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

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I. IFC AND IFC AMC ARE IMMUNE FROM SUIT

A. Plaintiffs' claims are "based upon" foreign tortious conduct.

Any common sense reading of the First Amended Complaint ("Complaint") reveals that the gravamen of this case is the alleged tortious conduct in Honduras. D.I. 54 at 7-10; *see also* D.I. 56 at 7 (describing injuries). Plaintiffs claim they were injured by Honduran security forces, military, and police, as a result of conduct occurring solely in Honduras. D.I. 38 ¶¶ 104, 106, 230-33, 508-24. No matter how artfully Plaintiffs attempt to describe IFC and IFC AMC's involvement, a straightforward application of Supreme Court precedent requires dismissal of all of Plaintiffs' claims in their entirety. D.I. 54 at 7-8.

First, Plaintiffs argue their claims are actually "based upon" IFC and IFC AMC's lending activities in the United States because the tortious acts of third parties in Honduras are irrelevant to the "based upon" inquiry. D.I. 56 at 9-11. But that is not the law. Contrary to Plaintiffs' suggestion, the Supreme Court has never held that the gravamen must be assigned to some conduct of the foreign sovereign or international organization named as a defendant.[1] As the Court has explained, "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)). The gravamen is the "basis" or "foundation" of a claim, the conduct that "actually injured" the plaintiff. *Id.* at 395-96. If the direct cause of the injury is something other than a commercial activity by the sovereign with a nexus to the United States, the

[1] The few lower court cases Plaintiffs cite for this point are distinguishable because none discusses the gravamen test. D.I. 56 at 10. Rather, the courts were considering whether the sovereign's actions were commercial or noncommercial. *See Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1108 (5th Cir. 1985); *Universal Trading & Inv. Co. v. Bureau for Representing Ukranian Interests in Int'l & Foreign Courts*, 727 F.3d 10, 16-17 (1st Cir. 2013).

exception does not apply. *See, e.g.*, *Fed. Ins. Co. v. Richard I. Rubin & Co.*, 12 F.3d 1270, 1289-90 (3d Cir. 1993); *Williams v. Romarm S.A.*, No. 17-6, 2017 WL 3842595, at *6 (D. Vt. Sept. 1, 2017), *aff'd*, 751 F. App'x 20 (2d Cir. 2018).

Accordingly, it is entirely predictable to have a case like this where the gravamen is foreign activities of foreign third parties not named in the lawsuit and the alleged commercial activities are *not* what actually harmed the plaintiff. In fact, these are precisely the types of cases that should be dismissed on the basis of the gravamen inquiry. *See* Br. for the United States as Amicus Curiae Supporting Reversal at 8, *OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390 (2015) (No. 13-1067), 2015 WL 1938761, at *8 (gravamen inquiry exists, among other reasons, to "prevent[] U.S. courts from assuming jurisdiction over cases in which all or virtually all of the acts or omissions that are the subject of the parties' dispute took place abroad"). This is no doubt why the government expressed "serious doubts" in *Jam II* that the commercial activities exception would apply to similar foreign tort claims brought against IFC, a critical point Plaintiffs ignored in their response. *Jam v. Int'l Fin. Corp.*, 139 S. Ct. 759, 772 (2019) ("*Jam II*").

Second, in describing the gravamen of their claims, Plaintiffs repeat the errors the Supreme Court corrected in *Nelson* and *Sachs*. D.I. 56 at 9-12.[2] Plaintiffs claim the investments in Honduras are the gravamen of this lawsuit because without the investments "Plaintiffs would not have a claim against Defendants." *Id.* at 10. That is just a re-formulation of the "one-element test" the Supreme Court already rejected. *Sachs*, 136 S. Ct. at 396. Under the FSIA, it is not enough that the commercial activity satisfies an element of the claim or is an alleged but-for cause of the harm. *See id*. at 395; *Nelson*, 507 U.S. at 358 ("While these activities led to the conduct that eventually

[2] Plaintiffs also repeatedly cite non-FSIA cases on the gravamen point that do not shed any light on the scope of the exception. D.I. 56 at 11-12 (citing *Overseas Private Inv. Corp. v. Industria de Pesca, N.A.*, 920 F. Supp. 207 (D.D.C. 1996); *Aziz v. Alcolac, Inc.*, 658 F.3d 388 (4th Cir. 2011)).

injured the Nelsons, they are not the basis for the Nelsons' suit."). What matters is whether the commercial activity is the core of the suit, the conduct that "actually injured" the plaintiff. *Sachs*, 136 S. Ct. at 396.

Finally, Plaintiffs assert it is irrelevant to an analysis of the commercial activities exception that each of their claims sounds in tort. D.I. 56 at 12. That is plainly incorrect. *See Jin v. Ministry of State Sec.*, 557 F. Supp. 2d 131, 141-42 (D.D.C. 2008). The fact that all of the claims sound in tort is strong evidence that Plaintiffs are employing "artful pleading" to avoid the requirements of the FSIA's exception for intentional torts. D.I. 54 at 8-10. Indeed, Plaintiffs failed to cite a single decision applying the commercial activity exception to claims that are remotely similar to their tort claims.[3]

B. IFC's Articles did not waive immunity for third-party tort claims.

Plaintiffs also fail to shoehorn their tort claims into the waiver exception. D.I. 56 at 13-17.

