IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

JUANA DOE I et al,

Plaintiffs,

v.

IFC ASSET MANAGEMENT COMPANY, LLC,

INTERNATIONAL FINANCE CORPORATION,

Defendants.

Civil Action No. 17-1494-JFB-SRF

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS THE FIRST AMENDED COMPLAINT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

NATURE AND STAGE OF THE PROCEEDINGS[1]

This case arises from Defendants' decision to provide millions of dollars to Dinant, a notorious Honduran oil palm company that stole local farmers' land and used violence and murder to silence them. Like any commercial bank, Defendants International Finance Corporation (IFC), and its wholly-owned subsidiary, IFC Asset Management Co. (AMC), are liable under ordinary tort principles. Defendants knew about Dinant's history of murder and intimidation when they provided the funding necessary for Dinant to expand and consolidate its operations. Defendants' support triggered an explosion of Dinant violence, including scores of murders, kidnappings and incidents of torture of local farmers and their allies. And Defendants' support was not a one-time mistake; it was continued throughout this period of violence, and even as their own internal auditor cried foul. Plaintiffs have been shot, tortured and terrorized or had family members murdered.

In March 2017, Plaintiffs sued Defendants in the District of Columbia. *Doe v. Int'l Fin. Corp.*, 1:17-c-00363-CRC (D.D.C, Mar. 9, 2017) (D.C. Action). IFC is an international organization, and at the time, the D.C. Circuit was reviewing its immunity. *Jam v. Int'l Finance Corp. ("Jam I")*, 860 F.3d 703 (D.C. Cir. 2017). In June 2017, *Jam I* held IFC was entitled to absolute immunity. *Id.* Defendants moved to dismiss, based in part on *Jam I*. D.C. Action, D.I. 17 (Sept. 6, 2017). Plaintiffs voluntarily dismissed the D.C. Action without prejudice. D.C. Action, D.I. 18 (Oct. 24, 2017).

That same day, Plaintiffs sued AMC in this Court, save one who had been murdered during the short pendency of the D.C. litigation as part of the violence at issue here. In the Third Circuit, unlike the D.C. Circuit, organizations like IFC were not immune for commercial acts. *OSS Nokalva, Inc. v. European Space Agency*, 617 F.3d 756, 763-66 (3d Cir. 2010). After AMC moved to dismiss, D.I. 34, Plaintiffs amended their complaint, adding IFC and additional facts. D.I. 38, 47.

In June 2018, after the Supreme Court granted *certiorari* in *Jam* to determine the scope of

[1] Plaintiffs respectfully request oral argument on this motion.

IFC's immunity under the International Organizations Immunities Act (IOIA), 22 U.S.C. § 288a(b), this Court stayed this case. D.I. 49. In February, the Supreme Court overturned the D.C. Circuit's decision in *Jam I*, rejecting absolute immunity and agreeing with the Third Circuit that IFC may be sued for commercial acts. *Jam v. Int'l Finance Corp. ("Jam II")*, 139 S. Ct. 759 (2019). The stay was lifted, D.I. 52, and Defendants moved to dismiss. D.I. 54.

SUMMARY OF THE ARGUMENT

Defendants gave millions of dollars to a murderous organization that terrorized Honduran farmers. Their actions flouted Defendants' own mission and policies, which are designed to serve and protect people like Plaintiffs, as well as ordinary tort standards. Defendants acted like they were above the law. And although the Supreme Court recently rejected IFC's claim to absolute immunity, they still claim this Court cannot touch it, no matter how reckless and destructive their acts. They are wrong, and their other arguments for dismissal are equally meritless.

1. Defendants do not have immunity for their commercial acts. Under the IOIA, IFC, like a foreign state, has no immunity from claims based on commercial activity in the United States. Defendants' financing was clearly commercial and indisputably occurred in the United States; thus they are not immune. Their only argument is that Plaintiffs' claims against these Defendants for their own acts are "based upon" the acts of others in Honduras. But these claims are based on the *Defendants'* tortious conduct. Sovereign immunity cannot depend on the acts of a non-sovereign; it turns on the nature of the sovereign's acts. Defendants' argument conflicts with Supreme Court and First, Fifth and D.C. Circuit precedent, all of which base immunity on the sovereign's acts.

2. Even if the IOIA provided immunity, IFC's Articles expressly waive it. The international agreement establishing IFC makes clear IFC can be sued. And even if the Court could ignore IFC's express waiver, there is no basis to provide immunity that IFC does not need to fulfill its mission. IFC surely does not need immunity when, rather than fighting poverty, it funds murder.

3. Even if IFC has immunity, AMC does not. AMC is a Delaware LLC, not an organization protected by the IOIA. IFC has no authority to unilaterally grant AMC immunity; only Congress and the President can do that. Delaware law allows AMC to be sued, and IFC cannot exempt it from state law. Nor is AMC IFC's "asset," entitled to IOIA immunity; IFC owns an *interest*, like shares, in a U.S. commercial subsidiary.

4. Venue is proper. Venue is undisputedly proper for AMC. For IFC, venue is proper as it is subject to personal jurisdiction and thus resides in Delaware, *and* because it is AMC's alter ego; by their own admission, they act as a single entity. Venue is also proper because, at the time of suit, no other district could have heard this case. If venue is improper, the Court should transfer.

5. There are no absent indispensable parties. Joint tortfeasors are not necessary parties. And even if they were, dismissal would not be equitable.

6. There is personal jurisdiction over IFC. AMC is subject to general jurisdiction in Delaware. There is jurisdiction over IFC because it is AMC's alter ego. IFC is also subject to jurisdiction because it is a required party under Rule 19 served within 100 miles of this Court.

7. Plaintiffs have plausibly pled their claims. Plaintiffs have adequately pled negligence, aiding and abetting, and other claims, under any potentially applicable law. IFC funded Dinant's expansion while knowing that doing so risked precisely the violence that Plaintiffs suffered. The expansion – and thus the injuries – would not have happened without IFC's funding. Those facts suffice to hold Defendants liable. The Court should, however, defer ruling on the sufficiency of Plaintiffs' claims until the record is sufficiently developed to determine what law applies.

8. Plaintiffs' claims are timely. The claims were equitably tolled by the very violence Defendants funded, which made any attempt to seek redress a potentially deadly proposition.

STATEMENT OF FACTS

I. Defendants' mission is to fight poverty.

IFC is an international organization created by Articles of Agreement among its member nations, including the U.S., where it is headquartered; IFC makes for-profit loans to private corporations. D.I. 47 ¶¶ 80, 85-87. IFC's stated "mission is to fight poverty" and it commits "to ensuring that the costs of economic development do not fall disproportionately on those who are poor or vulnerable." *Id.* ¶¶ 578-79. AMC, a Delaware limited liability company, is IFC's wholly-owned subsidiary, *id.* ¶ 81, and shares its anti-poverty mission, D.I. 55-1 at 22 ¶ 5; both claim "their ultimate client" is "the poor." D.I. 47 ¶¶ 434, 573. AMC investments are approved by and jointly managed with IFC, and must comply with IFC standards. *Id.* ¶¶ 95-96. Defendants only invest in projects otherwise lacking sufficient private capital, *i.e.*, those that would not happen without their investment. *Id.* ¶ 116. All their relevant financing and monitoring occurs in the U.S. *Id.* ¶¶ 41, 565.

Defendants' investments must meet IFC's Performance Standards on Environmental and Social Sustainability ("Performance Standards"), which IFC's clients are obligated to follow. *Id.* ¶¶ 88, 430. These exist to benefit communities that IFC projects affect, and require risky projects to have "broad community support"; "avoid or minimize the risks and impacts to community, health, safety and security"; avoid the use of force except defensively; and "reduce[ ], mitigate[e] or compensate[ ]" harms. *Id.* ¶¶ 429-31, 438-40. IFC can cancel loans for non-compliance and intervene to ensure remedies are provided to those harmed. *Id.* ¶¶ 89, 452.

II. Defendants supported violence in communities they were mission-bound to help.

A. Dinant used fraud and violence to obtain land in the Bajo Aguán.

Plaintiffs are farmers in the "Bajo Aguán" region of Honduras; they or their forbears have farmed small plots, often as part of cooperatives, since the 1970s, when the Honduran government encouraged them to move to the Aguán, clear the jungle and work the land. *Id.* ¶¶ 126-27.

