, the commercial activities exception applies when "the action" is based upon "a commercial activity carried on in the United States by the foreign state" or "an act performed in the United States in connection with a commercial activity of the foreign state elsewhere." 28 U.S.C. § 1605(a)(2); D.I. 38 ¶ 561. In this case, both grounds for invoking the exception fail for the same reason: Plaintiffs' claims are based upon the alleged intentional tortious acts of third parties in Honduras, not upon IFC and IFC AMC's commercial activities in the United

States or other activities in the United States performed in connection with commercial activities elsewhere. Indeed, at oral argument in *Jam*, the federal government acknowledged that the commercial activities exception would likely not apply to foreign tort claims brought against IFC for this reason. *See Jam*, 139 S. Ct. at 772 ("At oral argument in this case, the Government stated that it has 'serious doubts' whether petitioners' suit, which largely concerns allegedly tortious conduct in India, would satisfy the 'based upon' requirement."); Oral Arg. Tr. at 26-27, *Jam v. Int'l Fin. Corp.*, No. 17-1011 (Oct. 31, 2018) ("[T]he gravamen of this suit as we understand it is . . . tortious conduct that occurred in India, injuries that occurred in India.").

In the context of the commercial activities exception, "an action is 'based upon' the 'particular conduct' that constitutes the 'gravamen' of the suit." *OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390, 396 (2015) (quoting *Saudi Arabia v. Nelson*, 507 U.S. 349, 357 (1993)); *see also Fed Ins. Co.*, 12 F.3d at 1289 ("[T]he commercial activity undertaken by the defendant must be directly connected to the cause of action alleged by the plaintiff."). The "gravamen" is the "basis" or "foundation" of a claim. *OBB Personenverkehr AG*, 136 S. Ct. at 395. In applying the gravamen test, courts "zero[] in on the core" of the suit rather than undertake an "exhaustive claim-by-claim, element-by-element analysis," and the fact that a commercial activity may establish one element of a claim is insufficient to show that the commercial activity is the gravamen of the suit. *Id.* at 396.

Applying this test to Plaintiffs' claims, the gravamen is clear: Plaintiffs claim that they were injured in Honduras by a variety of security forces and their claims are, at their core, claims for tortious injuries allegedly caused by those non-parties in Honduras. *E.g.*, D.I. 38 ¶ 1 (Plaintiffs seek damages and injunctive relief "to remedy murders, torture, assault, battery, trespass, unjust enrichment and other acts of aggression, committed, sponsored, and abetted by [Dinant]"); ¶ 5

("Plaintiffs and their decedents are among the scores of farmers . . . that have been shot, killed, and terrorized by Dinant and those working on its behalf."). The claims are not, at their core, claims based on the investment activities of IFC and IFC AMC in Honduras.

To assess the true gravamen of this lawsuit, the Court need not look any further than the claims for relief, all of which are personal-injury torts, the underlying conduct of which has nothing to do with IFC or IFC AMC's investments.[1] *See Jin v. Ministry of State Sec.*, 557 F. Supp. 2d 131, 141–42 (D.D.C. 2008) ("The fact that the plaintiffs characterize the nature of these activities as 'tortious,' further indicates that the commercial activities exception does not appropriately apply."). Courts routinely hold that such tort claims brought against foreign sovereigns do not qualify for the commercial activities exception because the core of such claims are the torts themselves—even where there is some commercial activity that is alleged to be connected to the underlying tort. *See Jiggi v. Republic of Cameroon*, No. 18-1303, 2018 WL 6040262, at *3–4 (D. Del. Nov. 19, 2018); *O'Bryan v. Holy See*, 556 F.3d 361, 380 (6th Cir. 2009); *Cicippio v. Islamic Republic of Iran*, 30 F.3d 164, 168 (D.C. Cir. 1994); *Rukoro v. Fed. Republic of Germany*, No. 17-62, 2019 WL 1060030, at *4 (S.D.N.Y. Mar. 6, 2019); *Moses v. Air Afrique*, No. 99-54, 2000 WL 306853, at *3–4 (E.D.N.Y. Mar. 21, 2000); *Marketic v. Kaliber Talent Consultants, Inc.*, No. 97-0356, 1998 WL 1147140, at *3 (C.D. Cal. Mar. 15, 1998).

Plaintiffs allege that their claims are "based upon" IFC and IFC AMC's commercial activities because the Dinant and Banco Ficohsa investments are the purported basis for holding IFC and IFC AMC liable for injuries caused by the tortious acts of third parties. D.I. 38 ¶¶ 418–507. But that is just a re-packaged formulation of the "one-element test"—the rule that the

[1] Plaintiffs allege claims for: (1) wrongful death; (2) battery; (3) assault; (4) intentional infliction of emotional distress; (5) false imprisonment; (6) trespass; (7) negligent infliction of emotional distress; (8) negligence; and (9) unjust enrichment. D.I. 38 ¶¶ 587–666.

commercial activity exception is satisfied so long as a commercial activity establishes a single element of a single claim—that the United States Supreme Court expressly rejected. *OBB Personenverkehr AG*, 136 S. Ct. at 396. Even if the investments are a commercial activity that somehow allegedly preceded or contributed to the tortious conduct, the investments themselves are not the gravamen of the claims for relief. *See Nelson*, 507 U.S. at 358 (act of recruiting and hiring an employee that "led to the conduct that eventually injured" the plaintiff was not the basis of the personal injury suit); *Fed. Ins. Co.*, 12 F.3d at 1289–90 (tort claims related to an office building fire did not arise from the alleged commercial activities that preceded the fire); *Williams v. Romarm S.A.*, No. 17-6, 2017 WL 3842595, at *6 (D. Vt. Sept. 1, 2017) (the gravamen of claims related to a fatal shooting brought against the firearm's manufacturer was the "tortious and illegal discharge of the firearm" by "unknown third parties," not the firearm manufacturer's commercial activities), *aff'd,* 751 F. App'x 20 (2d Cir. 2018).[2]

Courts have repeatedly warned of the danger of allowing plaintiffs to use "semantic ploy[s]" or "artful pleading" to recast intentional torts as claims involving commercial activities. *Nelson*, 507 U.S. at 363; *OBB Personenverkehr AG*, 136 S. Ct. at 396. Indeed, in enacting the FSIA, Congress specifically created an exception to foreign sovereign immunity for certain claims related to "personal injury or death, or damage to or loss of property, occurring in the United States." 28 U.S.C. § 1605(a)(5). The claims here do not meet the requirements of the FSIA's tort

[2] *OSS Nokalva, Inc. v. European Space Agency*, 617 F.3d 756 (3d Cir. 2010) is also distinguishable for this reason. The gravamen of that case was commercial activity with a nexus to the United States. OSS Nokalva—a private business headquartered in New Jersey—entered into a contract with the European Space Agency to provide the organization with "among other things, software tools and related proprietary software and information to assist ESA in developing its own software." *OSS Nokalva*, 617 F.3d at 759. OSS Nokalva sued the European Space Agency for breach of that contract. Here, in contrast, Plaintiffs have no direct commercial relationship with IFC and IFC AMC, and the gravamen of this suit is personal injuries caused by Dinant's security forces.

exception because the alleged injuries were sustained in Honduras. Permitting plaintiffs to bypass the tort exception and bring their claims under the guise of the commercial activities exception because an international organization or foreign sovereign invested in a company whose agents (or others) allegedly committed a tort would affect an end-run around the FSIA and its carefully calibrated exceptions to immunity.

B. The waiver exception does not apply.

Plaintiffs also allege that IFC and IFC AMC have waived immunity from suit, possibly in an attempt to invoke the IOIA's waiver exception. D.I. 38 ¶¶ 53, 558; *see also* 22 U.S.C. § 288a(b) (international organizations are immune "except to the extent such organizations may expressly waive their immunity for the purpose of any proceedings or by the terms of any contract"). Nonetheless, neither IFC nor IFC AMC has waived IOIA immunity in this case, expressly or implicitly.

At most, IFC's Articles of Agreement provide that IFC—and, by extension, IFC AMC—is subject to suits brought by "debtors, creditors, bondholders, and . . . other potential plaintiffs" to whom IFC "would have to subject itself to suit in order to achieve its chartered objectives." *Mendaro v. World Bank*, 717 F.2d 610, 615 (D.C. Cir. 1983); *see also* Articles of Agreement, art. VI § 3 ("Actions may be brought against [IFC] only in a court of competent jurisdiction in the territories of a member in which the Corporation has an office, has appointed an agent for the purpose of accepting service of process, or has issued or guaranteed securities."). In interpreting IFC's Articles and identically-worded provisions in the founding treaties of other international organizations, courts uniformly apply the "corresponding benefits test," which reads the text of the treaties narrowly to only permit suits that enable the organizations to achieve their stated purposes. *See Osseiran v. Int'l Fin. Corp.*, 552 F.3d 836, 840 (D.C. Cir. 2009) (IFC); *Mendaro*, 717 F.2d at 617 (International Bank for Reconstruction and Development); *Bro Tech Corp. v. European Bank*

for Reconstruction & Dev., No. 00-2160, 2000 WL 1751094, at *2 (E.D. Pa. Nov. 29, 2000) (European Bank for Reconstruction and Development); *Vila v. Inter-Am. Inv. Corp.*, 570 F.3d 274, 279 (D.C. Cir. 2009) (Inter-American Investment Corporation); *In re Dinastia, L.P.*, 381 B.R. 512, 520–24 (S.D. Tex. 2007) (IFC); *Banco de Seguros del Estado v. Int'l Fin. Corp.*, No. 06-427, 2007 WL 2746808, at *4–5 (S.D.N.Y. Sept. 20, 2007) (IFC).