In the first instance, Plaintiffs offer scant support for their radical view that the "plain terms" of IFC's Articles waive immunity for all claims. D.I. 56 at 13-15. They cite a handful of precedents, but overstate or misstate their relevance. Beginning with *Lutcher*, the D.C. Circuit has rejected Plaintiffs' reading of that case, explaining that it did not hold, as Plaintiffs suggest, that the Articles were a "blanket waiver." *Mendaro v. World Bank*, 717 F.2d 610, 620 (D.C. Cir. 1983). Rather, *Lutcher* concerned a breach of contract action that arose out of lending activities, such that

[3] Rather, all of the cases Plaintiffs cite where the commercial activities exception was satisfied involve claims arising out of a contract between the parties, a critical factor that is missing here. *See Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 620 (1992); *Universal Trading*, 727 F.3d at 27; *Callejo*, 764 F.2d at 1112; *Sugarman v. Aeromexico, Inc.*, 626 F.2d 270, 275 (3d Cir. 1980); *Woods Hole Oceanographic Inst. v. ATS Specialized, Inc.*, No. 17-12301, 2019 WL 1276124, at *13 (D. Mass. Mar. 20, 2019); *Devengoechea v. Bolivarian Republic of Venezuela*, No. 12-23743, 2016 WL 3951279, at *8 (S.D. Fla. Jan. 20, 2016).

a waiver would "directly aid" the organization in attracting borrowers. *Id.* As for *Jam I*, the D.C. Circuit held that IFC's Articles do *not* permit suits like this one. *Jam v. Int'l Fin. Corp.*, 860 F.3d 703, 707-08 (D.C. Cir. 2017) ("*Jam I*"); D.I. 54 at 13-14. While the concurring opinion alone took issue with *Mendaro*'s formulation of the waiver analysis, it never endorsed the view that the Articles operate as a complete waiver. *Jam I*, 860 F.3d at 708, 710-13 (Pillard, J., concurring).[4] Finally, in *Jam II*, the Supreme Court addressed a question of statutory interpretation and, despite Plaintiffs' invitation, refused to interpret IFC's Articles. D.I. 54 at 14. At most, the Court suggested that IFC's Articles do not provide absolute immunity, a point not in dispute. *Jam II*, 139 S. Ct. at 771-72. Beyond this, the opinion says nothing about how to interpret the Articles or the corresponding benefits test.

Plaintiffs also generally miss the mark in their interpretation of the Articles. D.I. 56 at 13-17. Plaintiffs claim they are simply relying on "plain text," but treaties are interpreted differently than statutes. *See Tabion v. Mufti*, 73 F.3d 535, 537 (4th Cir. 2007).[5] In *Mendaro*, the D.C. Circuit applied the proper interpretative tools to the Articles and concluded that Article VII, § 3 embodies a limited, functional waiver of immunity. *Mendaro*, 717 F.2d at 615-20. This conclusion was informed by the international law principle of functional immunity, *id.* at 615, the unique needs of international financial institutions, *id.* at 618, and the views of the U.S. Executive Branch, *id.* at 620. It has since been affirmed (and reaffirmed) by federal courts, authoritative treatises, and the

[4] Plaintiffs think they can have it both ways with *Jam I*, citing it when useful and, when it is not, claiming that it is "hardly persuasive" because it was "entirely vacated." D.I. 56 at 16-17. The judgment in *Jam I* was vacated, the opinion was not. Rather, it was reversed on grounds that had nothing to do with the corresponding benefits test. D.I. 54 at 14.

[5] Plaintiffs' reference to tools of statutory interpretation also provide little help. For example, the Articles include a provision permitting IFC to waive immunity "in its discretion," a safety valve that makes little sense if the Articles waived all immunity. *See* Articles of Agreement, art. VI, § 11; *Yates v. United States*, 135 S. Ct. 1074, 1085 (2015) (canon against surplusage).

U.S. Government. D.I. 54 at 10-12.[6] Plaintiffs also suggest that reading IFC and IMF's Articles together helps their argument, D.I. 56 at 15 n.7, but *Mendaro* explained why the differences between IFC and IMF's operations only underscore why IFC's Articles must be read in light of functional concerns related to the issuance of securities. *Mendaro*, 717 F.2d at 618 n.53.

Moreover, Plaintiffs' alternative argument that IFC's Articles waive immunity for this particular type of claim likewise fails. D.I. 56 at 15-17. Plaintiffs are unable to cite a single case holding or suggesting that IFC (or any other similar organization) intended to waive immunity for a third-party tort claim. That is because courts have consistently rejected attempts to extend these treaty provisions to third parties. *See* D.I. 54 at 10-12. There is simply no support in the history or case law for Plaintiffs' claim that IFC intended to waive immunity for third-party tort claims when the Articles were adopted in 1956. *Id.*

Similarly, there is no support for Plaintiffs' contention that third-party tort suits such as this would "benefit IFC by holding it to its mission and allowing it to gain communities trust." D.I. 56 at 16. On the contrary, these suits would significantly interrupt and undermine IFC's mission. D.I. 54 at 12-14. Plaintiffs argue that IFC intended to waive immunity for this type of suit to promote "third-party's trust." D.I. 56 at 16.[7] But these alleged benefits are far afield from IFC's core mission to promote economic development and combat world poverty through investments

[6] Plaintiffs suggest the State Department "has read identical language" in IFC's Articles to "mean organizations can be sued," without explaining what they could be sued for. D.I. 56 at 14. Moreover, more recent interpretations from the State Department have made clear that the Articles do *not* work a blanket waiver. *See* D.I. 54 at 11 (citing Letter from Roberts B. Owen, State Department Legal Adviser, to Leroy D. Clark, Gen. Counsel, EEOC (June 24, 1980)).

[7] *Vila v. Inter-Am. Inv.*, 570 F.3d 274 (D.C. Cir. 2009), does not support finding a waiver "where organization needs third party's trust." D.I. 56 at 16. The "third party" in that case was an independent consultant and the concern was the organization's ability to hire consultants in the future. *Vila*, 570 F.3d at 277, 281. Those concerns are irrelevant here. *See* D.I. 54 at 11-12.

in productive enterprises. Moreover, as the D.C. Circuit explained in *Jam I*, throwing open the floodgates to these types of third-party tort suits would "implicate internal operations," "threaten the policy discretion of the organization," and "create a strong disincentive to internal organizations using an internal review process." *Jam I*, 860 F.3d at 708.[8]

C. IFC AMC is immune to the same extent as IFC.

Plaintiffs do not dispute that IFC created IFC AMC in order to further its development mission by having IFC AMC raise funds that could be invested alongside IFC in productive enterprises. D.I. 54 at 15-16. Plaintiffs nonetheless insist that the same investment activities that are generally immune from suit when carried out by IFC are not immune when carried out by IFC AMC, IFC's wholly-owned subsidiary. D.I. 56 at 17-20. That argument is without merit.