In the 1990s, Dinant's former owner, Miguel Facussé, began to dispossess farmers, including Plaintiffs, of their land through violence, threats, and fraud. *Id.* ¶¶ 137-44. To recover their land, the

farmers filed suits, and engaged in political action. *Id.* ¶¶ 159-64. Facussé and his security forces responded with more violence; at least one of the farmers' lawyers was murdered. *Id.* ¶¶ 163, 330-32.

Amidst this violence and dispossession, IFC lent $55 million to Dinant's predecessor, Cressida, owned by Facussé. *Id.* ¶¶ 151-55. In that same year, Facussé was charged with complicity in the murder of an environmentalist opposing his operations in the Aguán. *Id.* ¶¶ 155-58.

In 2005, Facussé re-launched Cressida as Dinant, which now holds Cressida's palm plantations in the Aguán. *Id.* ¶ 163. In the early 2000s, farmers continued to seek return of their lands. *Id.* ¶¶ 162-64. And, in 2009, then-President of Honduras Zelaya began reviewing the legality of land "transfers," which included Dinant's property claims in the Aguán. *Id.* ¶¶ 164, 210-14.

B. Defendants knowingly funded Dinant's murder and violence in the Aguán.

IFC staff admitted that Facussé's violence against farmers was well-known in Honduras's palm oil industry, *id.* ¶ 169, but IFC financed his company anyway. In 2007, IFC began to consider a second loan, this time through Dinant – and went forward even though other development banks backed out. *Id.* ¶¶ 167-68. In February 2008, a due diligence assessment flagged issues including Dinant's "continuous compliance problems related to . . . social issues," and numerous armed security coupled with no security incident reporting. *Id.* ¶¶ 175, 186. Later in 2008, when the loan was being appraised, IFC investment staff ignored these concerns; they "influence[d] the context of the [social] review" to "get the money out the door." *Id.* ¶¶ 185-86. Ultimately, IFC approved a $30 million loan to Dinant in December 2008. *Id.* ¶ 200. The terms required Dinant to have "good" title to the land and abide by IFC's standards, conditions Dinant repeatedly violated. *Id.* ¶ 203.

Before IFC disbursed the loan, security for farmers challenging Dinant grew more tenuous. In June 2009, one farmer representative was shot after a meeting with the government regarding contested land "transfers" to Dinant; the shooting was widely reported, and linked to Facussé. *Id.* ¶ 214. Five days later, President Zelaya was ousted in a coup backed by Facussé, which unleashed

widely reported repression and targeting of land rights defenders in the Aguán. *Id.* ¶¶ 215-18. Despite being required to ensure that no changed circumstances had a "material adverse effect" on Dinant's ability to comply with its obligations, IFC pressed on. *Id.* ¶¶ 206, 219. In November 2009, as the security situation deteriorated, IFC disbursed $15 million to Dinant. *Id.* ¶ 226.

Defendants' financing was indispensable to Dinant's ability to expand and control its palm farms and land holdings and its ability to use violence to do so. *Id.* ¶¶ 21-22, 123, 473. Defendants' millions quadrupled Dinant's cash on hand; prior to this, Dinant had paltry resources, anemic cash flow, and no other credit source. *Id.* ¶¶ 21, 120-21. IFC's $15 million enabled Dinant to expand its security forces fourfold and upgrade their weapons. *Id.* ¶¶ 21, 232.

As farmers advocated for the return of their land, Dinant security forces – whose ranks included assassins, paramilitaries, and contracted military personnel – murdered, kidnapped, tortured and terrorized farmers and their advocates, including Plaintiffs. *See e.g. id.* ¶¶ 233. In March 2010, IFC put Dinant on its "Corporate Watch List," "a list of high risk investments" that is "circulated to senior management." *Id.* ¶ 242. Dinant's violence continued, including the 2010 killing of five farmers and wounding of four others, *id.* ¶ 262-72, and outside groups notified IFC that Dinant was using its money to kill farmers. *Id.* ¶ 273-74.

Rather than enforce Dinant's commitments, IFC indirectly funneled more money to the company when, in 2011, as violence raged, it financed Banco Ficohsa - including a $32 million equity stake (10 percent ownership) and a $38 million loan. *Id.* ¶¶ 18-19, 305, 466. IFC knew that Ficohsa was a major financier of Dinant, but rather than use its control of Ficohsa to end this financing, IFC specifically waived policies that required Ficohsa to reduce lending to Dinant. *Id.* ¶¶ 19, 250, 307-08. The violence continued: Dinant security shot at 50 unarmed women and children as they fled in June 2011, *id.* ¶¶ 298-301, and 35 farmers were murdered in the Aguán that year. *Id.* ¶ 311.

Again IFC provided more support to Dinant while waiving ordinary requirements. In 2012,

IFC investment staff requested temporary waivers of the requirement that Dinant comply with the Performance Standards, an unusual move that was based on Facussé's "personal commitment" to comply. *Id.* ¶ 318. In November 2013, IFC guaranteed over $5 million in loans to Dinant. *Id.* ¶ 20. In 2014, IFC approved AMC's additional $5.5 million equity stake in Ficohsa. *Id.* ¶ 379.

The violence continued. In October 2016, two Aguán leaders were killed as they left a meeting. *Id.* ¶ 412. In September 2017, Dinant killed a farmer from the village of Panama as he worked his small corn plot on property Dinant claimed. *Id.* ¶ 411. One Plaintiff in the D.C. Action was murdered while that case was pending. *Id.* ¶ 62. Many farmers, including several Plaintiffs, have been forced to flee their homes in response to threats. *Id.* ¶ 25. Dinant continues to terrorize the Panamá Plaintiffs and class, by destroying property, trespassing, firing weapons near Plaintiffs' homes, and spying on villagers. D.I. 47 ¶¶ 386, 528. Efforts to obtain redress in Honduras resulted in violent retaliation, including the 2012 and 2013 murders of Antonio and José Trejo. *Id.* ¶¶ 133-35; 290-306; 318; 339-41; 343-49; 370-78. Meanwhile, Dinant repaid Defendants based on lands and profits unjustly taken and held at Plaintiffs' expense. D.I. ¶ 108.

Plaintiffs include seven surviving family members of men killed by security forces acting on Dinant's behalf; three Plaintiffs survived shootings, and three others home invasions; almost all Plaintiffs were assaulted, some at gunpoint. *Id.* ¶¶ 508-24. Dinant security was implicated in each attack, all of which occurred outside an active confrontation and outside land Dinant claims. *Id.*

C. IFC's internal ombudsman found that IFC violated its own standards.

In April 2012, IFC's Compliance Advisor Ombudsman (CAO), which reviews IFC's compliance with its social obligations, took the unusual step of opening an audit into IFC's Dinant loan without a formal complaint because of "[v]iolence against farmers on and around Dinant plantations in the Bajo Aguán (including multiple deaths) [that] occurred because of inappropriate use of private and public security forces under Dinant's control or influence." *Id.* ¶¶ 338-40. CAO's

scathing 2013 audit report found that IFC failed to spot or deliberately ignored the serious social, political and human rights context in which Dinant was operating; failed to adhere to its own policies to protect local communities, and allowed Dinant to breach those safeguards over the preceding five years; and failed to consult local communities, or identify the project as high-risk, despite pubic information that was widely available when the investment was made. *Id.* ¶¶ 358-69.

CAO blamed these failures, in part, on IFC staff incentives "to overlook . . . or even conceal potential environmental, social and conflict risk" and to "get money out the door." *Id.* ¶ 360. Despite publicly available "contemporaneous reports of violence and conflict, as well as allegations relating to illegal activities on and/or around properties belonging to Dinant and its owner," which were available before IFC made the loan, it discouraged its staff from "making waves." *Id.* ¶ 34.

After the audit, Defendants announced an "Enhanced Action Plan," declaring: "Should Dinant fail to meet these commitments, IFC stands prepared to exercise all remedies available[.]" *Id.* ¶ 448. Instead, they increased investing in Ficohsa, and encouraged Dinant to hire Honduran soldiers as security though the military was implicated in human rights abuses. *E.g.*, *id.* ¶ 37.