Plaintiffs appear to suggest that IFC and IFC AMC are amenable to suit on the basis of the Articles and the corresponding benefits test because "[l]liability for . . . support to Dinant is consistent with, and supports, IFC and IFC-AMC's mission and purpose" because violating the law is not consistent with IFC and IFC AMC's "core mission and purpose." D.I. 38 ¶ 571. Plaintiffs also suggest that disregarding immunity in this case would further IFC and IFC AMC's compliance with internal policies and procedures and increase community support for projects where IFC and IFC AMC invest. *Id.* ¶¶ 582–83.

Plaintiffs' suggestions have no support in history or precedent. IFC and other international organizations dedicated to economic development agreed in their founding treaties to permit certain claims brought by investors and contractual counterparties because these types of claims further the economic objectives of the organizations. *See Mendaro*, 717 F.2d at 617–20.[3] In light of this history, suits can proceed against an otherwise immune international organization when the

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[3] *See also Restatement (Third) of the Foreign Relations Law of the United States* § 467(1), reporters note 3 (1987) ("The charters of the International Bank for Reconstruction and Development and other international financial institutions contain provisions permitting suits against the organization under some circumstances and in selected venues; these provisions were designed to permit suits by bondholders and related creditors."); Letter from Roberts B. Owen, State Department Legal Adviser, to Leroy D. Clark, Gen. Counsel, EEOC (June 24, 1980), *in* Marian L. Nash, *Contemporary Practice of the United States Relating to International Law*, 74 Am. J. Int'l L. 917, 918 (1980) (explaining that World Bank's Articles were "intended as a limited waiver of immunity specifically to permit suits by private lenders against the Bank in connection with the Bank's issuance of securities").

suits are, for example, brought by prospective investors in particular projects, *Osseiran*, 552 F.3d at 840, or independent consultants who performed work for the organization, *Vila*, 570 F.3d at 280. But courts have rejected attempts to read these same treaties to permit suits brought by parties like Plaintiffs here who lack any direct, commercial relationship with the organization. *See Banco de Seguros del Estado*, 2007 WL 2746808, at *5 (affirming IFC's immunity in relation to claims brought by third parties who had a financial interest in a bank where IFC owned shares in the bank); *Atl. Tele-Network, Inc. v. Inter-Am. Dev. Bank*, 251 F. Supp. 2d 126, 132 (D.D.C. 2003) (affirming a development bank's immunity in relation to claims brought by a third party based on loans the development bank made to a foreign country).

Moreover, tort claims brought by third parties like Plaintiffs would not further IFC and IFC AMC's chartered objectives. In fact, they would severely hamper them. Third-party tort suits would significantly undermine IFC and IFC AMC's objective of providing financial assistance to productive private enterprises in developing countries and interfere with the internal administration of both organizations. Having to defend against suits asserting liability for the alleged torts of borrowers would have a considerable chilling effect on IFC and IFC AMC's capacity and willingness to finance business entities in developing countries, thus interfering with the core mission of furthering economic development. Allowing third parties to relitigate investment decisions would also interfere with the discretion to select investments and set internal performance standards for such investments. Plaintiffs base their claims in large part on IFC and IFC AMC's purported failure to adhere to IFC's internal standards, but immunity for international organizations exists precisely to protect these types of discretionary judgments from interference and entanglement with local courts. *See Mendaro*, 717 F.2d at 617. And the prospect of becoming enmeshed in contentious litigation related to these internal standards would force IFC to reevaluate

its operations and policies to minimize litigation risk—a perspective that would be inimical to its development mission.

These types of lawsuits would also not significantly advance the mission and purpose of IFC and IFC AMC when IFC has already established the Office of the Compliance Advisor Ombudsman, an independent accountability mechanism that investigates and responds to complaints from project-affected communities. *See About the CAO*, Compliance Advisor Ombudsman, http://www.cao-ombudsman.org/about/; *see also Atl. Tele-Network, Inc.*, 251 F. Supp. 2d at 132 ("[Plaintiff] suggests that this suit will aid [the international organization] in attracting responsible borrowers as well as encouraging American investment in developing nations generally. Both, however, are objectives the IDB can well pursue on its own without help from a private litigant."). Plaintiffs themselves note that the CAO undertook a thorough review of IFC's investment in Dinant and identified areas of deficiency in the loan approval process that IFC took steps to remediate. D.I. 38 ¶¶ 31–35.

The D.C. Circuit in *Jam* reached the exact same conclusions regarding the potential impact of third-party tort suits on IFC in a case involving similar claims—this time brought by Indian nationals related to construction loans made to finance a power plant where the plant allegedly caused tortious harm to the surrounding community. *Jam*, 860 F.3d at 704, 706–07. The D.C. Circuit explained that these tort claims were especially problematic under the corresponding benefits test because they "implicate internal operations of an international organization" and "threaten the policy discretion of the organization." *Id.* at 708. The D.C. Circuit also found that if this type of case were allowed to proceed, "every loan the IFC makes to fund projects in developing countries could be the subject of a suit," while also creating a "strong disincentive" to use an internal review process to oversee compliance. *Id*. In granting cert., the Supreme Court explicitly

declined to review this aspect of the D.C. Circuit's decision and it remains strong persuasive authority. *See* Petition for a Writ of Certiorari, *Jam v. Int'l Fin. Corp*., No. 17-1011, 2018 WL 509826 (Jan. 19, 2018) (seeking cert. on the question of: (1) the scope of immunity under the IOIA; and (2) the "basic rules governing" IOIA immunity, including the prevailing analysis for assessing waivers of immunity); *Jam v. Int'l Fin. Corp.*, 138 S. Ct. 2026 (2018) (mem.) (limiting grant of cert to the scope of immunity under the IOIA).

Because this type of lawsuit is far outside the scope of suits permitted by IFC's Articles, IFC and IFC AMC also retain all of the applicable immunities arising out of IFC's Articles of Agreement. The Articles of Agreement provide for a collection of privileges and immunities meant to protect IFC's operations from the interference of member state governments and to enable IFC to fulfill its functions. Articles of Agreement, art. VI. These privileges and immunities were separately incorporated into federal law when the United States joined IFC. *See* 22 U.S.C. § 282g. In light of the clear grounds for immunity and dismissal under the IOIA, this Court need not separately rely upon the Articles as an independent basis for IFC and IFC AMC's immunity from suit, but doing so would be proper. *See Jam*, 139 S. Ct. at 771; *Nyambal v. Int'l Monetary Fund*, 772 F.3d 277, 280 (D.C. Cir. 2014) (noting that international organizations enjoy "dual protections" of IOIA immunity and treaty-based immunity).[4]

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[4] Plaintiffs also allege that IFC AMC, but not IFC, has impliedly waived immunity because the Delaware Limited Liability Company Act requires designating a corporate agent for service of process and payment of taxes. D.I. 38 ¶ 59. But the mere fact of IFC AMC's compliance with Delaware state law does not operate as an implied waiver of immunity over any and all claims. *See Popli v. Air India Airline*, No. 17-337, 2017 WL 1826499, at *4 (E.D. Pa. May 5, 2017) (holding that airline had not impliedly waived immunity by registering to do business in New Jersey because the registration statutes at issue did not mention immunity).

C. Under the IOIA, IFC AMC has the same immunity from suit as IFC.

In 2009, IFC formed IFC AMC to facilitate its worldwide operations and carry out its stated mission of promoting economic development through private investment. Springsteen Decl. ¶¶ 4–5. Although they are separate entities, IFC's immunities extend to IFC AMC under the IOIA. The IOIA confers immunity on "[i]nternational organizations, *their property and their assets*, wherever located and by whomsoever held." 22 U.S.C. § 288a(b) (emphasis added). Because IFC AMC is a wholly-owned subsidiary of IFC, it is an asset of IFC. Springsteen Decl. ¶ 4; *see also Victor Hotel Corp. v. FCA Mortg. Corp.*, 928 F.2d 1077, 1083 (11th Cir. 1991) (wholly-owned subsidiary is an asset of a financial institution); *In re: The Brown Publ'g Co.,* No. 10-73295, 2014 WL 1338102, at *6 (Bankr. E.D.N.Y. Apr. 3, 2014) ("[M]ost transfers made by parents to or on behalf of subsidiaries result in at least some benefit to the parent because the subsidiary is an asset of a parent, so preserving the subsidiary generally impacts the parent's net worth."); *In re Royal Crown Bottlers of N. Ala., Inc.*, 23 B.R. 28, 30 (Bankr. N.D. Ala. 1982) (same).[5] IFC AMC also deploys the assets and property of IFC, including about $2.3 billion in IFC's funds. Springsteen Decl. ¶ 6. For these reasons, IFC AMC enjoys the same immunity from suit as IFC under the IOIA.

Extending IFC's immunity to IFC AMC is consistent with precedent and historical practice. In the context of the United Nations ("UN"), courts routinely extended the UN's immunities under the IOIA or applicable international treaties to its affiliate entities that operate as "subsidiaries" or "subdivisions" or "organs" of the UN. *See Lempert v. Rice*, 956 F. Supp. 2d 17, 24 (D.D.C. 2013) (United Nations Development Program); *Sadikoglu v. United Nations Dev.*

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[5] As a wholly-owned subsidiary, IFC AMC shares a "complete unity of interest" with IFC, *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 771 (1984), and it is fundamentally a matter of IFC's discretion to establish a subsidiary like IFC AMC. *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 19 (2007).