First, Plaintiffs argue that under "ordinary corporate law principles," IFC AMC is not an asset of IFC because "IFC does not own AMC, it owns an 'interest' in AMC." D.I. 56 at 19. Plaintiffs do not cite any authority in support of this supposed "ordinary corporate law principle." Rather, they merely cite to generic provisions of the Delaware LLC Act that provide that an LLC is a "separate legal entity" and its members have a share in LLC profits and losses and a right to distributions of LLCs assets. D.I. 56 at 19 (6 Del. Code §§ 18-201(b), 18-101(8)). These provisions say nothing about the statutory interpretation question here: whether IFC AMC, a wholly-owned subsidiary, is an "asset" of IFC for purposes of the IOIA. As to that question, an asset is simply "[a]n item that is owned and has value." *Asset*, Black's Law Dictionary (11th ed. 2019). It is undisputed that IFC is IFC AMC's sole owner, that IFC has invested $2.3 billion in funds managed

[8] For the same reasons the Articles do not operate as a waiver of IOIA immunity, there has been no waiver of Articles-based immunity. D.I. 54 at 14. Plaintiffs claim that this Articles-based immunity must be spelled out with "specificity," D.I. 56 at 15, ignoring that international organization immunity is, at its core, a functional inquiry.

by IFC AMC, and that IFC AMC carries out and supports IFC's development mission. D.I. 54 at 15-16. For these reasons, IFC AMC is an "asset" entitled to immunity under the IOIA. *Id*.

Second, Plaintiffs claim that IFC cannot "extend" immunity to IFC AMC because, historically, foreign sovereigns cannot create an entity under another sovereign's law without subjecting it to suit. D.I. 56 at 17-18. That may be the case for foreign sovereigns under the FSIA, but the IOIA includes no such limitation. D.I. 54 at 17-18.[9] Plaintiffs also overlook that the rule for foreign sovereigns, by its own terms, could not be applied to international organizations. A foreign sovereign always has the option of creating an immune entity under its own domestic law. *See* 28 U.S.C. § 1603(b). International organizations, on the other hand, have no domestic law and could not create a separate entity without running afoul of Plaintiffs' proposed rule.

Finally, Plaintiffs argue that IFC cannot "create" a new international organization. D.I. 56 at 18. That argument might matter if the immunity issue turned on whether IFC AMC is an international organization and therefore subject to the IOIA's protections. But the issue is whether IFC AMC is an "asset" of IFC, not whether it is an international organization. D.I. 54 at 17. And it is irrelevant to that question of statutory interpretation whether IFC AMC is designated as an international organizaton or treated the same as IFC by the U.S. government. D.I. 56 at 17-18, 20.

II. VENUE IS IMPROPER IN DELAWARE

Plaintiffs throw up a grab bag of arguments to gloss over the glaring venue defect in this case. All of them fall apart upon cursory inspection. D.I. 56 at 20-23.

[9] *Somerlott* is also distinguishable. D.I. 56 at 17. There, the Oklahoma LLC statute defined an LLC as an entity that can be sued, further undercutting any claim of immunity. *Somerlott v. Cherokee Nation Distribs., Inc.*, 686 F.3d 1144, 1154 (10th Cir. 2012) (Gorsuch, J. concurring). There is no similar provision in the Delaware LLC statute. Plaintiffs claim that IFC AMC was "formed 'subject to' Del. Code Title 6, Ch. 18, which permits IFC AMC 'to be sued,'" D.I. 56 at 20, but fail to cite any specific provision that waives immunity.

A. The only proper venue for this case is Washington, D.C.

Plaintiffs do not dispute that transactional venue is lacking and focus their attention instead on residential venue and the general venue statute. D.I. 56 at 20-21. But where residential venue is concerned, the Court need look no further than 22 U.S.C. § 282f, wherein Congress commanded that IFC "shall be deemed 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; *see also* D.I. 54 at 20. IFC's principal office is in Washington, D.C., so for purposes of residential venue, it can only be sued in Washington, D.C. D.I. 54, Ex. C, Rechden Decl. ¶ 3. Plaintiffs attempt to distract from this reality.

First, Plaintiffs wrongly suggest that § 282f is not a venue provision at all. D.I. 56 at 20-21. But § 282f by its own terms governs "jurisdiction *and venue* of actions" against IFC, and it commands (in common venue terms) that IFC is an "inhabitant" of the "Federal judicial district" where its principal office is located, in this case Washington, D.C. 22 U.S.C. § 282f (emphasis added); *see also Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 226 (1957) ("[T]he Words 'inhabitant' and 'resident,' as respects venue, are synonymous …."). Plaintiffs also contend that the general venue statute's definition of residency in § 1391(c) controls because it cannot be preempted by a specific venue statute. D.I. 56 at 20-21. The Supreme Court rejected this very argument in connection with another specific venue statute. *See TC Heartland LLC v. Kraft Foods Grp. Brands LLC*, 137 S. Ct. 1514, 1521 (2017) (patent venue statute preempts general venue statute, which "includes a saving clause expressly stating that it does not apply when 'otherwise provided by law'" (quoting 28 U.S.C. § 1391(a))). Here, § 282f defines venue narrowly to include only the district of IFC's "principal office in the United States" and, like the patent venue statute, it preempts the general venue statute. For this reason, Plaintiffs' arguments that center on personal jurisdiction are misplaced, and otherwise incorrect. *See* D.I. 54 at 30-34; *infra* § IV.