Despite CAO's review, little has changed. CAO's January and July 2016 monitoring reports found Defendants still failed to comply with their Performance Standards, the Enhanced Action Plan failed to bring Dinant into compliance, and Defendants' waiver of safeguards and subsequent Ficohsa investments "facilitated a significant ongoing flow of capital to Dinant . . . at a time when IFC management was aware of serious unmitigated environmental and social risks." *Id.* ¶¶ 402-03, 465. CAO lacks an "enforcement mechanism" and cannot provide remedies. *Id.* ¶¶ 32, 99, 366.

ARGUMENT

I. Defendants are not immune from suit.

The IOIA provides *only* the "same immunity from suit. . . as is enjoyed by foreign governments, except to the extent that [it] may expressly waive [its] immunity." 22 U.S.C. § 288a(b).

IFC is not immune for the commercial acts here, and IFC's charter expressly waives immunity. Even if IFC were immune, AMC is not. The IOIA does not immunize AMC and IFC has no power to do so. AMC can be sued like any company established under state law.

A. IFC is not immune, and thus AMC cannot be derivatively immune.

1. Defendants are not immune because their acts were commercial.

IFC enjoys only the "limited" immunity "foreign governments currently enjoy" and is thus not immune from suits "based upon" its commercial activity in the United States. *Jam II*, 139 S. Ct. at 765, 772. *See also* 28 U.S.C. §1605(a)(2). Defendants' tortious conduct here – lending to Dinant – is clearly commercial. *See Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 614 (1992) (where state engages in type of act a private party would, regardless of motive, act is commercial). Defendants do not deny that their commercial acts occurred in the United States. Since Plaintiffs' claims are "based upon" these commercial acts in the U.S, Defendants are not immune.

To avoid this straightforward conclusion, Defendants argue that Plaintiffs' claims against Defendants are really based on the acts of third parties in Honduras, not Defendants' tortious commercial activity. D.I. 54 at 6-7. But courts do not look to a third party's acts to determine if a sovereign is immune; Plaintiffs' claims here are "based upon" Defendants' *own* conduct.

a. The gravamen of Plaintiffs' claims is Defendants' commercial activity; without it Plaintiffs would have no claim against them.

The "'based upon' inquiry" requires courts to "identify the particular conduct on which the plaintiff's action is 'based,'" *i.e.* its "gravamen." *OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390, 395 (2015); *accord Saudi Arabia v. Nelson*, 507 U.S. 349, 357 (1993). Courts focus on the sovereign's acts, because a state is immune from suit for "*its* sovereign" acts but not its "commercial" arts. *Nelson*, 507 U.S. at 359-60 (emphasis added). *Accord Permanent Mission of India to the U.N. v. City of N.Y.*, 551 U.S. 193, 199 (2007) (courts consider the "acts . . . of [the] state"); *Weltover*, 504 U.S. at 614 (issue is whether "the particular actions that the foreign state performs" are commercial).

Several Circuits reject Defendants' position. The Fifth Circuit – in the case the Supreme Court relied on in *Nelson*, 507 U.S. at 357, and *OBB,* 136 S. Ct. at 395 – held that the "analysis must focus on the *named defendant's* acts which are the basis of the action and not on [another entity's] separate acts." *Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1108 (5th Cir. 1985) (internal quotes omitted) (emphasis added). The First Circuit held the "inquiry [ ] turn[s] on the particular actions that the foreign state performs as opposed to the specific actions performed by the party with whom the foreign state contracted." *Universal Trading & Inv. Co. v. Bureau for Representing Ukrainian Interests in Int'l & Foreign Courts*, 727 F.3d 10, 16-17 (1st Cir. 2013) (internal quotes omitted). And the D.C. Circuit noted – in a similar case against IFC for enabling third-party torts – that the issue is whether *IFC's loan* is commercial activity under the FSIA, recognizing that it is. *Jam I*, 860 F.3d at 707.[2]

That Defendants' commercial acts in the United States are tortious is not just the gravamen of Plaintiff's claim, it *is* the claim. If those acts were removed from the complaint, Plaintiffs would not have a claim against Defendants. Defendants' argument would thus extend *OBB* and *Nelson* far beyond their "limited" reach. *OBB*, 136 S. Ct. at 397 n.2 (citing *Nelson*, 507 U.S. at 358 n.4). In both, the question was which of *defendant*'s acts counted: in *OBB*, a personal injury claim against a State railway was "based upon" *its* management of the railway, not the sale of a ticket, 136 S. Ct at 396; in *Nelson*, plaintiffs' torture claim against Saudi Arabia was based on *its* torture, not its hiring of the plaintiff, 507 U.S. at 362-63. Thus, *OBB* turned on the fact that the *defendant*'s tortious act occurred abroad, and *Nelson* on the fact that *defendant's* tortious act was not commercial. Here, all *IFC*'s

[2] Other cases analogous to this one further refute Defendants' argument. *See e.g., Woods Hole Oceanographic Inst. v. ATS Specialized, Inc.*, Civ. No. 17-12301, 2019 U.S. Dist. LEXIS 46133, at *22-24 (D. Mass. Feb. 5, 2019) (applying *OBB* and holding claim for damage to plaintiff's submarine was based on contract loaning it to the defendant, *not* acts of third party that resulted in the harm; "focus" of "the commercial activity inquiry [is] on the activities carried on by *the foreign state* upon which the civil action is based") (emphasis added and internal quotes omitted), *adopted in relevant part* 2019 U.S. Dist. LEXIS 45565, at *3-4 (D. Mass. Mar. 20, 2019); *Crystallex Int'l Corp. v. Venezuela*, 251 F.Supp.3d 758, 766-67 (D. Del. 2017) (although fraudulent transfer was undertaken by another entity, the gravamen of the claim was determined by reference to the sovereign *defendant*'s acts).

conduct occurred in the U.S. and was commercial. The contrast with *OBB* could hardly be starker: there, the sovereign had virtually no physical presence in the U.S. and did virtually nothing here.[3]

The logical conclusion of Defendants' position is that if the situation here were reversed – a sovereign engages only in non-commercial acts *abroad*, and a non-sovereign engages in the injurious commercial activities *in the United States* – then the claim *would* be based on commercial activity in the United States, and the sovereign would not be immune even though it engaged in no commercial activity in the U.S. or anywhere else. That would upend the commercial activity exception.

Defendants cannot strip Plaintiffs of the right to frame their suit. Acts are the "basis" if they involve "elements of a claim that, if proven, would entitle the plaintiff to relief under his theory of the case." *Nelson*, 507 U.S. at 357; *accord OBB*, 136 S. Ct. at 395-96. Plaintiffs' theory is that Defendants are liable for *their* aiding and abetting and negligence. *Infra* § V. The elements of *these* claims center on *Defendants*' conduct and *mens rea*. *See Crystallex*, 251 F. Supp. 3d at 766 (gravamen of fraudulent transfer claim was defendants' intent, as there would be no claim without it).

"[T]he gravamen of an aiding and abetting claim," for example, "is that the *alleged aider and abettor*" knowingly and substantially assisted a tort. *Overseas Private Inv. Corp. v. Industria de Pesca, N.A.*, 920 F. Supp. 207, 210 (D.D.C. 1996) (emphasis added); *accord Aziz v. Alcolac, Inc.*, 658 F.3d 388, 394 (4th Cir. 2011) ("gravamen" of claim for abetting chemical weapon attack was defendant's sale of chemical). An abettor "is himself a tortfeasor." Restatement (Second) of Torts § 876 & cmt. d (1979) (hereafter, "Restatement"). The gravamen of a negligence claim is defendant's conduct that breaches

[3] *Fed. Ins. Co. v. Richard I. Rubin & Co.*, 12 F.3d 1270 (3d. Cir. 1993) similarly supports Plaintiffs. *Contra* D.I. 54 at 9. There the court held that tort claims for causing a fire through improper design and operation of a building were not "based upon" the commercial act of forming subsidiaries because plaintiffs would not need to prove those activities. *Id.* at 1289-90. Here, Defendants' commercial acts *are* the tortious acts Plaintiffs must prove. To the extent *Williams v. Romarm*, No. 2-17-cv-6, 2017 U.S. Dist. LEXIS 141633 (D. Vt. Sept. 1, 2017), looked to a third party's acts, it is wrong. But it still does not help Defendants: there, the commercial act was too distant from the injury because it was not a proximate cause; here, IFC's acts were a proximate cause. *Infra* § V.C.2.

a duty of care. One whose act involves an unreasonable risk of injury due to the foreseeable conduct of another commits a tort himself. *Id.* §§ 302, 302B & cmts. e(H). Thus, the "basis" of the claims is what *Defendants* knew and did, and Plaintiffs' focus on *Defendants* is not "artful pleading." D.I. 54 at 9.

b. Defendants' other arguments are meritless.