Programme, No. 11-0294, 2011 WL 4953994, at *3 (S.D.N.Y. Oct. 14, 2011) (United Nations Development Program); *D'Cruz v. Annan*, No. 05-8918, 2005 WL 3527153, at *2 (S.D.N.Y. Dec. 22, 2005), *aff'd*, 223 F. App'x 42 (2d Cir. 2007) (United Nations Organization and United Nations Insurance Services); *Boimah v. United Nations Gen. Assembly*, 664 F. Supp. 69, 71 (E.D.N.Y. 1987) (UN General Assembly); *Shamsee v. Shamsee*, 74 A.D.2d 357, 361 (N.Y. App. Div. 1980), *aff'd*, 421 N.E.2d 848 (N.Y. 1981) (UN Pension Fund). These affiliate entities are not separately designated as international organizations pursuant to the IOIA. But courts have nonetheless held that the entities fall within the scope of the IOIA immunity afforded to the UN and its property and assets. *See Shamsee*, 74 A.D.2d at 361 (extending UN's immunity to UN Pension Fund because the Fund's "assets, although held separately from other United Nations property, are the property of that international organization").

Moreover, to disregard IFC AMC's status as an asset of IFC and permit suits against IFC AMC for actions undertaken in furtherance of IFC's mission would be tantamount to disregarding IFC's immunity. *See Askir v. Brown & Root Servs. Corp.*, No. 95-11008, 1997 WL 598587, at *6 (S.D.N.Y. Sept. 23, 1997) (holding that contractors who act under the authority and direction of the UN are immune because it would "make little sense to hold [a contractor] liable for performing the same sovereign acts for which the United Nations is itself immune"). International organization immunity "protect[s] international organizations from unilateral control by a member nation over the activities of the international organization within its territory." *Mendaro*, 717 F.2d at 615. Refusing to extend IFC's immunity to IFC AMC would expose IFC's operations to exactly the harms that international organization immunity is meant to avoid. There is no indication that the IOIA's drafters contemplated such a result. Rather, there is affirmative evidence that the drafters understood that IFC's immunity would extend to its assets.

Plaintiffs assert a handful of allegations that challenge IFC AMC's immunity. D.I. 38 ¶¶ 54–56, 559–60. None is persuasive. Plaintiffs allege that IFC AMC is not protected by the IOIA because the President never designated it as an international organization. *Id.* ¶¶ 54, 559. Plaintiffs also allege that the State Department does not grant IFC AMC employees the same diplomatic visas granted to some IFC employees, *id.* ¶ 55, and that IFC AMC must file labor certifications with the Department of Labor and foreign nationals must pay taxes that IFC employees do not typically pay. *Id.* ¶ 56. But IFC AMC's lack of express designation by the President and any differences in the treatment of IFC and IFC AMC employees are immaterial to IFC AMC's immunity. It is undisputed that IFC AMC is a subsidiary of IFC, an organization the President has designated as a qualifying international organization under the IOIA. And the IOIA, by its own terms, gives international organizations the flexibility to organize their own affairs by extending immunity to the organization's "property and . . . assets." 22 U.S.C. § 288a(b). There is no support for requiring international organizations to seek separate designations from the Executive Branch for each of their subsidiaries or for treating subsidiaries differently than the parent organization for purposes of the IOIA. Again, the practice is the opposite in the case of the UN, where courts extend immunity to affiliate entities despite the lack of a separate designation. *See, e.g.*, *Shamsee*, 74 A.D.2d at 361.

Plaintiffs further claim that as a Delaware LLC, IFC AMC is outside the scope of the IOIA because it "is incorporated in the state of Delaware and is a 'citizen of a State of the United States" and IFC AMC is "therefore excluded from any immunity otherwise provided by the plain terms of 28 U.S.C. § 1603(b)(3)." D.I. 38 ¶ 560. Section 1603(b)(3) is a part of the FSIA that defines an "agency or instrumentality of a foreign state" as, among other things, an entity that is not "a citizen of a State of the United States as defined in section 1332(c) and (e)." 28 U.S.C. § 1603(b)(3).

Section 1332 (c) and (e), in turn, define a corporation as a citizen of the state of its incorporation and principal place of business for purposes of diversity jurisdiction. 28 U.S.C. § 1332(c), (e). Plaintiffs thus appear to argue that IFC AMC, as a Delaware LLC, is a citizen of Delaware and is therefore cannot qualify as an agency or instrumentality of a foreign state as that term is defined in the FSIA.

That argument misunderstands the FSIA and its application to this case. The FSIA's definition of what entities qualify as an agency or instrumentality of a foreign state is not applicable to international organizations under the IOIA. In *Jam*, the Supreme Court held that the scope of immunity for international organizations under the IOIA was the same as the scope of immunity for foreign sovereigns under the FSIA. *Jam*, 139 S. Ct. 767. But this does not change the fact that under the IOIA the beneficiaries of the immunity are "[i]nternational organizations, their property and their assets." 22 U.S.C. § 288a(b). In other words, *Jam* addressed the "what" of international organization immunity, not the "who" of that immunity. And even if the FSIA's definition of "agency or instrumentality of a foreign state" applied *in toto* to the IOIA, IFC AMC is not "a citizen of a State of the United States as defined in section 1332(c) and (e)." 28 U.S.C. § 1603(b)(3). As Plaintiffs recognize, IFC AMC is an LLC formed under Delaware law. D.I. 38 ¶ 50. Section 1332(c), which applies to corporations, does not apply to LLCs and other unincorporated entities. *See Zambelli Fireworks Mfg. Co. v. Wood*, 592 F.3d 412, 420 (3d Cir. 2010) (refusing to apply the rule of corporate citizenship under Section 1332(c) to LLCs because LLCs are an "unincorporated business entity"); *see also Lincoln Benefit Life Co. v. AEI Life, LLC*, 800 F.3d 99, 105 (3d Cir. 2015) ("But unlike corporations, unincorporated associations such as partnerships 'are not considered citizens' as that term is used in the diversity statute.'" (quoting *Swiger v. Allegheny Energy, Inc.*, 540 F.3d 179, 182 (3d Cir. 2015)); *Americold Realty Tr. v.*

Conagra Foods, Inc., 136 S. Ct. 1012, 1017 (2016) ("[W]e reaffirm that it is up to Congress if it wishes to incorporate other entities into 28 U.S.C. § 1332(c)'s special jurisdictional rule.").[6] IFC AMC therefore satisfies the requirements of the FSIA's definition of agency or instrumentality because, as an LLC, it is not "a citizen of a State of the United States as defined in section 1332(c) and (e)." 28 U.S.C. § 1603(b)(3).

II. VENUE IS IMPROPER IN DELAWARE AND DISMISSAL IS WARRANTED UNDER RULE 12(b)(3)

Both the general venue statute and the specific venue statute applicable here clearly establish that venue in Delaware is improper. As a result, either dismissal or transfer is mandated by 28 U.S.C. § 1406. In this case, § 1406 requires dismissal (rather than transfer) of Plaintiffs' claims against both IFC and IFC AMC as a result of the obviousness of this venue defect, Plaintiffs' forum shopping, and their transparent attempt to manufacture venue in Delaware. Should the court decide that transfer is the appropriate remedy, this case should be transferred to the United States District Court for the District of Columbia, where it began two years ago.

A. Venue in Delaware is improper.

Venue in Delaware is improper under the governing statute. The general venue statute provides that venue is proper in the following locations:

> (1) a judicial district in which any defendant resides, if all defendants are residents of the State in which the district is located;
>
> (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated; or

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[6] In the case of an LLC like IFC AMC, its citizenship is determined for purposes of diversity jurisdiction by the citizenship of its members. *Lincoln Benefit Life Co.*, 800 F.3d at 105. In this case, IFC AMC's only member and sole owner is IFC, Springsteen Decl. ¶ 4, an international organization formed pursuant to an international treaty and not the law of any state.

> (3) if there is no district in which an action may otherwise be brought as provided in this section, any judicial district in which any defendant is subject to the court's personal jurisdiction with respect to such action.

28 U.S.C. § 1391(b)(1)–(3). Residential venue is improper under section (1) because not all the defendants reside in Delaware. For purposes of venue, Congress has deemed IFC "to be an inhabitant of the Federal judicial district in which its principal office in the United States is located," 22 U.S.C. § 282f, and IFC's principal (and only) office in the United States is located in Washington, D.C. Ex. C, Rechden Decl. ¶ 3. The specific venue provision under 22 U.S.C. § 282f supplants the general venue statute's residency provisions under 28 U.S.C. § 1391(c). *See Am. Water Works Co. v. Util. Workers Local 423*, No. 11-1462, 2011 WL 4457049, at *2 (D.N.J. Sept. 23, 2011) ("[W]here Congress has created a venue statute specific to certain kinds of actions, that statute trumps the general venue statute. . . . And in such cases, the general venue statute does not provide an alternative basis for venue.").

Transactional venue is improper under section (2) because none of the events or omissions giving rise to Plaintiffs' claims occurred in Delaware. Plaintiffs have conceded this point, as the First Amended Complaint contains only residential (rather than transactional) venue allegations and otherwise lacks any Delaware-connected allegations. D.I. 38 ¶ 61. Plaintiffs also acknowledged in their initial complaint filed in Washington, D.C. that the only conduct with an arguable U.S.-connection occurred in Washington, D.C. *Compare* Compl. ¶¶ 43 & 464–68, D.I. 4, *Doe v. IFC*, No. 17-cv-363 (D.D.C. Mar. 9, 2017) ("IFC made key decisions in Washington, D.C. about whether and under what conditions to finance Dinant."), *with* First Am. Compl., D.I. 38 ¶¶ 564–69 (changing allegations to refer only to the "United States").