Second, Plaintiffs wrongly attempt to invoke the fallback provision under § 1391(b)(3). Plaintiffs suggest that they could not file suit against IFC in Washington, D.C. at the time they filed that complaint because "it would have been rejected in D.C. for lack of subject matter jurisdiction based on IFC's absolute immunity." D.I. 56 at 21. But the fallback provision does not apply where § 282f preempts the general venue statute. And regardless, it applies only "if there is no district in which an action may otherwise be brought *as provided in this section*." 28 U.S.C. § 1391(b)(3) (emphasis added). Plaintiffs omit that critical language and thereby miss the point. Because residential venue would be proper under § 1391(c) in Washington, D.C., there is another district in which this action could be brought "as provided in this section" and the fallback provision is thus "absolutely irrelevant." 14D Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 3806.1 (4th ed. 2019).[10]

Finally, Plaintiffs' last ditch "alter ego" and "pendent" venue arguments fail. D.I. 56 at 21-22. Plaintiffs' "alter ego" authorities are specific to patent cases, and Plaintiffs have not shown the "fraud, injustice, or unfairness" required to disregard the separate residence of IFC and IFC AMC. *Bristol-Myers Squibb Co. v. Aurobindo Pharma USA Inc.*, No. 17-374, 2018 WL 5109836, at *4 (D. Del. Oct. 18, 2018); *see also infra* § IV. Also, "pendent venue" is applicable only where venue is appropriate as to some claims but "there [is] no other forum in which to bring the entire action." *Christian Dalloz, S.A. v. Holden*, No. 90-0835, 1990 WL 121342, at *5 n.2 (E.D. Pa. Aug. 20, 1990). Here, venue in Delaware is improper as to *all* claims against IFC, and D.C. is an available forum. The doctrine is also irrelevant where it would override a special venue statute (here, § 282f).

[10] A defendant's ability to raise a jurisdictional defense such as IOIA immunity makes no difference to the analysis under the fallback provision. *See Wachovia Bank v. Schmidt*, 546 U.S. 303, 318 (2006) (venue "presupposes subject-matter jurisdiction and simply delineates *where* within a given judicial system as case may be maintained").

See Sierra Club v. Johnson, 623 F. Supp. 2d 31, 37 (D.D.C. 2009) (pendent venue does not apply "[w]here a special venue provision places venue in a specific district").[11]

B. The venue defect was obvious at the time of filing and dismissal is warranted.

Plaintiffs raise a host of arguments to justify their actions. D.I. 54 at 21-23. But the venue defect was so obvious that Plaintiffs omitted IFC from their initial complaint, after having included both IFC and IFC AMC in their D.C. complaint. *See* D.I. 1. Plaintiffs later added IFC as a party but ignored § 282f in asserting that venue was proper. *See* D.I. 38 ¶ 61. Because § 282f unquestionably governs residential venue, and Plaintiffs acknowledge there is no basis for transactional venue, allowing a transfer "would reward plaintiffs for their lack of diligence in choosing a proper forum." *Spar, Inc. v. Info. Res., Inc.*, 956 F.2d 392, 394 (2d Cir. 1992).

III. DISMISSAL IS WARRANTED FOR FAILURE TO JOIN NECESSARY PARTIES

Five parties—Dinant, its security forces, the Honduran government, Banco Ficohsa, and the farmer cooperatives—are necessary parties under Rule 19, but joinder is not feasible. D.I. 54 at 24-30. Plaintiffs claim that joinder of these parties is unnecessary, but that IFC is a required party under Rule 19. *Compare* D.I. 56 at 25, *with* D.I. 56 at 31. The Court must reject this self-serving logic and dismiss the action in its entirety for failure to join indispensable parties.[12]

Rule 19(a): The Parties are "Required." Plaintiffs do not dispute that the absent parties were the "primary participants" in the alleged tortious conduct at issue. D.I. 54 at 24-30. Rather, they attempt to downplay the role of the absent parties by characterizing them as "ordinary joint

[11] Plaintiffs also contend they joined IFC as a Rule 19 "required party," *see* D.I. 56 at 31, which if true would *require* dismissal. *See* Fed. R. Civ. P. 19(a)(3) ("If a joined party objects to venue and the joinder would make venue improper, the court *must dismiss* that party.") (emphasis added).

[12] The Court need only find that *one* party is necessary under *any* Rule 19 factor; if so, dismissal is warranted. *See Angst v. Royal Maccabees Life Ins. Co.*, 77 F.3d 701, 706 (3d Cir. 1996).

tortfeasors" and by arguing that relief can be complete in their absence. D.I. 56 at 24-28. These assertions are meritless.

First, Plaintiffs' claims presuppose that the farmer cooperatives hold valid title to the disputed lands. D.I. 54 at 25, 28-29. Plaintiffs assert cursorily that "only the unjust enrichment claims even possibly involve ownership." D.I. 56 at 27. Not so, unless Plaintiffs have abandoned their other claims, like trespass, which are also predicated on ownership. *E.g.* D.I. 38 ¶¶ 652-58; *Beckrich Holdings, LLC v. Bishop*, No. 18116, 2005 WL 1413305, at *9 (Del. Ch. June 9, 2005) ("[T]he elements of [trespass] are entry onto real property without the permission of the owner."). And even though valid title is at the heart of Plaintiffs' claims, they suggest the claims may be litigated in the absence of *either* potential titleholder (Dinant and the cooperatives). But "[a] party who seeks to quiet title to a piece of land must join all known persons who are claiming title in order to settle the property's ownership without additional litigation." 7 Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 1621 (3d ed.). Plaintiffs also acknowledge that litigation over this issue is ongoing *in Honduras*, D.I. 38 ¶¶ 229, 238, 532, so attempting to quiet title *in this Court* could subject IFC and IFC AMC to inconsistent obligations should the Honduran courts find that Dinant holds valid title. Because Plaintiffs' complaint "predicate[s] liability and relief" on this determination, Dinant and the cooperatives are required parties to this suit. *Guthrie Clinic, Ltd. v. Travelers Indem. Co. of Ill.*, 104 F. App'x 218, 222 (3d Cir. 2004).