The suggestion that tortious acts cannot be commercial activity, and can only be brought under the non-commercial tort exception (28 U.S.C. § 1605(a)(5)), D.I. 54 at 8-10, has been rejected by the Third Circuit. It overturned a decision that negligent treatment by an airline was not "commercial activity, but rather a tortious [sic] act," holding the claim *was* based on commercial activity. *Sugarman v. Aeromexico, Inc.*, 626 F.2d 270, 272-73 (3d Cir. 1980); *accord Vermeulen v. Renault, U.S.A., Inc.*, 985 F.2d 1534, 1544 n.13 (11th Cir. 1993) (fact that Plaintiff sued for personal injuries "does not belie the commercial nature" of the activity or require court to apply the "noncommercial torts" exception) (collecting cases). This follows from the text. "Commercial activity" is not defined to exclude tortious acts. 28 U.S.C. § 1603(d). And the noncommercial torts exception, 28 U.S.C. § 1605(a)(5), applies to cases "not otherwise encompassed in" the commercial activity exception, which would make no sense if commercial activity could not be tortious.[4]

[4]*Cicippio v. Islamic Rep. of Iran*, 30 F.3d 164, 168 (D.C. Cir. 1994), also *refutes* their claim; it noted that even such an inherently tortious act as state kidnapping, if committed in a commercial context, could be commercial. None of Defendants' other cases suggest the commercial activity exception cannot apply where commercial activity is tortious. Some held that, unlike here, *defendants*' *specific* tortious conduct was not commercial. *Jin v. Ministry of State Sec.*, 557 F. Supp. 2d 131, 141 (D.D.C. 2008) (hiring persons to commit torts does not involve a power private citizens can exercise); *O'Bryan v. Holy See*, 556 F.3d 361, 380 (6th Cir. 2009) (sexual abuse and covering it up not commercial); *Rukoro v. Fed. Republic of Germany*, 363 F. Supp. 3d 436, 445 (S.D.N.Y. 2019) (taking land and property during genocide not commercial); *Marketic v. Kaliber Talent Consultants, Inc.*, No. 97-0356, 1998 WL 1147140, at *3 (C.D. Cal. Mar. 15, 1998) (detention and abuse not commercial). The remainder are even further afield. *See Jiggi v. Republic of Cameroon*, No. 18-1303, 2018 WL 6040262, at *3-4 (D. Del. Nov. 19, 2018) (allegation of a "commercial deal" too vague to discern if commercial activity exception applied); *Moses v. Air Afrique*, No. 99-54, 2000 WL 306853, at *3-4 (E.D.N.Y. Mar. 21, 2000) (sale of ticket was irrelevant to claim of beating by airline employees).

Defendants note that *OBB* rejected a one-element test for determining the basis of a suit, D.I. 54 at 8-9 (citing 136 S. Ct at 396), yet they focus on a single element, the location of injury. *All* of Defendants' relevant conduct and their *mens rea* occurred in the United States. Defendants cannot argue that *every* element of the claim must be commercial activity; *Nelson* expressly noted that was *not* its holding. 507 U.S. at 358 n. 4. Requiring the injury (or the tort itself) to occur in the United States would ignore Congress' choice of different language in the commercial activity exception and the domestic, noncommercial tort exception. While the former must only be "based upon" commercial activity in the U.S., the latter covers injuries "occurring in the United States." 28 U.S.C. § 1605(a)(3) & (5). The D.C. Circuit held that the language of the domestic tort exception requires that the "entire tort" occur here, *Doe v. Ethiopia*, 851 F.3d 7, 11-12 (D.C. Cir. 2017), but Defendants' urge the same result from the commercial activity exception, even though it sets a lower bar.

Nor is the last act precipitating the injury necessarily the "gravamen." Where Venezuela engaged in U.S. negotiations over memorabilia, inducing the plaintiff to bring it to Venezuela (which wrongfully kept it), the gravamen was the U.S. negotiation. *Devengoechea v. Bolivarian Republic*, No. 12-23743-CIV, 2016 U.S. Dist. LEXIS 98429, at *23-24 (S.D. Fla. Jan. 20, 2016).

In sum, Defendants' commercial activity occurred here and is the gravamen of the claims.

2. IFC has waived any immunity from suit it might have.

Even if the commercial activity exception did not apply, IFC has waived immunity by the plain text of its Articles of Agreement. And even if the Court could limit that broad waiver, which it cannot, there is no immunity because the IFC does not need it to perform its mission.

a. The plain terms of the IFC's charter waives immunity here.

IFC may waive immunity, 22 U.S.C. § 288a(b), and its charter does so. Articles of Agreement of the Int'l Fin. Corp (1955), Art. VI, § 3; *Mendaro v. World Bank*, 717 F.2d 619, 613-14, 618 n.54 (D.C. Cir. 1983) (identical provision is "waiver" that "limit[s]" immunity). Section 3 explicitly waives

immunity from suits except by member states: "[a]ctions may be brought against the Corporation." Its plain text waives immunity "broad[ly]." *Lutcher S.A. Celulose E Papel v. Inter-Am. Dev. Bank*, 382 F.2d 454, 458 (D.C. Cir. 1967) (addressing identical provision); *See also Jam I*, 860 F.3d at 706 ("read literally," IFC's waiver is "categorical."); *accord id.* at 710-11 (Pillard, J., concurring).[5]

The fact that IFC reserved immunity for suits by member states shows that "when [the drafters] wanted to make an exception to waiver of immunity they knew how to do so." *Lutcher*, 382 F.2d at 457-58. More generally, IFC's Articles specifically *list* the immunities it needs "to fulfill [its] functions." Art. VI, § 1.[6] The fact that *only* immunity from suits by member states is on the list shows that the drafters believed IFC does not need immunity from other suits. This plain-text reading is consistent with how international law conceives of immunity, *i.e.* according to the "functional necessity" doctrine, which is a presumption *against* immunity unless the organization *needs* it to fulfill its mission. *See* Michael Singer, *Jurisdictional Immunity of International Organizations: Human Rights and Functional Necessity Concerns,* 36 Va. J. Int'l L. 53, 128 (1995). Since the Articles make clear IFC does not reserve or need the immunity it seeks, it is not immune.

Defendants urge the Court to adopt the D.C. Circuit's limitation on Section 3's plain language. D.I. 54 at 10-11. But *Mendaro* – which "read a qualifier into" Section 3, requiring a "corresponding benefit" before waiver is found, *Osseiran v. Int'l Fin. Corp.*, 552 F.3d 836, 839-40 (D.C. Cir. 2009) (citing 717 F.2d at 617) – is unpersuasive and inconsistent with *Jam II*. Nothing in the Articles supports such an inquiry. *Mendaro*'s "amorphous waiver-curbing doctrine" "lacks a sound legal foundation" and "second-guess[es] international organizations' own waiver decisions" in their charters; it was "wrongly decided." *Jam I*, 860 F.3d at 708, 710, 711-13 (Pillard, J., concurring).

[5] The United States, like *Lutcher*, has read identical language to mean organizations can be sued. 382 F.2d at 457; U.S. Dep't of State, *Constitutionality of the Bretton Woods Agreement Act* 90 (1945).

[6] IFC's Articles are clear where they intend to reserve immunities. *E.g.* Art. VI, § 9 ("shall be immune from all taxation"); *id.* § 4 ("Property and assets…shall be immune from search").

To give IFC greater immunity than its Articles do would negate IFC's founding member states' language and purpose. *Jam II* found that substituting the court's analysis of the purpose of immunity rather than relying on the plain text "gets th[e] inquiry backward"; the drafter's purpose is generally "expressed by the ordinary meaning of the words used." 139 S. Ct at 769 (internal quotation omitted). *Mendaro*, by looking past the waiver's text to what it believed to be immunity's "underlying purposes," did precisely what *Jam II* forbids. 717 F.2d at 615. The Court can only conclude that the drafters intended the "categorical" waiver the text provides.