Finally, venue is improper under the fallback provision in section (3) because there *is* a "district in which an action may otherwise be brought"—and that is Washington, D.C, where both IFC and IFC AMC reside, and where Plaintiffs initially filed their complaint. *See* 14D Charles

Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 3806.1 (4th ed. 2019) ("[I]f there is any federal district anywhere in the country that will satisfy either Section 1391(b)(1) or Section 1391(b)(2), the fallback venue provision is absolutely irrelevant."); Springsteen Decl. ¶ 12 ("IFC AMC's principal office is located at IFC's headquarters in Washington, D.C.").

B. Dismissal is warranted.

Because venue in Delaware is improper, 28 U.S.C. § 1406 requires this Court either to dismiss the claims outright or, "if it be in the interest of justice," to transfer the case to the proper venue. Transfer is not "in the interest of justice" in this case.

First, plaintiffs were fully aware that venue was improper. "[D]istrict courts often dismiss a case, rather than transfer it under Section 1406(a), if the plaintiff's attorney reasonably could have foreseen that the forum in which the suit was filed was improper and [the court decides] that similar conduct should be discouraged." *Stanifer v. Brannan*, 564 F.3d 455, 460 (6th Cir. 2009) (quoting Wright & Miller, Federal Practice & Procedure § 3827); *see also See also Deleski v. Raymark Indus., Inc.*, 819 F.2d 377, 381 (3d Cir. 1987) (refusing to transfer and dismissing case where the plaintiffs' attorney had ample information at his disposal to know that statute of limitations barred the claims in the forum state); *Spar, Inc. v. Info. Res., Inc.*, 956 F.2d 392, 394 (2d Cir. 1992) ("[A]llowing a transfer in this case would reward plaintiffs for their lack of diligence in choosing a proper forum."). Here, Plaintiffs have known since the outset of this litigation that venue was improper. In their initial complaint in Washington, D.C., Plaintiffs cited to the general venue statute, the specific venue statute, and also recognized that both IFC and IFC AMC were residents of Washington, D.C. for venue purposes. *See* Compl. ¶ 37, *Doe v. IFC*, No. 17-cv-363 (D.D.C. Mar. 9, 2017), D.I. 4 (citing 22 U.S.C. § 282f).

Second, transfer is not appropriate if the plaintiff is engaged in "blatant forum shopping." *FS Photo, Inc. v. PictureVision, Inc.*, 48 F. Supp. 2d 442, 450 (D. Del. 1999); *see also Poe v. Kuyk*,

448 F. Supp. 1231, 1237 (D. Del. 1978), *aff'd*, 591 F.2d 1336 (3d Cir. 1979) (opting to dismiss based on "already active forum shopping which has occurred"). That is the case here. Plaintiffs filed their initial complaint in March 2017 in Washington, D.C., but then voluntarily dismissed their claims after the D.C. Circuit issued an unfavorable ruling. *Jam v. Int'l Fin. Corp.*, 860 F.3d 703, 704 (D.C. Cir. 2017), *rev'd*, 139 S. Ct. 759 (2019). Plaintiffs later re-filed a second (and now third) iteration of their complaint here in Delaware, hoping to fare better under Third Circuit precedent. This is precisely the type of conduct that warrants dismissal—Section 1406 was "not designed to facilitate belated procedural maneuvers suggestive of forum shopping." *Roberts Bros. v. Kurtz Bros.*, 231 F. Supp. 163, 168 (D.N.J. 1964).

Third, transfer is not appropriate where plaintiffs are engaged in pleading gamesmanship in an attempt to establish venue. *See Nat'l Distillers & Chem. Corp. v. Dep't of Energy*, 487 F. Supp. 34, 37 (D. Del. 1980) ("[T]he Court does not believe that the manufacturing of venue by means of a collusive joinder of a party is any less objectionable than the manufacturing of venue by means of the joinder of a party with a frivolous claim."). Certain statutory provisions in fact *mandate* outright dismissal on the basis of such conduct when jurisdiction would be made improper. *See* 28 U.S.C. § 1359 ("A district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court."). Delaware courts have extended this rule to issues of venue, requiring plaintiffs to show that their pleading strategy was not done "for the sole purpose of obtaining venue in [Delaware]." *Nat'l Distillers & Chem. Corp.*, 487 F. Supp. at 37.

Plaintiffs' strategy here is transparent. No doubt recognizing that venue and personal jurisdiction in Delaware would be improper as to IFC, Plaintiffs initially only named IFC AMC as a defendant. In the First Amended Complaint, Plaintiffs' claims remain the same but they have re-

added IFC as a defendant. The subsequent addition of a defendant by way of an amended complaint does not, however, cure a venue defect. To the contrary, venue is a personal defense; when claims are filed against multiple defendants, as here, "proper venue must be established as to each defendant." *Shuman v. Comput. Assocs. Int'l, Inc.*, 762 F. Supp. 114, 115 (E.D. Pa. 1991); *see also* 28 U.S.C. § 1391(b) (requiring assessment of *all* defendants or *all* claims). Moreover, despite now filing this *third* iteration of their complaint, the same serious jurisdictional defects have existed since Plaintiffs filed their initial complaint in March 2017. *See Bell v. United States*, No. 08-2, 2008 WL 698985, at *2 (W.D. Pa. Mar. 13, 2008) (dismissal warranted for "abusive pattern of filings").

C. In the alternative, the Court should transfer the case to Washington, D.C.

In the event the Court disagrees that dismissal is the proper remedy for improper venue in and does not dismiss the First Amended Complaint based on any of the other grounds outlined in this motion, transfer to the United States District Court for the District of Columbia would be appropriate under 28 U.S.C. § 1406(a). As noted above, venue would be proper in Washington, D.C. because IFC and IFC AMC are both residents. Personal jurisdiction would also exist because both IFC and IFC AMC have their headquarters and principal places of business in Washington, D.C., and Plaintiffs' alleged bases for subject-matter jurisdiction would equally apply in that forum. *See* Compl. ¶¶ 42 & 44, *Doe v. IFC*, No. 17-cv-363 (D.D.C. Mar. 9, 2017), D.I. 4 (recognizing that both IFC and IFC AMC have their "headquarters and principal place of business" in Washington, D.C.); D.I. 38 ¶¶ 48–49 (alleging diversity and federal question jurisdiction). Moreover, should the court decide that venue is improper as to one defendant (but not both), transfer of the entire action is still the appropriate remedy. *See Cottman Transmission Sys., Inc. v. Martino*, 36 F.3d 291, 296 (3d Cir. 1994) ("[T]he court should not sever if the defendant over

whom jurisdiction is retained is so involved in the controversy to be transferred that partial transfer would require the same issues to be litigated in two places.").

This Court also has the discretion to transfer the case for improper venue without reaching IFC and IFC AMC's immunity from suit under the IOIA. *See* D.I. 31 at 1–4. There is no authority for requiring a transferring court to resolve pending jurisdictional defenses before transferring to another federal court. *See In re LimitNone, LLC*, 551 F.3d 572, 578 (7th Cir. 2008) (per curiam) ("[T]he indeterminacy of subject-matter jurisdiction is not, standing alone, a bar to consideration of venue."); *Aftab v. Gonzalez*, 597 F. Supp. 2d 76, 79 (D.D.C. 2009) (granting motion to transfer when defendant had pending motion to dismiss for lack of subject-matter jurisdiction).

III. THIS COURT SHOULD DISMISS THE FIRST AMENDED COMPLAINT FOR FAILURE TO JOIN INDISPENSABLE THIRD PARTIES

Under Rule 19, an absent party is necessary if without it: (1) "complete relief" cannot be accorded among those already parties; or (2) the absent party "claims an interest relating to the subject of the action and is so situated that disposing of the action in [that party's] absence may" either "(i) as a practical matter impair or impede [that] person's ability to protect the interest; or (ii) leave [the remaining] part[ies] subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest." Fed. R. Civ. P. 19(a). If the absent party is indispensable, the Court must determine whether "in equity and good conscience" the action should proceed without that party, or whether the action should be dismissed. *Steel Valley Auth. v. Union Switch & Signal Div.*, 809 F.2d 1006, 1013 (3d Cir. 1987). Here, the case should be dismissed because there are at least five necessary parties that are absent and cannot be joined.

A. At least five necessary parties are absent from this case.

Plaintiffs have failed to join at least five necessary parties:

- *Dinant*. Plaintiffs claim that Dinant is responsible for the actions of its security personnel, including private and public security forces. *E.g.*, D.I. 38 ¶¶ 101, 473–78, 481–91.
- *Dinant's Security Forces*. The claimed injuries giving rise to Plaintiffs' causes of action were allegedly committed by Dinant and its security personnel. *E.g.*, *Id.* ¶¶ 104, 237
- *The Honduran Government*. Plaintiffs allege that government officials, including the Honduran military, are also responsible for their injuries. *E.g.*, *Id.* ¶¶ 158, 218, 228–30, 482.
- *The Farmer Cooperatives*. Plaintiffs raise claims involving the interests of farmer cooperatives—a set of quasi-governmental organizations—who own the land under dispute in this case. *E.g.*, *Id.* ¶¶ 127–30, 145.
- *Banco Ficohsa*. Ficohsa provided direct financing to Dinant. *E.g.*, *Id.* ¶ 105.