Second, Plaintiffs' claims require breach of contract determinations that cannot be made in the absence of the counterparties, Dinant and Banco Ficohsa. D.I. 54 at 25-26; *see also Travelers Indem. Co. v. Household Int'l., Inc.*, 775 F. Supp. 518, 527 (D. Conn. 1991) ("[A] contracting party is the paradigm of an indispensable party."). Plaintiffs have devoted substantial discussion to constructing a contract-based theory, alleging, among other things, that Dinant and Banco

Ficohsa were in breach, and that IFC and IFC AMC were obligated to rescind those agreements. *See* D.I. 38 ¶¶ 44, 205-06, 309. Faced with the prospect of a Rule 19 dismissal, Plaintiffs now claim that Dinant and Banco Ficohsa are just "ordinary joint tortfeasors." D.I. 56 at 24. But given the centrality of the contractual questions to Plaintiffs' claims, "it is clear that a finding that [they] breached the [Agreements] is a necessary factual predicate" to Plaintiffs' recovery. *Fiscus v. Combus Fin. AG*, No. 03-1328, 2007 WL 4164388, at *5 (D.N.J. Nov. 20, 2007).[13]

Third, relief cannot be "complete" in the absence of Dinant, the security forces, and the Government of Honduras, because IFC and IFC AMC do not control those groups and any injunctive relief would thus be ineffectual. D.I. 54 at 26. Plaintiffs recognize the lack of control, D.I. 56 at 27, but suggest that the Court may instead enter a "meaningful" damages award. *Id*. at 25. A damages award would still be unavailable without the absent parties due to the above predicate determinations, and, in any event, relief would still not be "complete" because Plaintiffs would be left *without* title to the disputed lands and *without* injunctive relief preventing further harm. Indeed, Plaintiffs assert that the absent parties *continue* to injure them. *See, e.g.*, D.I. 38 ¶¶ 142, 233, 386, 391, 404-17.

Plaintiffs further suggest their requested injunction "requires no other parties" because it "asks only that *Defendants* exercise any contract rights or control they have." D.I. 56 at 25. The Court should see past this thinly veiled attempt to enjoin absent parties. Plaintiffs know that relief would only be effective through an injunction against the absent parties, which is why they seek to have IFC and IFC AMC "direct Dinant" and "require Dinant" to take specific actions, including

[13] *See also Fiscus*, 2007 WL 4164388, at *5 ("When a court is called upon to interpret the terms of a contract and to evaluate whether the parties to the contract have breached those terms or upheld their respective responsibilities, the absence of one or more of the parties exposes the absent party to precisely the kind of risks that Rule [19(a)(1)(B)(i)] empowers courts to guard against.").

to withdraw its coordination with the Honduran military. D.I. 38 ¶ 536. Plaintiffs cannot escape that the absent parties' presence is "necessary to effectuate the injunctive relief" they have requested. *United States v. Keystone Sanitation Co.*, 903 F. Supp. 803, 815 (M.D. Pa. 1995).

Rule 19(b): Joinder is Not Feasible and the Absent Parties are Indispensable. Plaintiffs do not dispute that jurisdiction over the absent parties is lacking. D.I. 54 at 27; *see also Baldonado v. Avrinmeritor, Inc.*, No. 13-833, 2014 WL 2116112, at *7 (D. Del. May 20, 2014) (arguments not addressed are abandoned). But they do contend the case may still proceed in equity and good conscience. D.I. 56 at 26-28. However, as IFC and IFC AMC have previously explained, each of the absent parties is indispensable. *See* D.I. 54 at 28-30; *Gen. Refractories Co. v. First State Ins. Co.*, 500 F.3d 306, 320 (3d Cir. 2007) (Rule 19(b) analysis "overlaps considerably with the Rule 19(a) analysis"). Where prejudice is concerned, the Court would be adjudicating, among other things, valid title in the absence of the titleholders and contractual obligations in the absence of the contracting parties.[14] Nothing about these interests is "speculative." D.I. 56 at 26. Indeed, Plaintiffs concede that adjudicating property rights in a party's absence is a "textbook example" of a situation "where an absentee may be severely prejudiced." D.I. 56 at 26 (quoting *Republic of Philippines v. Pimentel*, 553 U.S. 851, 868-70 (2008)). Further analysis of this factor is thus unnecessary.[15]

[14] Ordering specific performance, rescission, or any other contract-based remedy would also subject IFC and IFC AMC to multiple or inconsistent judgments, should Dinant or Banco Ficohsa later bring suit. D.I. 54 at 29.

[15] Plaintiffs wrongly suggest that the only relevant interest of the Honduran government is pecuniary in nature. D.I. 56 at 26. There is *also* a separate "comity interest in allowing a foreign state to use its own courts for a dispute if it has a right to do so." *Pimentel*, 553 U.S. at 866. Here, Honduras has a "concrete" interest in continuing to adjudicate property rights in its *own* courts, and under its *own* land ownership policies. *Id*; *see also W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp., Int'l*, 493 U.S. 400, 409 (1990) ("[T]he acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid.").

Nor do the remaining Rule 19(b) factors provide Plaintiffs with any shelter. Recognizing the serious prejudice that would result, Plaintiffs are quick to suggest that the Court may simply discard their unjust enrichment claims and requests for injunctive relief. D.I. 56. at 25, 27. But even that would be insufficient when the claims for damages are based on predicate determinations that cannot be made in the parties' absence and when the judgment would be ineffectual absent injunctive relief. *Supra* at 10-13. Finally, as IFC and IFC AMC previously explained, Honduras is a much-preferred forum. D.I. 54 at 29-30. This factor weighs heavily in favor of dismissal when real property is situated in a different jurisdiction. *See* 7 Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 1621 (3d ed.) (courts of the state where the land is located are typically better positioned to entertain a real-property action where local interests are at stake).

IV. THE COURT LACKS PERSONAL JURISDICTION OVER IFC

Plaintiffs concede that IFC itself has insufficient contacts, but still wrongly assert that IFC could stay in the case as an alter ego or under the bulge provision. D.I. 56 at 28-32.