Ignoring text, Defendants suggest the Articles somehow *create* immunity. D.I. 54 at 14. *Jam II* forecloses this argument. It noted that if an organization "would be impaired by restrictive immunity, [its] charter can always specify a different level of immunity," and "many" do, but "IFC's own charter does not state that the IFC is absolutely immune from suit." 139 S. Ct. at 771-72. The Articles enumerate immunities with specificity, they do not provide generally for immunity.[7] Section 3 is a waiver. Words mean what they say; "actions may be brought" means IFC may be sued.

b. If the Court ignores the Article's plain text, IFC still waived its immunity as it is unnecessary and this case furthers IFC's goals.

Even if the Court could decline to give effect to the broad waiver in IFC's Articles, IFC has still waived immunity here. Any judicially-created limit to the waiver must reflect the international law principle that organizations enjoy only those immunities *necessary* to fulfill their mission. Indeed, *Mendaro* looked to the effect of suit on an organization's mission, but inexplicably applied the

[7] 22 U.S.C. 282g just gives effect to IFC's Articles, which do not immunize IFC here. The Executive Order applying the IOIA to IFC makes clear such designation does not "affect" the waiver provision. Exec. Order 10680, 21 Fed. Reg. 7647 (Oct. 5, 1956). This "reinforce[s] the waiver of immunity" in section 3. *Lutcher*, 382 F.2d at 458. *Nyambal v. Int'l Monetary Fund* suggested *IMF*'s Articles create immunity because they *reserve* it. 772 F.3d 277, 281 (D.C. Cir. 2014) (IMF "enjoy[s] immunity from every form of judicial process") (quoting Articles of Agreement, Art. IX § 3). *Jam II* contrasted IFC's Articles with those organizations that provide greater immunity than the IOIA, citing IMF. 139 S. Ct. at 771-72; *accord Mendaro*, 717 F.2d at 618 n.53 (IMF "reserve[d]" immunity while a provision identical to IFC's "expressly subject[s] it to judicial process"). IFC's Articles do not surreptitiously grant immunity other charters set forth explicitly. *Lutcher*, 382 F.2d at 459.

doctrine "in reverse": a presumption favoring immunity, unless the organization benefits from waiver. 717 F.2d at 615, 617.[8] Here Defendants violated their own core policies and mission. IFC does not *need* impunity to fund murder in order to fulfill its anti-poverty mission.

Even under the "corresponding benefit" test *Mendaro* invented, Plaintiffs prevail, because the benefits of waiver here are clear. As the D.C. Circuit recognized, plaintiffs' claims *would* benefit IFC by holding it to its mission and allowing it to gain communities' trust. *Jam I*, 860 F.3d at 707-08. As to the latter, IFC requires "broad community support" for high-risk projects such as this one, s*upra* SoF § I, so it needs communities to believe its promises. *See Vila v. Inter-Am. Inv. Corp.*, 570 F.3d 274, 280 (D.C. Cir. 2009) (test satisfied where organization needs third party's trust). This need for third-party trust supports waiver where, for example, an organization fails to pay for electricity. *Mendaro*, 717 F.2d at 618. Plaintiffs' "ability to enforce the requirement that the IFC protect surrounding communities is as central to the IFC's mission as a commercial partner's ability to enforce the requirement that the IFC pay its electricity bill." *Jam I*, 860 F.3d at 708. Absent waiver, IFC management may continue to ignore IFC's commitments, further undermining the institution.

Suits like this one will not stymie Defendants' operations. D.I. 54 at 12. IFC has waived immunity for suits by creditors, and "there is no reason to believe suits by creditors are less harassing . . . than are other kinds of suits." *Lutcher,* 382 F.2d at 459. And "minimiz[ing] litigation risk," D.I. 54 at 13, simply means IFC will have to try to avoid hurting those it is supposed to help.

While Defendants rely on another part of *Jam I*, holding no suits can be heard arising out of the IFC's "core operations" because they "would threaten the policy discretion of the organization," 860 F.3d at 708, that is hardly persuasive since *Jam I* was entirely vacated after being reversed by the

[8] *Mendaro* reasoned that the Section 3 waiver should be limited because Section 1 "states that the purpose of the waiver . . . is 'to enable the [organization] to fulfill [its] functions.'" 717 F.2d at 617 (quoting analogous Sec. 1 of the World Bank's Articles) (emphasis removed). But Section 1 says that is the purpose of *immunity*, not waiver. *Mendaro* fundamentally erred in not trusting that the expressly enumerated immunities reflect the drafters' judgment as to what immunities are necessary.

Supreme Court. *Jam v. Int'l Fin. Corp.*, 760 Fed. Appx. 11 (Apr. 5, 2019). Indeed, *Jam I*'s notion that claims involving "core operations" are not waived conflicts directly with *Mendaro*'s recognition that suits could be brought by "debtors [and] creditors," as well as "other" claims that help the organization achieve its mission. 717 F.2d at 615. In any event, this suit cannot impede IFC's "discretion," because it has no discretion to disregard the law or fund murder. It is management's failure to follow IFC policy and the law, not IFC's amenability to suit, that endangers IFC's mission.

In sum, to find there is no waiver here, the Court would have to depart from the plain language of IFC's waiver, ignore the functional necessity doctrine, adopt the mistaken corresponding benefits test *and* accept *Jam*'s unwarranted limitation on that test. None of that is warranted.

B. Even if IFC were immune from suit, AMC is not.

Since AMC claims only that it is entitled to *IFC*'s immunity, it can be sued for all of the reasons IFC can be. Regardless, AMC is not entitled to IFC's immunity.

1. IFC lacks authority to "extend" immunity to AMC.

IFC lacks the power to create a new, immune international organization. *First*, IFC has no authority to exempt AMC from state law. Foreign sovereigns cannot create immune entities under another sovereign's law, when that law allows the entity to be sued. *Somerlott v. Cherokee Nation Distribs.*, 686 F.3d 1144, 1154-57 (10th Cir. 2012) (Gorsuch, J., concurring) (collecting authorities). "One sovereign, after all, cannot usually rewrite the laws of another." *Id.* at 1154-55. IFC created AMC under Delaware law; there is no question that Delaware allows LLCs to be sued. AMC cannot claim the benefits of Delaware law while avoiding its Delaware responsibilities. *See id.* at 1155-57.[9]

Second, AMC does not qualify for IOIA immunities; it is not an organization in which the

[9] AMC cites *Askir v. Brown & Root Servs. Corp.*, No. 95-11008, 1997 WL 598587, at *6 (S.D.N.Y. Sept. 23, 1997), D.I. 54 at 16, but it applied the "military contractor defense," which is irrelevant. *Mendaro* did not speak to subsidiaries' immunity. D.I. 54 at 16, citing 717 F.2d at 615. In *Popli v. Air India Airline*, No-17-337, 2017 WL 1826499 (E.D. Pa. May 5, 2017), D.I. 54 at 14, n.4, the entity was created under the *foreign sovereign's* law, thus not circumventing the law under which it was formed.

U.S. participates by treaty or other law, nor is it designated by Executive Order. 22 U.S.C. § 288.

Third, IFC has no authority to dispense with the international processes through which immunity is conferred. International organizations "cannot . . . create new international organizations, endowed with the same international legal personality, unless they are specifically mandated to do so by States." 1991 U.N. Judicial Yearbook 296-231, at 297. IFC is not. Nothing in its Articles allow it to imbue a separately chartered entity with IFC's privileges and immunities.[10]

IFC relies on cases involving U.N. organs. D.I. 54 at 15-16. But the U.N. Charter gives it authority that IFC's Articles do not: the power to create "subsidiary organs" as "necessary." UN Charter, Art. 7(1-2), Art. 22, 29. And none of Defendants' cases suggest that the U.N. organs at issue were separately formed under state law, like AMC.[11] While a *program* of an international organization may enjoy derivative immunity, an "independent organization" does not. *See Bisson v. United Nations,* No. 06-cv-6352, 2007 U.S. Dist. LEXIS 54334, at *25 (S.D.N.Y. July 27, 2007).