Each of the entities listed above are necessary parties who should be joined under Rule 19(a). Without testimony from Dinant's security forces, the government's forces, or the rural cooperatives who own the land and represent the farmers' interests, this Court cannot possibly resolve any of Plaintiffs' claims. In this case, the absent parties' "presence is critical to the disposition of the important issues in the litigation" because they possess evidence or control witnesses whose presence would otherwise preclude a ruling on the merits. *Haas v. Jefferson Nat'l Bank of Miami Beach*, 442 F.2d 394, 398 (5th Cir. 1971). These entities and individuals are "key witness[es] whose testimony would be of inestimable value" in deciding these claims. *Id.* Moreover, although not all joint tortfeasors are necessary parties under Rule 19, many of the absent parties—including Dinant, Dinant's securities forces, and the Honduran government—are necessary because they were all "active" or "primary" participants in the conduct wrongly attributed to IFC and IFC AMC. *See Johnson & Johnson v. Coopervision, Inc.*, 720 F. Supp. 1116, 1128 (D. Del. 1989); *B. Fernandez & Hnos, Inc. v. Kellogg USA, Inc.*, 516 F.3d 18, 27 (1st Cir.

2008) (“Given that Kellogg Caribbean was a central player—perhaps even the primary actor—in the alleged breach, the practical course here . . . is to proceed in a forum where the absentee may be joined.”); *Laker Airways, Inc. v. British Airways, PLC*, 182 F.3d 843, 848 (11th Cir. 1999) (“According to Laker’s complaint, ACL would certainly be considered an active participant in the allegations . . . We determine, therefore, that ACL is a necessary party and should be joined, if feasible.”). The liability determinations in this case would thus hinge on the culpability of absent parties who are not here to defend their actions. *See Acierno v. Preit-Rubin, Inc.*, 199 F.R.D. 157, 163 (D. Del. 2001) (“[B]ecause the court would have to review the [absent parties’] actions in order to fashion a remedy, [they are] necessary and indispensable part[ies].”). If the Court were to proceed with these claims, it would greatly impair the absent parties’ ability to protect their interests including, in the case of the Honduran government, its immunities.

In absence of these necessary parties, “complete relief” cannot be accorded. If the Court found IFC or IFC AMC to be liable, it would have claims against the absent parties. The relief Plaintiffs seek, including injunctive relief, also cannot ever be “complete” without a judgment against Dinant or the Honduran Government, because neither IFC nor IFC AMC has control over these entities. Courts have thus required joinder in cases, like this one, where the requested injunction would not bind an absent party. *See, e.g.*, *Acierno*, 199 F.R.D. at 163 (finding government entity—a county—to be a necessary party where an injunction would have the effect of overruling prior action taken by the county); *Dawavendewa v. Salt Water Project Agric. Improvement & Power Dist.*, 276 F.3d 1150, 1155–56 (9th Cir. 2002) (concluding the Navajo nation was a necessary party where it would not be bound by the injunction plaintiff sought).

B. This Court lacks jurisdiction to join the absent parties to this case, or joinder is not otherwise feasible.

Per the allegations in the First Amended Complaint, this Court lacks personal jurisdiction over the five absent parties, as well as subject-matter jurisdiction over the Government of Honduras and the Honduran military. The Government of Honduras and its military are immune from suit and cannot be subjected to this Court's jurisdiction absent its own waiver of immunity or another exception set forth in the FSIA. *See Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 439 (1989). Where a foreign sovereign is a required party for the purposes of Rule 19, and such party is not subject to any exception to the immunities under the FSIA, the case must be dismissed. *See, e.g.*, *Republic of Philippines v. Pimentel*, 553 U.S. 851, 867 (2008) ("A case may not proceed when a required-entity sovereign is not amenable to suit."); *TJGEM LLC v. Republic of Ghana*, 26 F. Supp. 3d 1, 7 (D.C. Cir. 2013) (same).

Moreover, Dinant, its security forces, Banco Ficohsa, and the farmer cooperatives are Honduran entities lacking contacts with Delaware. *See D'Jamoos ex rel. Estate of Weingeroff v. Pilatus Aircraft Ltd.*, 566 F.3d 94, 105 (3d Cir. 2009) (exercise of personal jurisdiction requires "that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there"); *Wilson v. Can. Life Assurance Co.*, No. 08-1258, 2009 WL 532830, at *2 (M.D. Pa. Mar. 3, 2009) ("Joinder may not be feasible for a number of reasons, including because joinder would destroy diversity, or, as alleged in this case, because the court lacks personal jurisdiction over the absentee.") (citation omitted). For similar reasons, venue would be improper, as none of the alleged conduct giving rise to Plaintiffs' claims occurred in Delaware, and in particular none of the five above-listed parties has any residence in, or connection to, Delaware.

C. Dismissal is warranted.

If an absent party is necessary but cannot be joined for lack of jurisdiction, improper venue, or otherwise, the Court must determine whether it can proceed without the indispensable party "in equity and good conscience." *Gen. Refractories Co. v. First State Ins. Co.*, 500 F.3d 306, 319 (3d Cir. 2007). Rule 19(b) dictates that courts should consider several factors in deciding whether to dismiss an action:

> (1) [T]he extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties; (2) the extent to which prejudice could be lessened or avoided by: (A) protective provisions in the judgment; (B) shaping the relief; or (C) other measures; (3) whether a judgment rendered in the person's absence would be adequate; and (4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

Fed. R. Civ. P. 19(b). Here, each of these factors indicates this action cannot proceed without the absent parties.

First, a judgment rendered in absence of the parties would cause significant prejudice to their interests. This includes the significant immunity interests of the Government of Honduras under the FSIA. *See Pimentel*, 553 U.S. 851 at 866–67 (courts must consider comity and dignity interests of foreign sovereigns and may not simply "bypass [another nation's] courts without right or good cause"). It would be a "specific affront" to the Government of Honduras for a U.S. court to issue judgment on disputed claims, including property claims, that arose in a foreign land. *Id*. at 866. Where, as here, the interests of the immune party is "not frivolous, dismissal of the action must be ordered where there is a potential for injury" to their interests. *Id*. at 867. Prejudice would likewise result to the interests of Dinant, the Farmer Cooperatives, and Banco Ficohsa, as discussed above. *See Provident Tradesmens Bank & Tr. Co. v. Patterson*, 390 U.S. 102, 110 (1968) (noting the effects that a judgment can have on nonparties, even without res judicata). For example, several of Plaintiffs' claims depend on the ownership of the land in question, yet they have failed to join

the farmer cooperatives, who are the legal owners of the land under dispute. *See, e.g.*, D.I 38 ¶ 129 (explaining that the cooperatives are "legal person[s]" and noting what occurs when a "cooperative sells it[s] land"). Finally, both IFC and IFC AMC have a significant interest in "avoid[ing] multiple litigation, or inconsistent relief, or sole responsibility for a liability" that it may share with the absent parties. *Provident Tradesmens Bank*, 390 U.S. at 110.

Second, this prejudice cannot be avoided by shaping the relief. Each of Plaintiffs' claims implicate the interests of government actors, who are immune from suit. *See* D.I. 38 ¶ 482 (explaining that Plaintiffs' tort claims are premised on the conduct of "Honduran military and police forces acting under a Memorandum of Understanding or other agreement or arrangement with Dinant"). And the prejudice to IFC and IFC AMC would be so significant if they were required to proceed in isolation that any fashioned relief would be inadequate.

Third, a judgment in the absence of these parties would be wholly inadequate. Plaintiffs' requested injunctive relief would be of no import in the absence of the Government of Honduras, which is immune from suit. Considerations of consistency and efficiency also dictate that these actions should be dismissed and brought instead in the courts of Honduras. Because the non-joined parties were active participants in the conduct at the center of Plaintiffs' claims, a trial in their absence—in a jurisdiction with no connection to those parties, the events at issue, and the location of relevant evidence—would unnecessarily burden this Court and prolong the litigation.

Fourth, Plaintiffs would have an adequate remedy were the case dismissed for nonjoinder. By bringing the case in Honduras, Plaintiffs could join other parties with substantial assets, including Dinant and Banco Ficohsa, who are not subject to personal jurisdiction in the United States. Honduras is also a superior forum for practical reasons—effectively all of the material

witnesses to the alleged conduct giving rise to Plaintiffs' claims, and the documents bearing on causation, liability, and alleged damages, are located solely in Honduras.

IV. THIS COURT LACKS PERSONAL JURISDICTION OVER IFC

Even if subject-matter jurisdiction and venue were somehow satisfied and there were no absent necessary parties, it still remains the case that IFC—an international organization headquartered in Washington, D.C. with no offices or staff in Delaware—has no place in this litigation and should be dismissed for lack of personal jurisdiction.[7] Simply put, "[p]laintiff has an obligation to provide more than labels and conclusions," and Plaintiffs here have failed to assert that IFC has any connection whatsoever with Delaware. *Parker v. Learn Skills Corp.*, 530 F. Supp. 2d 661, 673 (D. Del. 2008). "A district court sitting in diversity may assert personal jurisdiction over a nonresident defendant to the extent allowed under the law of the forum state." *Metcalfe v. Renaissance Marine, Inc.,* 566 F.3d 324, 330 (3d Cir. 2009) (citing *Time Share Vacation Club v. Atl. Resorts, Ltd.*, 735 F.2d 61, 63 (3d Cir. 1984)). This requires both a statutory basis for the exercise of jurisdiction over IFC under Delaware's long-arm statute, Del. Code Ann. tit. 10, § 3104(c)(1)–(6), and minimum contacts between IFC and Delaware sufficient to satisfy constitutional due process. Plaintiffs bear the burden of demonstrating that personal jurisdiction is proper. *Time Share Vacation Club*, 735 F.2d at 63 ("Once a jurisdictional defense has been properly raised, the plaintiff bears the burden of demonstrating contacts with the forum state sufficient to give the court in personam jurisdiction." (citation omitted)).