First, IFC and IFC AMC agree that the *Bancec* test governs whether to disregard the "strong presumption" that IFC and IFC AMC are separate entities for purposes of personal jurisdiction. *See Crystallex Int'l Corp. v. Bolivarian Republic of Venezuela*, 333 F. Supp. 3d 380, 396 (D. Del. 2018) (citing *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 627 (1983) ("*Bancec*")). Under that test, Plaintiffs bear the burden of establishing that IFC AMC is so "extensively controlled" by IFC that a "relationship of principal and agent is created." *Bancec*, 462 U.S. at 628-29. In assessing control, the court considers "whether the sovereign … exercises significant and repeated control over the instrumentality's day-to-day operations." *Crystallex Int'l Corp.*, 333 F. Supp. 3d at 401 (quoting *EM Ltd. v. Banco Cent. de la*

Republica Argentina, 800 F.3d 78, 91 (2d Cir. 2015)); *see also id.* (citing relevant factors).[16] With this test in mind, Plaintiffs' list of allegations regarding IFC AMC's operations, D.I. 56 at 31, does not rebut the strong presumption that IFC and IFC AMC are separate entities, with separate staff, performing separate functions. Plaintiffs have not, for example, alleged that IFC has pervasive, day-to-day control of IFC AMC's operations or that corporate formalities have been disregarded. For this same reason, Plaintiffs cannot claim that IFC AMC is liable for the actions of IFC, or vice versa. D.I. 56 at 42-43.

Second, Plaintiffs argue that personal jurisdiction over IFC may be found by virtue of the "bulge provision" of Rule 4(k) because IFC was joined as a necessary party. D.I. 56 at 31-32. Plaintiffs are mistaken. The bulge provision applies to "a party joined under" Rule 19. Fed. R. Civ. P. 4(k)(1)(B). Plaintiffs claim to have "joined" IFC by naming it as a defendant in the First Amended Complaint. That is absurd. "Rule 19 is the tool *of the defendant*, as the plaintiff has the power to choose which parties it wishes to sue and generally has ample freedom to amend its complaint to add a party." *Heraeus Med. GmbH v. Esschem, Inc.*, 321 F.R.D. 215, 219 (E.D. Pa. 2017) (emphasis added). The bulge provision is therefore inapplicable. D.I. 54 at 32-33; *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) ("By its own terms, the bulge service provision … applies in terms only to … additional parties to a pending action or a counterclaim or cross claim brought in under

[16] Plaintiffs wrongly claim that this analysis is "flexible," citing a non-FSIA case interpreting a federal statute regulating railroads. D.I. 56 at 29 (citing *Bhd. of Locomotive Eng'rs v. Springfield Terminal Ry.*, 210 F.3d 18, 25-27 (1st Cir. 2000)). On the contrary, there is a strong presumption of separateness. *Crystallex Int'l Corp.*, 333 F. Supp. 3d at 396. In addition, *Bancec* also applies when giving effect to separate status would "work fraud or injustice." 462 U.S. at 628-29. Plaintiffs failed to address this exception and have waived any argument that it might apply here. *Baldonado*, 2014 WL 2116112, at *7.

Rule 19.") (quotation marks omitted). Plaintiffs cite no support for the proposition that a plaintiff may singlehandedly deem a defendant to be a necessary party through an amended pleading.[17]

V. PLAINTIFFS FAIL TO STATE ANY PLAUSIBLE CLAIMS FOR RELIEF

A. Honduran law applies.

First, this Rule 12(b)(6) motion is not "premature." D.I. 56 at 32-33. Courts will not hesitate to apply a choice of law analysis at this stage, particularly in a case like this where the issue is straightforward. *See Benihana of Tokyo, Inc. v. Benihana, Inc.*, 828 F. Supp. 2d 720, 725-26 (D. Del. 2011); D.I. 54 at 33-34.[18] Moreover, even where courts defer the analysis, the court will presume that both laws might apply and dismiss the case unless the plaintiff can state a claim under either law. *See Zazzali v. Hirschler Fleischer, P.C.*, 482 B.R. 495, 517 (D. Del. 2012). Plaintiffs here cannot hide behind some future choice of law analysis when they have failed to state a claim under either Honduran or Delaware law. *See* D.I. 54 at 34-42.

Second, Delaware choice of law rules apply, not federal law rules. D.I. 56 at 33. In the analogous context of the FSIA, federal courts apply the forum state's choice of law rules. *See Oveissi v. Islamic Republic of Iran*, 573 F.3d 835, 841-42 (D.C. Cir. 2009); *Pittson Co. v. Allianz Ins. Co.*, 795 F. Supp. 678, 682 (D.N.J. 1992).

Third, Plaintiffs incorrectly insist that D.C. and "federal common law" might also apply. D.I. 56 at 33. IFC and IFC AMC did not address D.C. law because Plaintiffs did not cite it in their Complaint. D.I. 38 ¶ 472. Nor is there any indication that D.C. law would apply, given the

[17] IFC would also dispute that it is a "necessary party" under Rule 19 if that issue were before the court. D.I. 56 at 31. For instance, Plaintiffs do not explain why IFC would be a necessary party when IFC and IFC AMC made separate investments in Dinant and Banco Ficohsa.