AMC's only response to all of this is to claim AMC is immune under the IOIA as IFC's "asset." D.I. 54 at 15, 17.[12] But AMC is not IFC's "asset." Whether AMC is IFC's "asset" is

[10] *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 19 (2007), merely held that national banks can set up corporations. The fact that businesses can set up subsidiaries does not help AMC, because that is a function of state law; whether IFC can establish a subsidiary and grant it immunity is not.

[11] *See Lempert v. Rice*, 956 F. Supp. 2d 17, 24 (D.D.C. 2013); *Sadikoglu v. U.N. Dev. Programme*, No. 11-0294, 2011 WL 4953994 at 3 (S.D.N.Y. Oct. 14, 2011); *D'Cruz v. Annan*, No. 05-8918, 2005 WL 3527153 at *2 (S.D.N.Y. Dec. 22, 2005); *Boimah v. U.N. Gen. Assembly*, 664 F. Supp. 69, 71 (E.D.N.Y. 1987); *Shamsee v. Shamsee*, 74 A.D.2d 357, 361 (N.Y. App. Div. 1980).

[12] Defendants explicitly disclaim any argument that AMC is entitled to the limited immunity that foreign sovereign-owned corporations get if they are "instrumentalities." 28 U.S.C. § 1603; D.I. 54 at 18. They could not claim such immunity; an instrumentality cannot be "a citizen of a State of the United States as defined in section 1332 (c) and (e)" 28 U.S.C. § 1603(b)(3). Although AMC is a Delaware entity, it claims that LLCs are not citizens under section 1332(c). D.I. 54 at 18-19. But Congress clearly intended to immunize only entities formed under the *foreign sovereign*'s laws. Section 1603(b)(3)'s "rationale" – that "a company or *other legal entity*" established outside the foreign state "is presumptively engaging in [commercial or private] activities," H.R. Rep. No. 94-1487 at 15 (1976) (emphasis added) – codifies the rule that a foreign government's business formed under state law can be sued. *Somerlott*, 686 F.3d at 1155 (Gorsuch, J., concurring) (finding LLC not immune). Defendants cite no case granting immunity to an entity established under U.S. law.

determined under ordinary corporate law principles; immunity cases apply such principles. *See Dole Food. Co. v. Patrickson*, 538 U.S. 468, 474-75 (2003); *First National City Bank v. Banco Para El Comercio Exterior De Cuba (FNCB)*, 462 U.S. 611, 630 (1983). An organization's IOIA immunities have "no effect" on whether it has a legal interest in property. *U.S. v. BCCI Holdings (Lux.), S.A.*, 73 F.3d 403, 405 (D.C. Cir. 1996). An LLC is not its owners' asset, it is "a separate legal entity." 6 Del. Code § 18-201(b). IFC does not own AMC, it owns an "interest" in AMC – a share in profits and losses and a right to distribution. *Id.* § 18-101(8). A suit against AMC is against AMC, not IFC's interest.

None of AMC's cases, D.I. 54 at 15, suggest, contrary to black-letter law, that the entity itself rather than the ownership interest in the entity (such as stock) is the asset, and none turn on this distinction. *Victor Hotel Corp. v. FCA Mortgage Corp.*, 928 F.2d 1077, 1083 (11th Cir. 1991); *In re Brown Publ'g Co.*, No. 10-73295, 2014 WL 1338102 at *6 (Bankr. E.D.N.Y. Apr. 3, 2014); *In re Royal Crown Bottlers of N. Ala., Inc.*, 23 B.R. 28, 30 (Bankr. N.D. Ala. 1982). It makes no difference that IFC and AMC share a "complete unity of interest," *Copperweld Corp. v. Indep Tube Corp.*, 467 U.S. 752, 771 (1984), D.I. 54 at 15 n.5, because AMC points to nothing providing immunity on that basis.[13]

To be sure, AMC is no mere subsidiary. Defendants admit they are essentially the *same* entity; they are thus alter-egos, liable for each other's acts. *Infra* § IV.A.2. Courts pierce the corporate veil "to prevent the corporation's owners from abusing the legal privilege of the corporate form," but "do *not* pierce [it] to allow a corporation to escape the legal obligations it assumed when incorporating" or to confer immunity. *Somerlott*, 686 F.3d at 1157, n.1 (Gorsuch, J., concurring).[14]

2. The U.S. Government does not afford AMC IFC's immunities.

[13] AMC argues it "deploys" IFC's assets, D.I. 54 at 15, but the D.C. Circuit rejected the similar claim that IOIA immunities entitled OAS to deposits its bank forfeited. *BCCI*, 73 F.3d at 405-06. The forfeiture did not confiscate OAS property "because OAS retained what it had before--a claim against [the bank]" for the deposited amount. *Id.* at 405. Here too, if AMC is held liable, IFC will still own what it owns today: its interest in AMC and a claim for its funds.

[14] If Defendants are not alter-egos, AMC's derivative immunity argument is all the more implausible.

In practice, AMC does not enjoy IFC's privileges and immunities. Unlike IFC, AMC is not exempt from filing federal labor certifications, and its foreign employees do not get tax immunities or diplomatic visas. *Compare* Articles of Agreement, Art. VI, §§ 8(ii), 9(b) *with* D.I. 47 ¶¶ 55-56. Since AMC would receive these benefits if it were entitled to IFC's privileges and immunities, this shows that the Executive rejects AMC's argument – if AMC has even tried to claim immunity.

3. AMC has expressly waived any immunity it might have.

Corporate charters stating an entity may be sued waive sovereign immunity. *FNCB*, 462 U.S. at 625. AMC's charter states it was formed "subject to" Del. Code Title 6, Ch. 18, which permits AMC to be sued. AMC is not immune. *Somerlott*, 686 F.3d at 1156 (Gorsuch, J., concurring).

II. Venue is proper in Delaware and there is no basis for dismissal or transfer.

A. Venue lies under 1391(b)(1) because AMC and IFC reside in Delaware.

Venue is proper because IFC and AMC reside in Delaware. 28 U.S.C. § 1391(b)(1). Entities reside "in any judicial district" where they are subject to personal jurisdiction. 28 U.S.C. § 1391(c)(2). AMC is indisputably subject to personal jurisdiction in Delaware, and so is IFC. *Infra* § IV.

Defendants' claim that the general venue statute has been supplanted by 22 U.S.C. § 282f, D.I. 54 at 20, fails. Special venue provisions "supplement, rather than preempt, general venue statutes." *Go-Video, Inc. v. Akai Elec. Co.*, 885 F.2d 1406, 1409 (9th Cir. 1989); *accord Farmers Bank of Del. v. Bell Mortg. Corp.*, 452 F. Supp. 1278, 1280 (D. Del. 1978). Thus, the Supreme Court held that Section 1391(c)'s residency definition could be invoked even though the Jones Act's specific venue provision defined residency more narrowly. *Pure Oil Co. v. Suarez*, 384 U.S. 202, 204-05 (1966). Section 1391(c)'s residency definition "applies *to all venue statutes using residence as a criterion*, at least in the absence of contrary restrictive indications in any such statute." *Id.* at 205 (emphasis added). Section 282f does not even specify where IFC may reside, let alone restrict its residency; it merely states it "shall be deemed to be an inhabitant of the [District of Columbia]." No court has held IFC

is *solely* a resident of D.C. for venue purposes. Whatever "inhabitant" means in Section 282f, it cannot supersede Section 1391(c)(2), which defines "resident" for venue purposes.

B. Venue lies under 1391(b)(3); when Plaintiffs filed, venue did not lie elsewhere.

Venue lies in a district where "any defendant is subject to personal jurisdiction" if "there is no district in which an action may otherwise be brought," which is the case here. 28 U.S.C. § 1391(b)(3). The Supreme Court has construed nearly identical language to refer to districts where a plaintiff could have brought the case *at the time of filing*. *Hoffman v. Blaski*, 363 U.S. 335, 343 (1960); *accord Stafford v. Briggs*, 444 U.S. 527, 535-36 (1980) (reading another provision of Section 1391, cast "in the present tense," as describing the defendant "at the time of the suit"); *Dole Food Co.*, 538 U.S. at 478 (statute expressed in present tense applied as of the time of suit).