Plaintiffs allege that personal jurisdiction exists over IFC either: (1) under Federal Rule of Civil Procedure 4(k)(1)(A) because IFC is an "alter ego" of its subsidiary company IFC AMC (a

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[7] Defendants do not dispute that personal jurisdiction exists over IFC AMC in light of its contacts with the forum. That personal jurisdiction might exist over IFC AMC in Delaware is irrelevant to whether this Court has subject-matter jurisdiction over claims against IFC AMC.

Delaware limited liability company); or (2) under Rule 4(k)(1)(B) because IFC "meets the definition of a 'required' party under F.R.C.P. Rule 19(a) and is within 100 miles of this Court." D.I. 38 ¶¶ 51–52. Both of these arguments fail.

First, Rule 4(k)(1)(A) is inapplicable because IFC is not an "alter ego" of IFC AMC, and the First Amended Complaint lacks any allegations to sustain their "alter ego" theory. Delaware courts have recognized an "alter ego" theory to establish personal jurisdiction over a nonresident defendant, but they "apply the alter ego strictly and analyze and employ a similar analysis to that of deciding whether it is appropriate to pierce the corporate veil." *Greene v. New Dana Perfumes Corp.*, 287 B.R. 328, 342–43 (D. Del. 2002). "Delaware public policy does not lightly disregard the separate legal existence of corporations." *Crystallex Int'l Corp. v. Petroleos De Venezuela, S.A.*, 879 F.3d 79, 86 (3d Cir. 2018) (quoting *Crystallex Int'l Corp. v. Petroleos De Venezuela, S.A.*, 213 F. Supp. 3d 683, 690 (D. Del. 2016)); *see also Wallace ex rel. Cencom Cable Income Partners II v. Wood*, 752 A.2d 1175, 1183 (Del. Ch. 1999) ("Persuading a Delaware court to disregard the corporate entity is a difficult task."). In particular, courts examine two "critical elements" in this analysis:

> (1) whether the foreign defendant over whom jurisdiction is sought has no real corporate identity from a defendant over whom jurisdiction is clear; and (2) the existence of acts in the forum which can be fairly imputed to the foreign defendant and which satisfy the state's long-arm statute and/or federal due process requirements.

Greene, 287 B.R. at 342–43 (alterations omitted).

As to corporate identity, the First Amended Complaint is entirely bereft of allegations of "commingling, fraudulent transfers and disregard of the separate corporate structure" of IFC and IFC AMC. *Reach & Assocs., P.C. v. Dencer*, 269 F. Supp. 2d 497, 506 (D. Del. 2003). Plaintiffs misleadingly note that IFC and IFC AMC argued in a prior motion to dismiss that "IFC AMC is not a separate international organization." D.I. 1 ¶ 423. But this argument was made in the context

of establishing IFC AMC's immunities and has nothing to do with whether IFC and IFC AMC are separate legal entities. *See* Mtn. to Dismiss, *Doe v. IFC*, No. 17-cv-363 (D.D.C. Sept. 6, 2017), D.I. 17 ¶ 16 ("IFC AMC is not a separate international organization, and, given its subsidiary status, does not need to be designated as such by the President of the United States to enjoy IFC's immunities."). Moreover, Plaintiffs fail to allege the existence of *any* acts in the forum that can be fairly imputed to IFC. Indeed, the only "Delaware-directed behavior" alleged in the First Amended Complaint is that IFC AMC was formed in Delaware in 2009. *See HMG/Courtland Props., Inc. v. Gray*, 729 A.2d 300, 308 (Del. Ch. 1999); D.I. 38 ¶ 50. But IFC AMC's formation is irrelevant where, as here, "the incorporation and/or formations in Delaware had nothing to do with the underlying claims of the Plaintiffs." *Reach & Assocs., P.C.*, 269 F. Supp. 2d at 506.

Second, Plaintiffs misconstrue Rule 4(k)(1)(B) in arguing that personal jurisdiction exists over IFC because it "meets the definition of a 'required' party under Rule 19(a) and is within 100 miles of this Court." D.I. 38 ¶ 52. Rule 4(k)(1)(B) provides that "[s]erving a summons . . . establishes personal jurisdiction over a defendant . . . who is a party *joined* under Rule 14 or 19 and is served within a judicial district of the United States not more than 100 miles from where the summons was issued." Fed. R. Civ. P. 4(k)(1)(B) (emphasis added). IFC was never "joined" as a necessary party under Rule 19, but instead was named as a party in the First Amended Complaint. Rule 4(k)(1)(B) "has no effect, by its own terms, on service upon the original parties." *Pierce v. Globemaster Balt., Inc.*, 49 F.R.D. 63, 67 (D. Md. 1969); *see also Prince of Peace Enters., Inc. v. Top Quality Food Mkt., LLC*, No. 07-00349, 2007 WL 704171, at *2 (S.D.N.Y. Mar. 7, 2007) ("[A] plaintiff may not use the bulge provision to obtain service on an original defendant.").

Aside from the above two arguments, which fail to pass muster, Plaintiffs fail to allege any further basis for the exercise of personal jurisdiction over IFC. As discussed in the venue section,

supra, Congress has provided that IFC is a resident of Washington, D.C. *See* 22 U.S.C. § 282f ("[IFC] shall be deemed to be an inhabitant of the Federal judicial district in which its principal office in the United States is located."). Moreover, IFC lacks sufficient contacts with Delaware to satisfy Delaware's long-arm statute or due process. Rechden Decl. ¶ 4. All of Plaintiffs' claims against IFC must therefore be dismissed for lack of personal jurisdiction.

V. PLAINTIFFS HAVE FAILED TO STATE ANY PLAUSIBLE CLAIM FOR RELIEF

Despite three attempts at presenting their claims against IFC and IFC AMC, Plaintiffs' most recent complaint still fails to state any plausible scenario in which Plaintiffs are entitled to relief and dismissal is warranted under Rule 12(b)(6). In evaluating a Rule 12(b)(6) motion to dismiss, this Court accepts as true the well-pleaded allegations in the First Amended Complaint. *Resnik v. Woertz*, 774 F. Supp. 2d 614, 629 (D. Del. 2011). If the well-pleaded allegations do not state a plausible claim for relief, the First Amended Complaint must be dismissed. *Id.* at 629–30.

A. Plaintiffs' claims are governed by Honduran law.

Before evaluating the sufficiency of Plaintiffs' First Amended Complaint, the Court must determine which law applies. Under Delaware choice of law rules, Honduran law applies because Honduras has the "most significant relationship" to the litigation: *all* of the alleged injuries occurred in Honduras, *all* of the Plaintiffs and indispensable third parties are located in Honduras, and *all* of the evidence pertinent to Plaintiffs' alleged injuries is located in Honduras. *See Bell Helicopter Textron, Inc. v. Arteaga*, 113 A.3d 1045, 1051–52 (Del. 2015); *Restatement (Second) of Conflict of Laws* § 146 (1971) (presumption is that "the local law of the state where the injury occurred determines the rights and liabilities of the parties"). Moreover, "Delaware has no public policy interest in this case, except to avoid contributing to forum-shopping and enmeshing itself in unrelated litigation." *Bell Helicopter Textron, Inc.*, 113 A.3d at 1052.

Plaintiffs have refused to say which law applies, asserting instead that IFC and IFC AMC's conduct "violates the laws of the Delaware, United States federal common law, Honduran law, and the laws of any other jurisdiction that might apply." D.I. 38 ¶ 472 (emphasis added). To facilitate the Court's choice of law analysis, and there being no federal common law of torts, IFC and IFC AMC analyze Plaintiffs' claims under both Honduran law and Delaware law. Ultimately, it is clear that Plaintiffs' First Amended Complaint fails to state a claim under either regime. To the extent Plaintiffs purport to bring claims under something other than Honduran law or Delaware law, they have failed to explain what other law might apply to claims based on alleged injuries suffered in Honduras brought in a diversity action in a Delaware court.

B. Plaintiffs fail to state a claim under Honduran law.

Plaintiffs raise nine separate causes of action: (1) wrongful death, (2) battery, (3) assault, (4) intentional infliction of emotional distress, (5) false imprisonment, (6) trespass, (7) negligent infliction of emotional distress, (8) negligence, and (9) unjust enrichment. Plaintiffs' First Amended Complaint fails to state a claim under Honduran law for any of those claims.

First, Honduras is a civil code jurisdiction, and there is no law permitting a lender—or, in the case of IFC AMC, a lender and investor in a bank that, in turn, lent money to another company—to be held liable for the tortious conduct of third parties under the circumstances alleged in the complaint. Ex. D, Turcios Decl. ¶¶ 25, 27.

Second, to the extent that Plaintiffs can obtain monetary damages from a foreign lender for such conduct, Honduran law requires Plaintiffs to first obtain a criminal conviction against the intentional tortfeasor (for claims 1-6 and 9), which must be a natural person. *See id.* ¶ 30–37, 42–43. Impacted individuals must commence battery and assault proceedings by "private initiative," whereas all other criminal proceedings must be initiated by the Public Attorney. *Id.* ¶ 44. Once a criminal conviction is secured, plaintiffs may then use a fast-track "Execution Procedure" to obtain

monetary damages from the intentional tortfeasors. *Id.* ¶¶ 47–48. Damages may also be recovered from a legal entity, but *only* if the legal entity employed the intentional tortfeasors and if a superior of those tortfeasor-employees allowed or directed the criminal action. Plaintiffs' claims fail because the First Amended Complaint does not allege the existence of any criminal conviction, nor do Plaintiffs allege that IFC or IFC AMC employees or superiors allowed or directed the criminal conduct at issue.