[18] Contrary to Plaintiffs' assertion, IFC and IFC AMC have identified relevant conflicts between Honduran and Delaware law. D.I. 56 at 33. At a minimum, there is a conflict regarding the necessity of a criminal conviction for civil claims based on criminal conduct. *See infra* § IV.B.

presumption that Honduran law governs. D.I. 54 at 33-34. As for "federal common law," Plaintiffs are intentionally vague about what this means and, in any event, it is irrelevant. In FSIA cases, courts consider whether a foreign sovereign is liable under relevant state law, not federal common law. *See* 28 U.S.C. § 1606; *Bancec*, 462 U.S. at 622 n.11; *Oveissi*, 573 F.3d at 841.[19]

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

First, Plaintiffs are incorrect about the impact of the criminal process on their claims. D.I. 56 at 34. When a civil claim is based on facts or circumstances that are also criminal, there *must* be a criminal conviction before an injured party can obtain civil damages. Ex. A, Turcios Decl. ¶¶ 14-16; D.I. 54 at 34-35. In other words, a plaintiff cannot maintain a separate civil action for injuries caused by criminal conduct unless and until there has been a criminal conviction. *Id.* Here, *all* of Plaintiffs' claims involve alleged criminal conduct. The failure to allege the existence of underlying criminal convictions is thus fatal to their entire case. At a minimum, the claims that are based on intentional tortious conduct (claims 1-6 and 9) must be dismissed. *See* D.I. 54 at 34-35.[20]

Second, it is relevant to the negligence claims (claims 7 and 8) that the Civil Code does not provide for lender liability. D.I. 56 at 34. To sustain a negligence claim, Plaintiffs must show "illicit conduct," an "act or omission" that is "contrary to law, because it either violates a positive law or the legal duty to respect a third party right." Turcios Decl. ¶ 20. Here, there is no positive law in Honduras that creates an enforceable obligation against lenders in these circumstances, *id.*

[19] Plaintiffs cite to 22 U.S.C. § 282f. D.I. 56 at 29. But no court has ever read that provision as authorizing the creation of federal common law, a generally disfavored outcome when Congress is presumed to legislate against the backdrop of existing state law. *See, e.g.*, *Atherton v. F.D.I.C.*, 519 U.S. 213, 218 (1997).

[20] The court should give no weight to the Flores Declaration, which was submitted by a current judge who could no longer give testimony. D.I. 58 ¶ 7.

¶ 18, and there is no legal duty in Honduras to control the conduct of third parties like Dinant and prevent them from causing injury. D.I. 54 at 35.[21]

C. Plaintiffs failed to state a claim under Delaware law.

First, Plaintiffs have failed to allege the knowledge and substantial assistance elements of their aiding and abetting claims. *See* D.I. 54 at 35-38. In articulating the knowledge element, courts in Delaware and elsewhere have explained that aiding and abetting requires some proof that the defendant intended or desired to assist in the tort. *Id.* at 36-37. Contrary to Plaintiffs' assertion, D.I. 56 at 35-36, there is nothing "out of step" with this articulation of the elements. *See Halberstam v. Welch*, 705 F.2d 472, 478 n.8 (D.C. Cir. 1983) (citing case that used "unlawful intent" standard and explaining that the elements of aiding and abetting "can be merged or articulated somewhat differently without affecting their basic thrust").[22]

As for substantial assistance, Plaintiffs appear to take issue with the requirement that the assistance be a "substantial factor" in causing the tort. D.I. 56 at 37-38. But that is the law, D.I. 54 at 37-38, and Plaintiffs repeatedly cite a case that makes this very point. D.I. 56 at 36-38 (citing *Aetna Cas. & Sur. Co. v. Leahey Constr. Co.*, 219 F.3d 519, 537 (6th Cir. 2000)). With that in mind, Plaintiffs' allegations fall well short of establishing that IFC and IFC AMC's investments were a substantial factor in causing these particular alleged injuries. D.I. 54 at 37-38. Plaintiffs try to make much of the fact that the investments allowed Dinant to expand its palm oil operations.

[21] Plaintiffs also wrongly claim there is "no specific code provision for truck-driver liability." D.I. 56 at 34. Like other recognized relationships that impose a legal duty under Honduran law, there *is* a code provision specific to truck drivers and owners. Turcios Decl. ¶ 21.

[22] Some cases appear to discuss intent in the context of the substantial assistance element. *See, e.g.*, *Halberstam*, 705 F.2d at 488 (noting that defendant's "continuous participation reflected her intent and desire to make the venture succeed").

D.I. 56 at 36-37.[23] But the conditions that underlie the alleged violent conflict between Dinant and the campesinos predate and are entirely unrelated to IFC and IFC AMC's investments.[24] In these circumstances, Plaintiffs cannot plausibly claim that investments in Dinant's operations were a substantial factor in causing violence and unrest in the region.

Second, Plaintiffs have failed to allege the duty and proximate cause elements necessary for the negligence claims. D.I. 54 at 39-41. Plaintiffs dispute that the "special relationship" test applies to the duty analysis. D.I. 56 at 39-40. But the core of their negligence claim is an alleged failure to protect Plaintiffs, as it is this alleged failure that actually caused the claimed injuries. *E.g.*, D.I. 38 ¶ 649 (describing duty to "prevent harm to the Plaintiffs"). Their negligence claim is therefore principally based on a negligent omission (or nonfeasance) and requires a special relationship. *See Ramsey v. Ga. S. Univ. Advanced Dev. Ctr.*, 189 A.3d 1255, 1284-85 (Del. 2018) (en banc) (explaining difference between "nonfeasance" and "misfeasance" cases); Restatement (Second) of Torts § 315 (Am. Law Inst. 1965). And the "contractual control," D.I. 56 at 41, that IFC and IFC AMC allegedly had does not suffice to establish a special relationship. *See Rogers v. Christina Sch. Dist.*, 73 A.3d 1, 7-8 (Del. 2013) (en banc).

Plaintiffs also claim that IFC and IFC AMC's investments create a duty because the investments created an "unreasonable risk of harm" or "dangerous situation," but that argument also fails. D.I. 56 at 40. The relevant provision of the Restatement is § 302B, which applies when

[23] Plaintiffs also cite a number of clearly inapposite cases where the defendant provided direct financial support to designated terrorist groups and violated federal law. *See, e.g., In re Chiquita Brands Int'l, Inc.*, 284 F. Supp. 3d 1284 (S.D. Fla. 2018). Dinant is a diversified company that carries out legitimate business activities and it has never been designated as a terrorist group.