Defendants wrongly suggest this action could have been brought in D.C. D.I. 54 at 20-21. A case cannot "be brought" in a court lacking jurisdiction; venue "presupposes subject-matter jurisdiction." *Wachovia Bank, N.A. v. Schmidt*, 546 U.S. 303, 318 (2006). When this case was filed, after *Jam I* and prior to *Jam II*, it would have been rejected in D.C. for lack of subject matter jurisdiction based on IFC's absolute immunity. *Jam I*, 860 F.3d 703. The venue statutes are intended to avoid "venue gaps, which take away with one hand what Congress has given by way of jurisdictional grant with the other." *Brunette Mach. Works, Ltd. v. Kockum Indus., Inc.*, 406 U.S. 706, 710 n. 8 (1972). Section 1391 does not force Plaintiffs to file where IFC was not subject to jurisdiction.

C. Venue is proper over the case because venue lies with respect to AMC.

Venue lies because it is proper as to AMC, and AMC is IFC's alter-ego. *Infra* § IV. Cases involving alter egos are exceptions "to the general proposition that venue must be satisfied independently as to individual defendants." *HomeBingo Network, Inc. v. Chayevsky*, 428 F. Supp. 2d 1232, 1251 (S.D. Ala. 2006) (collecting cases). *See also 3M v. Eco Chem, Inc.*, 757 F.2d 1256, 1265 (Fed. Cir. 1985) (same). Another exception, "pendent" venue, also applies. Venue lies regarding a party for

whom it is not otherwise proper, where the claims "arise out of the same core of operative facts" as plaintiffs' other claims, because "judicial economy, convenience, and fairness" warrant a single action. *Wultz v. Islamic Republic of Iran*, 755 F. Supp. 2d 1, 38 (D.D.C. 2010). That is so here.

D. If venue is improper, transfer is in the interest of justice.

Even if venue and jurisdiction were lacking, this Court should transfer, not dismiss, because transfer is "in the interest of justice." 28 U.S.C. 1406(a). Transfer is generally favored over dismissal:

> [Section] 1406(a) is amply broad enough to authorize the transfer of cases, however wrong the plaintiff may have been in filing his case as to venue . . . . [It] is thus in accord with the general purpose . . . of removing whatever obstacles may impede an expeditious and orderly adjudication of cases and controversies on their merits.

Goldlawr, Inc. v. Heiman, 369 U.S. 463, 466-67 (1962). Defendants provide no basis to dismiss.

First, Defendants' claim that "plaintiffs were fully aware that venue was improper" because they initially sued in D.C., D.I. 54 at 21, is a *non-sequitur*, since venue can be proper in more than one place. They selectively cite *Stanifer v. Brannan*, 564 F.3d 455 (6th Cir. 2009), but it noted the presumption "in favor of transfer." *Id.* at 459. "[D]ismissal is only appropriate in unusual circumstances"; courts transfer if Plaintiffs had "some arguable basis for thinking" venue was proper. *Id.* at 459-60. The bases for venue here are surely arguable; indeed, they are valid.

This case is 180-degrees from *Deleski v. Raymark Indus., Inc.*, 819 F.2d 377, 381 (3d Cir. 1987), and *Spar, Inc. v. Info. Res., Inc.*, 956 F. 2d 392, 394 (2d Cir. 1992). There, courts declined transfer because plaintiffs filed where they should have known they were *barred* by statute of limitations; here, Defendants fault Plaintiffs for *not* filing in a forum where they would have been *barred*.

Second, Defendants' "forum-shopping" accusations fall flat. D.I. 54 at 21-22. Plaintiffs have "the option of shopping for a forum with the most favorable law." *Ferens v. John Deere Co.*, 494 U.S. 516, 527 (1990). Impermissible "forum shopping" involves an attempt to gain an "unfair" advantage that is absent where suit was potentially foreclosed by law in one forum and plaintiffs "were

indifferent as to *which* court would hear their claims; they simply wanted *a* court to hear their claims." *Chavez v. Dole Food Co.*, 836 F.3d 205, 222 (3d Cir. 2016) (*en banc*). That is this case. Plaintiffs filed here because their claims against IFC were foreclosed in D.C. by the erroneous immunity decision in *Jam*, while the Third Circuit applied the correct standard, as the Supreme Court later held. As in *Chavez*, Plaintiffs sought no "unfair" advantage. *Id.* Courts often dismiss where plaintiffs are wrong about the law. But it would not serve justice to punish Plaintiffs for being right.

Third, Plaintiffs are not manufacturing venue. D.I. 54 at 22. Plaintiffs did not sue AMC to create jurisdiction or venue over IFC in Delaware: AMC was a defendant in D.C. and remains a proper defendant here, because it is IFC's alter ego and participated in tortiously financing Dinant. This case is nothing like *Nat'l Distillers & Chem. Corp. v. Dep't of Energy*, 487 F. Supp. 34 (D. Del. 1980). There, a plaintiff transferred its interest in a distillery – the subject of the dispute – to a long dormant subsidiary, which it added as a plaintiff, all to manufacture venue. *Id.* at 34-36. Plaintiffs have no ability to affect where venue is proper against Defendants.

Last, since venue requires jurisdiction, this Court cannot transfer to D.C. without first deciding that D.C. *has* subject matter jurisdiction, *i.e.* that Defendants are not immune there. *See Joao Control & Monitoring Sys. v. Ford Motor Co.*, No. 12-cv-1479, 2013 U.S. Dist. LEXIS 118299, at *4 (D. Del. Aug. 21, 2013) (court may only transfer if transferee court has jurisdiction). If, as IFC erroneously claims, it cannot be sued under the commercial activity exception, it will be immune in D.C., given that Circuit's waiver caselaw; but the same is not true here. *Supra* § I.A.2.

III. There are no absent necessary parties; even if there were, dismissal is not warranted.

Courts may only dismiss for failure to join a party if: (1) the absentee's presence is required under Rule 19(a); (2) it cannot be feasibly joined; and (3) suit cannot proceed "in equity and good conscience" without the absentee under Rule 19(b). *Gen. Refractories Co. v. First State Ins. Co.*, 500 F.3d 306, 319 (3d Cir. 2007). Defendants claim there are five parties – Dinant, its security forces, Banco

Ficohsa, farming cooperatives, and Honduras – whose absence justifies dismissal, D.I. 54 at 25, but have not shown any of them are required under Rule 19(a) or that dismissal is equitable.

A. Defendants have not shown the absent parties are required under Rule 19(a).

Defendants "bear[ ] the burden of showing why an absent party should be joined under Rule 19." *Disabled in Action of Pa. v. SEPTA*, 635 F. 3d 87, 97 (3d Cir. 2011). That burden is significant, as a plaintiff typically gets to choose who it sues. Defendants largely ignore Rule 19(a)'s factors, and to the extent they discuss them, their arguments are meritless.

Joint tortfeasors are not required parties. *Temple v. Synthes Corp.*, 498 U.S. 5, 7 (1990); *In re Howmedica Osteonics Corp.*, 867 F.3d 390, 408-09 (3d Cir. 2017). Except for the cooperatives – about which Defendants make no argument – the absentees are ordinary joint tortfeasors. Defendants' claim that the absentees were "active or primary participants" in the tort, D.I. 54 at 25, "would destroy" the joint tortfeasor rule, which "does not allow for gradations in participation." *In re Rio Piedras Explosion Litig.*, 179 F.R.D. 59, 63 (D.P.R. 1998)).[15] Aiding and abetting and other concerted action cases, such as this, are often litigated without the person who pulled the trigger.[16]

[15] Defendants' cases are inapposite. In *Johnson & Johnson v. Coopervision, Inc.*, 720 F. Supp. 1116 (D. Del. 1989), plaintiff sued for breach of contract, but its subsidiary – who the parent had transferred its rights to – was not a plaintiff; under those circumstances – where the subsidiary would be bound by the judgment and had rights that would be affected – Rule 19(a) was satisfied. *Id.* at 1119-20. Here, estoppel will not bind the absentees, and no absentee rights have been identified. In *B. Fernandez & Hnos, Inc. v. Kellogg USA, Inc.*, 516 F.3d 18 (1st Cir. 2008), another contract case, the court was not analyzing Rule 19(a), but addressing Rule 19(b) concerns with respect to a complex multi-party contract scenario where plaintiffs sought primarily specific performance. *Id.* at 23. Similarly, *Laker Airways, Inc. v. British Airways, PLC*, 182 F.3d 843, 848 (11th Cir. 1999), did not hold that every "active participant" is a necessary party. It recognized joint tortfeasors need not be joined, but that the absentee's interests were "more significant than those of a routine joint tortfeasor." *Id.*

[16] *See Owens v. Rep. of Sudan*, 374 F. Supp. 2d 1, 29 n.30 (D.D.C. 2005) (Al Qaeda not necessary party in case against Sudan for material support); *Ward v. Apple Inc.*, 791 F.3d 1041, 1050 (9th Cir. 2015) (anti-trust co-conspirator will not generally satisfy Rule 19(a)(1)(B)(i), even if central to conspiracy). *See also Hall v. Nat'l Serv. Indus., Inc.*, 172 F.R.D. 157, 159 (E.D. Pa. 1997) (joinder of principal *and* agent not required); *Graco, Inc. v. PMC Global, Inc.*, No. 08-1304, 2009 U.S. Dist. LEXIS 26845, at *27 (D.N.J. Mar. 31, 2009) (individual upon whose act creates vicarious liability not required).