Third, as for Plaintiffs' negligence claims (claims 7 and 8), Plaintiffs have failed to allege any cognizable duty under Honduran law extending to IFC or IFC AMC, under Article 2237 or otherwise. *See id.* ¶ 39. Nor have Plaintiffs alleged any relationship or the causation necessary to prevail under Honduran law. *See id.* ¶¶ 39, 63; *infra* § V.C.2. Moreover, Honduran law does not allow for the recovery of punitive damages. *See id.* ¶ 38.

C. Plaintiffs also fail to state a claim under Delaware law.

Even if the Court were to conclude that Honduran law does not apply, Plaintiffs have likewise failed to allege any plausible claims for relief under Delaware law. *First*, for the claims arising out of the intentional tortious conduct of third parties, Plaintiffs have failed to state a claim for aiding and abetting liability. *Second*, Plaintiffs' negligence claims fail because they have failed to allege that IFC or IFC AMC owed Plaintiffs any duty of care, nor have they alleged that IFC or IFC AMC's acts were the proximate cause of their injuries. *Third*, Plaintiffs' unjust enrichment claims fail because they have not alleged a direct relationship between the deprivation of their property and IFC or IFC AMC's enrichment.

1. Plaintiffs have failed to state a claim for aiding and abetting liability.

Many of Plaintiffs' tort claims do not, on their face, have anything to do with IFC and IFC AMC's conduct. Rather, Plaintiffs allege six tort claims where Dinant and Dinant's security personnel are said to have committed the tortious conduct. D.I. 38 ¶¶ 587–631, 652–58 (claims

for: (1) wrongful death; (2) battery; (3) assault; (4) intentional infliction of emotional distress; (5) false imprisonment; and (6) trespass). Even though third parties thousands of miles away allegedly committed these torts, Plaintiffs nonetheless suggest that IFC and IFC AMC are liable because they aided and abetted the tortious conduct by providing financing to Dinant. *Id*. ¶¶ 492–502. IFC and IFC AMC's conduct with respect to Dinant is plainly insufficient to invoke aiding and abetting liability under Delaware law.

Under an aiding and abetting theory of liability, a defendant is liable "[f]or harm resulting to a third party from the tortious conduct of another" if the defendant (1) "knows that the other's conduct constitutes a breach of duty," and (2) "gives substantial assistance or encouragement to the other so to conduct himself." *In re Dole Food Co., Inc. Stockholder Litig.*, No. 8703, 2015 WL 5052214, at *41 (Del. Ch. Aug. 27, 2015) (quoting *Restatement (Second) of Torts* § 876(b) (1979)); *see also Anderson v. Airco, Inc.*, No. 02C-12-091, 2004 WL 2827887, at *4 (Del. Super. Ct. Nov. 30, 2004) (noting that the concept of civil liability for providing substantial assistance is "a more recent phenomenon in the civil, non-fiduciary arena"). Plaintiffs' aiding and abetting theory fails because Plaintiffs have not alleged either the knowledge or substantial assistance required to invoke aiding and abetting liability.

First, Plaintiffs' allegation that IFC and IFC AMC were generally aware of Dinant's tortious conduct is insufficient to fulfill the knowledge element. D.I. 38 ¶ 493. Under Delaware law, "mere knowledge is insufficient" and the "knowledge element must be coupled with some degree of intent." *Jenkins v. Williams*, No. 02-331, 2008 WL 1987268, at *14 (D. Del. May 7, 2008). Accordingly, Plaintiffs must plausibly allege that IFC and IFC AMC acted with some degree of intent, i.e., the organizations intended to assist or encourage Dinant and its security forces in the commission of these intentional torts. *See Taylor v. Am. Chemistry Council*, 576 F.3d 16,

35 (1st Cir. 2009) (for aiding and abetting liability defendant must possess "unlawful intent," which includes "knowledge that the other's conduct is tortious" and "an intent to substantially assist or encourage that conduct"); *Goldberg v. UBS AG*, 660 F. Supp. 2d 410, 425 (E.D.N.Y. 2009) (aiding and abetting requires "knowledge of the illegal activity that is being aided and abetted, a desire to help that activity succeed, and some act to further such activity to make it succeed"); *Juhl v. Airington*, 936 S.W.2d 640, 644 (Tex. 1996) (defendant must possess "unlawful intent, i.e., knowledge that the other party is breaching a duty and the intent to assist that party's actions" (quoting *Payton v. Abbott Labs,* 512 F. Supp. 1031, 1035 (D. Mass. 1981))).

In this case, Plaintiffs have failed to allege any facts suggesting that IFC or IFC AMC intended to assist Dinant in this fashion. At most, Plaintiffs allege that IFC and IFC AMC loaned money to Dinant (directly and indirectly through Banco Ficohsa) "for the purpose of expanding and consolidating its palm operations in the region." D.I. 38 ¶ 123. But that allegation is exceedingly remote from even suggesting that IFC or IFC AMC intended to finance or support tortious conduct. Indeed, if these allegations were sufficient to state a claim, Plaintiffs would have an equally plausible aiding and abetting claim against every lender, supplier, customer, or counterparty that has ever facilitated Dinant's palm oil operations with any awareness that Dinant was allegedly involved in a violent land conflict with organizations claiming to represent the farmer cooperatives in the Bajo Aguán.

Second, Plaintiffs have also failed to allege that IFC or IFC AMC substantially assisted Dinant in the commission of the underlying intentional torts. The assistance the defendant provided must be a "substantial factor in causing the resulting tort." *Taylor*, 576 F.3d at 35 (quoting *Restatement (Second) of Torts* § 876 cmt. D); *see also Aetna Cas. & Sur. Co. v. Leahey Constr. Co.,* 219 F.3d 519, 537 (6th Cir. 2000) (plaintiff must show that "the secondary party proximately

caused the violation, or, in other words, that the encouragement or assistance was a substantial factor in causing the tort") (quoting *K & S P'ship v. Continental Bank, N.A.,* 952 F.2d 971, 979 (8th Cir. 1991)). "[S]ubstantial assistance means something more than merely providing routine professional services that aid the tortfeasor in remaining in business." *El Camino Res., LTD. v. Huntington Nat'l Bank*, 722 F. Supp. 2d 875, 911 (W.D. Mich. 2010), *aff'd,* 712 F.3d 917 (6th Cir. 2013).

Here, Plaintiffs' alleged causal chain between their injuries and the assistance of IFC and IFC AMC is untenably long. Again, Plaintiffs allege that IFC and IFC AMC provided, either directly or indirectly through Banco Ficohsa, financing to Dinant allegedly to support its palm operations. Plaintiffs allege that the financing provided "Dinant with the capital, motive, and reputational cover to violently suppress farmers' opposition." D.I. 38 ¶ 501. On information and belief, Plaintiffs allege that the financing "substantially increased" Dinant's cash on hand and Dinant "utilized funds freed up" by the financing to purchase weapons and expand its security forces. *Id.* ¶¶ 121–22, 230. Most incredibly, Plaintiffs allege that the financing "incentivized" Dinant to use violence against the local farmers. *Id.* ¶¶ 123, 231, 474. These allegations—however inflammatory—still do not explain how IFC and IFC AMC's assistance was a "substantial factor" in causing the *particular* injuries alleged by these *particular* plaintiffs. There is no suggestion, for example, that the financing was provided with the explicit or implicit purpose of funding an expansion of Dinant's security operations. Nor is there any explanation of how financing from IFC and IFC AMC substantially caused Plaintiffs' injuries when these injuries were the direct result of independent, intervening action by Dinant, Dinant security forces, or members of the Honduran government.

2. Plaintiffs' claims related to IFC and IFC AMC's alleged negligence fail to sufficiently allege duty or causation.

"Under Delaware law, to prevail on a claim of negligence, a plaintiff must prove (1) that the defendant owed the plaintiff a duty of care, (2) that the defendant breached that duty, (3) and that the plaintiff's injury was proximately caused by the breach of that duty." *Halchuck v. Williams*, 635 F. Supp. 2d 344, 346 (D. Del. 2009). With respect to Plaintiffs' claims for negligence and negligent infliction of emotional distress, D.I. 38 ¶¶ 632–51, Plaintiffs have failed to plead sufficiently either a recognized duty or that IFC and IFC AMC proximately caused their injuries, and dismissal of their negligence claims is therefore warranted.

First, Plaintiffs have failed to allege any recognized duty of care. "[W]hether a duty exists is entirely a question of law, to be determined by reference to the body of statutes, rules, principles and precedents which make up the law; and it must be determined by the court." *Pipher v. Parsell*, 930 A.2d 890, 892 (Del. 2007). "If no duty exists, 'a trial court is authorized to grant judgment as a matter of law.'" *Id*.

Plaintiffs allege that IFC and IFC AMC provided financing to Dinant and that Dinant is responsible for the various injuries alleged in the First Amended Complaint. But the loans and investments involving Dinant and Ficohsa did not put IFC or IFC AMC in a "relation of dependence or of mutual dependence" with Plaintiffs so as to "trigger a duty to act for their protection." *Doe 30's Mother v. Bradley*, 58 A.3d 429, 451 (Del. Super. Ct. 2012). Under Delaware law, "[t]here is no duty to control the conduct of a third person as to prevent him from causing physical harm to another" unless a recognized "special relationship" exists between the alleged tortfeasor and the plaintiff. *Rogers v. Christina Sch. Dist.*, 73 A.3d 1, 11 (Del. 2013). This principle is especially true in the context of a lender-borrower relationship, where it is widely recognized that lenders "do not owe non-customers a duty to protect them from the intentional torts of their

customers." *Lerner v. Fleet Bank, N.A.,* 459 F.3d 273, 286 (2d Cir. 2006). It is thus the "universal rule in this country" that a "bank's relationship is with its customer and that the bank owes third parties no duty of care to monitor a customer's activities." *El Camino Res., LTD.*, 722 F. Supp. 2d at 907.