[24] These conditions include the Honduran land reforms in the mid-1990s, Facussé's alleged unlawful land grab, the promise of a government investigation, and the assassination of the Honduran president. *E.g.*, D.I. 38 ¶¶ 125-48, 159-63, 207-18. These are the factors that substantially contributed to the alleged injuries, not modest investments in Dinant.

a plaintiff is harmed by the intentional or criminal conduct of a third party. Under § 302B, parties like IFC and IFC AMC may be required to "anticipate and guard against the intentional, or even criminal, misconduct of others" where the "actor's own affirmative act has created or exposed the other to a recognizable high degree of risk of harm through such misconduct." Restatement (Second) of Torts § 302B cmt. e. (Am. Law Inst. 1965).[25] But in this case, IFC and IFC AMC's investments did not create the risk of harm. *See supra* at 19 n.23.[26] For many of these same reasons, the chain of causation is untenably long and proximate cause is lacking. *See* D.I. 54 at 40-41.

Third, the unjust enrichment claim must be dismissed because Plaintiffs have not shown a "direct relationship" between the alleged impoverishment (which took place in the 1990s when Facussé purchased the farmlands) and the alleged enrichment (which took place twenty years later when IFC and IFC AMC invested in Honduras). D.I. 54 at 41-42. Plaintiffs are wrong to dismiss this requirement under Delaware law, D.I. 56 at 42, which does not depend on contract law. *See Vichi v. Koninklijke Philips Elecs. N.V.*, 62 A.3d 26, 61 (Del. Ch. 2012) (explaining purpose of the requirement). Notably, Plaintiffs decline to provide any precedent for their radical view that unjust enrichment is a vehicle for recouping funds that might be connected to decades-old torts.

[25] This provision also applies when there is "special responsibility" towards the injured party. Restatement (Second) of Torts § 302B cmt. e (Am. Law Inst. 1965). But this is just another articulation of the special relationship test that Plaintiffs are unable to satisfy. *Id.*

[26] Also, parties like IFC and IFC AMC are "generally entitled to assume that third parties will not commit intentional criminal acts" except in "extraordinary circumstances." *James v. Meow Media, Inc.*, 300 F.3d 683, 693 (6th Cir. 2002) (citing Restatement (Second) of Torts § 302B cmt. d)).

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

Plaintiffs agree that Delaware's statutes of limitations apply, but they assert various legal and equitable arguments in an attempt to cloud the waters. D.I. 56 at 43. These arguments are meritless, and the core claims in this suit are untimely.

First, Plaintiffs assert that the limitations periods for Juana Doe VIII[27] and the minor class members were tolled under Del. Code Ann. tit. 10, § 8116. That section applies only to actions raised under §§ 8101-8115, so all of the minor class members' personal injury claims under § 8119 (battery, assault, intentional infliction of emotional distress, false imprisonment, negligent infliction of emotional distress, and negligence) would not be subject to tolling. *See Hurwitch v. Adams*, 151 A.2d 286, 290 (Del. Super. Ct. 1959), *aff'd*, 155 A.2d 591 (1959). As for Juana Doe VIII specifically, she has only brought a claim for false imprisonment, D.I. 38 ¶ 625-31, which—as indicated above—is not subject to the tolling provision.

Second, Plaintiffs cannot rely on the "claims of [unnamed] minor class members," or on the vaguely asserted "continuing" harms to unnamed class members, to avoid the statute of limitations. D.I. 56 at 43. *Named* class representatives must assert timely claims, or dismissal is warranted. *See Great Rivers Coop. v. Farmland Indus., Inc.*, 120 F.3d 893, 899 (8th Cir. 1997). Plaintiffs fail to identify a single named class representative with timely claims, and in any event the Court should significantly restrict the lawsuit's scope by applying the "undisputed limitations periods." D.I. 56 at 43; *see also* D.I. 54 at 43 (noting the operative dates).

Third, the unjust enrichment claim is untimely because Plaintiffs could have brought an unjust enrichment claim against Facussé or Dinant decades ago. D.I. 54 at 43; *see also Taplin v.*

[27] Although Plaintiffs refer to Juana Doe VII, they cite to ¶ 678 of the Complaint, which indicates that the minor child is actually Juana Doe VIII. D.I. 56 at 43. Regardless, Juana Doe VII has only brought claims for false imprisonment and trespass. D.I. 38 at 136, 142.

Schuitemaker, No. K18A-07-004, 2019 WL 126981, at *8 (Del. Super. Ct. Jan. 7, 2019) (unjust enrichment claim accrues "at the point when the eventual action might first have been successfully brought"). To hold otherwise would allow a party deprived of property to bypass suing the persons responsible for the deprivation and wait decades before bringing an unjust enrichment claim against remote third parties. Alternatively, even if, as Plaintiffs claim, the unjust enrichment claim accrued when IFC and IFC AMC were "enriched," D.I. 56 at 44, that occurred when the investments were made in 2009 and 2011, respectively. D.I. 38 ¶¶ 13, 109, 112.

Finally, Plaintiffs' assertion that their claims were equitably tolled "until 2017" is wrong. D.I. 56 at 44-45. Plaintiffs admit that the cooperatives filed prior lawsuits in Honduras to challenge the land transfers, and that they "continue" to press those claims against Dinant in Honduran courts. D.I. 38 ¶¶ 160-61, 532. The Court must therefore reject any self-serving assertion that 2017 was the first opportunity to file suit. Moreover, Plaintiffs' tolling theory relies *entirely* on inapposite cases involving war crimes under the Torture Victims Protection Act ("TVPA"). D.I. 56 at 44-45. Unlike the tort claims here, the TVPA specifically affords for equitable tolling. *See* S. Rep. No. 102-249, at 10-11 (1991) ("[The TVPA] explicitly calls for consideration of all equitable tolling principles in calculating the period ….").

CONCLUSION

For the foregoing reasons and those stated in Defendants' Opening Brief, this Court should dismiss the First Amended Complaint in its entirety with prejudice.

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