In search of a legal duty, Plaintiffs allege that IFC and IFC AMC "assume legal obligations to the communities affected by their projects" in light of their internal policies and the "unique relationship" they have with the companies and projects they finance. D.I. 38 ¶¶ 453, 390. But even if IFC and IFC AMC policies establish that these organizations are internally "mission-bound to help" the communities they serve, *id.* ¶ 420, this does not create a legally recognized duty. Consider that on Plaintiffs' theory, IFC and IFC AMC potentially owe a legal duty to every person impacted by every company or project that IFC and IFC AMC has ever financed. This theory further supposes that IFC and IFC AMC are obligated to control the conduct of parties that receive funding from IFC either directly or indirectly through a "financial intermediar[y]" like Ficohsa. *Id.* ¶ 449. This vision of IFC's and IFC AMC's duty is boundless and would potentially flow to millions of people around the world without any grounding in law or reason. An "injured party must show that a defendant owed not merely a general duty to society but a specific duty to him or her, for without a duty running directly to the injured person there can be no liability in damages, however careless the conduct or foreseeable the harm." *Hamilton v. Beretta U.S.A. Corp.*, 750 N.E.2d 1055 (N.Y. 2001), *opinion after certified question answered*, 264 F.3d 21 (2d Cir. 2001) (citation omitted).

Second**,** Plaintiffs further fail to allege proximate causation sufficiently to survive a motion to dismiss. *See Halchuck*, 635 F. Supp. 2d at 347 (recognizing that proximate cause can be decided as a matter of law); *Phifer v. E.I. Du Pont De Nemours & Co.*, No. 03-0327, 2004 WL 32940, at

*2 (D. Del. Jan. 5, 2004), *aff'd sub nom. Phifer v. Du Pont Country Club, Inc.*, 138 F. App'x 446 (3d Cir. 2005) (dismissing complaint for failure to allege proximate cause). Under Delaware law, proximate cause is causation "which in [a] natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury and without which the result would not have occurred." *Duphily v. Del. Elec. Coop., Inc.*, 662 A.2d 821, 829 (Del. 1995) (emphasis omitted). For the same reasons that IFC and IFC AMC did not substantially assist Dinant in the commission of any alleged intentional torts, IFC and IFC AMC's involvement with Dinant was far too remote for the direct and indirect financing to be considered part of an "unbroken" chain leading to Plaintiffs' injuries. Indeed, Plaintiffs have failed to allege any facts suggesting that their alleged injuries would not have occurred but for IFC and IFC AMC's investments. At bottom, under "[a]ny way the court looks at it," IFC and IFC AMC's alleged negligence is not the proximate cause of Plaintiffs' alleged injuries. *Vollendorf v. Craig*, No. 01-08106, 2004 WL 440418, at *3 (Del. Super. Ct. Mar. 9, 2004).

3. IFC and IFC AMC are not liable for unjust enrichment.

Under Delaware law, the elements of unjust enrichment are: (1) an enrichment; (2) an impoverishment; (3) a relation between the enrichment and impoverishment; (4) the absence of justification; and (5) the absence of a remedy provided by law. *Bakerman v. Sidney Frank Importing Co.*, No. 1844, 2006 WL 3927242, at *18 (Del. Ch. Oct. 10, 2006). Plaintiffs allege that IFC and IFC AMC has been unjustly enriched because Dinant obtained farmland in the 1990s through fraud or coercion, and that Dinant used that farmland decades later to generate revenue to repay loans made by IFC and Banco Ficohsa. D.I. 38 ¶¶ 138–39, 660–66.

Plaintiffs' allegations are insufficient to plausibly make out the third element—a relation between IFC and IFC AMC's alleged enrichment and the Plaintiffs' alleged impoverishment. To prove a relation between enrichment and impoverishment, a plaintiff must show "some *direct*

relationship" between the two. *Vichi v. Koninklijke Philips Elecs. N.V.*, 62 A.3d 26, 59–60 (Del. Ch. 2012). "In other words, there must be '[a] showing that the defendant was enriched unjustly by the plaintiff who acted for the defendant's benefit.'" *Id.* Here, Plaintiffs allegations support at most the inference that Dinant was unjustly enriched by the land transfers. Plaintiffs cannot use that unjust enrichment as a basis for recouping any and all funds that Dinant used to repay unrelated loans made by IFC or Banco Ficohsa under specific, contractual terms. *Id.* at 59–60. If Plaintiffs' theory of liability were correct, they would have an unlimited claim to every dollar Dinant has spent in the twenty seven years since the land transfers began, D.I. 38 ¶ 135, and could bring an unjust enrichment claim against every party that has ever done business (or will ever do business) with Dinant.

VI. PLAINTIFFS' CLAIMS ARE BARRED BY THE STATUTE OF LIMITATIONS

Plaintiffs filed their Complaint in the District of Delaware on October 24, 2017, D.I. 1, and their First Amended Complaint (adding IFC as a defendant) on March 8, 2018. D.I. 38. For statute of limitations purposes, Plaintiffs cannot rely on the date of the complaint that they filed and then voluntarily dismissed in Washington, D.C. because tolling of the statute of limitations ceases when a complaint is dismissed voluntarily. *See In re Direxion Shares ETF Tr.*, 279 F.R.D. 221, 236 (S.D.N.Y. 2012); *In re IndyMac Mortg.-Backed Sec. Litig.*, 718 F. Supp. 2d 495, 504 (S.D.N.Y. 2010).

For Plaintiffs' tort claims for: (1) wrongful death; (2) battery; (3) assault; (4) intentional infliction of emotion distress; (5) false imprisonment; (6) negligent infliction of emotional distress; and (7) negligence, the statute of limitations under Delaware law is two years. Del. Code Ann. tit. 10, § 8119. Plaintiffs' claim for trespass is subject to a three-year statute of limitations. *Id.* § 8106. The Honduran statute of limitations does not apply to any of Plaintiffs' claims because, pursuant to Delaware's borrowing statute, Delaware's statute of limitations is the shorter of the two statutes.

See id. § 8121; Turcios Decl. ¶¶ 50–62 (limitations period under Honduran law ranges from three to forty-five years for Plaintiffs' claims). The limitations period for these tort claims begins to run at the time of injury. *Rose Hall, Ltd. v. Chase Manhattan Overseas Banking Corp.*, 494 F. Supp. 1139, 1157 (D. Del. 1980). While Plaintiffs failed to specify the dates of each of their alleged injuries, the First Amended Complaint strongly suggests that most of the violence took place between 2009 and 2014. *E.g.*, D.I. 38, ¶¶ 233, 262, 298, 382.

Plaintiffs' claims are untimely as to both IFC and IFC AMC. The applicable limitations period is different for each defendant because Plaintiffs' omission of IFC from the original complaint was not the result of a "mistake concerning the proper party's identity." Fed. R. Civ. P. 15(c)(1)(C)(ii); *supra* § II (discussing Plaintiffs' pleadings gamesmanship). Accordingly, the operative date for claims against IFC AMC is October 24, 2017 (the date of the Complaint), and the operative date for claims against IFC is March 8, 2018 (the date of the First Amended Complaint). Plaintiffs' first seven claims are untimely to the extent their injuries occurred two years before those dates: October 24, 2015 (for IFC AMC) or March 8, 2016 (for IFC). Plaintiff's trespass claims are untimely to the extent the claims arose three years before those dates: October 24, 2014 (for IFC AMC) or March 8, 2015 (for IFC). For Plaintiffs' sole remaining claim for unjust enrichment, the applicable statute of limitations is three years and the limitations period begins to run "when the wrongful act causing the enrichment and impoverishment occurred." *Pulieri v. Boardwalk Props., LLC*, No. 9886, 2015 WL 691449, at *13 (Del. Ch. Feb. 18, 2015). Plaintiffs allege that the questionable land transfers took place in the 1990s and that the farmer cooperatives filed several lawsuits around 1998 seeking to challenge the land transfers. D.I. 38 ¶¶ 134–43, 160. Accordingly, the unjust enrichment claim is plainly barred by the statute of limitations, which

requires that the "wrongful act" occurred on or after October 24, 2014 (for IFC AMC) or March 8, 2015 (for IFC).

To the extent Plaintiffs claim that tolling might rescue their untimely claims, such tolling is unavailable. D.I. 38 ¶¶ 667–78. Plaintiffs allege that they brought this action "as soon as it was safe and practical to do so" and that they "moved expeditiously to file their claims" after "uncovering" IFC and IFC AMC's role in their injuries and after "learning of the prospect" of bringing suit in the United States. D.I. 38 ¶ 668–69. These allegations are irrelevant because under Delaware law, the limitations period is tolled "*only until* the plaintiff discovers (or exercising reasonable diligence should have discovered) his injury." *EBS Litig. LLC v. Barclays Glob. Inv'rs, N.A.*, 304 F.3d 302, 305 (3d Cir. 2002) (quoting *In re Dean Witter P'ship Litig.*, 1998 WL 442456, at *6 (Del. Ch. July 17, 1998), *aff'd,* 725 A.2d 441 (Del. 1999)); *see also* Turcios Decl. ¶ 51 (stating that there is no tolling under Honduran law for incapacity or inability to bring suit). On this critical point, Plaintiffs do not allege that they were delayed in discovering their injuries.

CONCLUSION

For the foregoing reasons, this Court should dismiss the First Amended Complaint with prejudice.

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