The fact that an absentee may have relevant evidence makes it a discovery target or witness, not a required party. *Haas v. Jefferson Nat'l Bank of Miami Beach*, did not hold otherwise; there, an absentee had an interest in property claimed by the plaintiff. 442 F.2d 394, 398 (5th Cir. 1971).

Nor is complete relief a problem. Fed. R. Civ. Proc. 19(a)(1)(A). Complete relief can be had if the relief afforded "is meaningful." *Bank of Am. Nat'l Tr. & Sav. Ass'n v. Hotel Rittenhouse Assocs.*, 844 F.2d 1050, 1054 n.5 (3d Cir. 1988). "[W]here liability is joint and several among multiple parties, a court may grant complete relief with respect to any one of them." *Gen. Refractories Co.*, 500 F.3d at 314. Here, Plaintiffs seek primarily monetary relief: damages and the disgorgement of Defendants' profits. This relief is meaningful. *See, e.g.*, *Huber v. Taylor*, 532 F.3d 237, 251 (3d Cir. 2008) (reversing finding that absentee was required where plaintiffs sought, "among other things, disgorgement of fees received by *Defendants*"). That Defendants may have third-party claims against Dinant or others, D.I. 54 at 26, is irrelevant. Completeness is determined by reference to the *parties*, "not as between a party and the absent person." *Gen. Refractories Co.*, 500 F.3d at 313 (internal quotes omitted).

Moreover, the injunction Plaintiffs seek also requires no other parties; it asks only that *Defendants* exercise any contract rights or control they have. *Contra* D.I. 54 at 26. Defendants cite cases where the *primary* relief sought was an injunction *requiring* action from the absentee.[17] Regardless, the "key" issue is not the relief *sought*, but whether the Court can "fashion" complete relief without the absentee; here it can "craft meaningful relief by awarding plaintiffs damages." *Doe v. Exxon Mobil Corp.*, 69 F. Supp. 3d 75, 100-01 (D.D.C. 2014) (internal quotes omitted).

Defendants also have not met their Rule 19(a)(1)(B)(i) burden to produce evidence showing the absentee's interest and that the "interest will be impaired by the absence." *Colon v. Blades*, 570 F.

[17] *Acierno v. Preit-Rubin Inc.*, 199 F.R.D. 157, 163 (D. Del. 2001) (the particular injunction sought "necessarily depends on the [absentee's] approval"); *Dawavendewa, v. Salt River Project Agric. Improvement & Power Dist.*, 276 F.3d 1150, 1155 (9th Cir. 2002) (where plaintiff sued defendant, for conduct required by a contract with an absentee, the injunction sought would not assure plaintiff relief since the absentee would not be bound by a decision and could seek to enforce the contract).

Supp. 2d 204, 209 (D.P.R. 2008) (internal quotes omitted). The interest must be concrete and its impairment cannot be speculative. *See Janney Montgomery Scott, Inc. v. Shepard Niles, Inc.*, 11 F.3d 399, 407-08 (3d Cir. 1993). Defendants just say that this case will harm absentees' interests, but fail to meet their burden to identify those interests or explain how they would be impaired. D.I. 54 at 26.

Last, Defendants have made no argument under Rule 19(a)(1)(B)(ii) about how they would be subject to multiple or inconsistent judgments without the absentees.

B. This case should proceed "in equity and good conscience" under Rule 19(b).

Even if any absentee should be joined, the case cannot be dismissed because none are indispensable parties; none have an interest in the controversy such "that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience." *Zambelli Fireworks Mfg. Co. v. Wood*, 592 F. 3d 412, 421 (3d Cir. 2010) (internal quotes omitted). Since there is no other forum where this case could be litigated against the absentees, dismissal would result in impunity for serious abuses and is not in "equity or good conscience."

Four non-exhaustive factors guide the Rule 19(b) inquiry, all of which favor proceeding. *First*, no absentee or party would be prejudiced by a judgment. Defendants suggest some Honduran immunity interest will be, but do not identify that interest or how it will be harmed. D.I. 54 at 28. Defendants misstate *Republic of Philippines v. Pimentel*, 553 U.S. 851 (2008); there, the Philippines claimed an interest in the same property Plaintiffs sought to seize, "a textbook example" of a case where an absentee may be severely prejudiced. *Id.* at 868-70. The Court noted a "specific affront" could result if a foreign court ordered such property seized, *id.* at 866; it did not suggest such an affront arises any time a U.S. court hears a claim that "arose in a foreign land." D.I. 54 at 28. Nor did it suggest, contrary to the joint tortfeasor rule, that if state security forces are implicated in torts against a third party, the case should be thrown out because the sovereign cannot be joined; that

would overturn countless human rights cases. *See, e.g.*, *Doe v. Unocal Corp.*, 963 F. Supp. 880, 889 (C.D. Cal. 1997) (rejecting argument that foreign state was necessary party in suit against company complicit in state abuses).

Defendants also claim the Farmer Cooperatives will be prejudiced, asserting that some of Plaintiffs' claims depend on ownership of land the cooperatives own. But the cooperatives either will be represented – one proposed class includes all affected members, D.I. 47 at ¶ 543 – or, if they are "not before the court, [they] cannot be bound by the judgment rendered." *Provident Tradesmens Bank*, 390 U.S. at 110. Regardless, only the unjust enrichment claims even possibly involve ownership. At worst, the Court could narrow the relief by dismissing those claims, *see* Rule 19(b)(2); there is no basis to dismiss the entire case. Requiring Defendants to pay damages for personal injuries or enforce a contract with Dinant cannot affect the cooperatives' ownership interest.

Defendants fail to articulate any specific prejudice to Dinant or Banco Ficohsa; they are just joint tortfeasors. Likewise, Defendants identify no prejudice to *them* beyond that which would exist for any joint tortfeasor. *See Janney Montgomery Scott*, 11 F.3d at 412 (defendant's right to contribution or indemnity from absent party does not render absentee indispensable); *accord Gen. Refractories Co.*, 500 F.3d at 320 (noting defendants can bring a separate action).

Second, under Rule 19(b)(2), if there were any prejudice, it "could be lessened" by shaping a potential judgment. Thus, if the injunctive relief requested – ordering Defendants to exercise their rights under their loan agreements – is still viable after Dinant repaid the loan, the Court can narrow the injunction or deny it and award only money damages. Defendants do not dispute this; they reiterate their Rule 19(b)(1) argument about Honduras' immunity, failing again to explain how it would be prejudiced if Defendants exercised rights against Dinant, or if Defendants paid damages.

Third, under Rule 19(b)(3), "a judgment rendered in the person's absence [would] be adequate" here, because this turns on whether the relief will be an adequate remedy *for the plaintiff*.

Gen. Refractories Co., 500 F.3d at 320-21. This Court can grant adequate relief by awarding damages, or forcing Defendants to disgorge profits, which is "the proper measure of money damages for unjust enrichment." *Skold v. Galderma Labs., L.P.*, No. 14-5280, 2017 U.S. Dist. LEXIS 139217, at *28 (E.D. Pa. Aug. 29, 2017). Defendants' contrary arguments are wrong. D.I. 54 at 29. The relief is "adequate" even if the Court does not issue an injunction. Regardless, an injunction forcing IFC to exercise its rights in a contract with Dinant does not affect the Honduran government. Whether Honduras is a preferable forum is irrelevant to whether this Court can provide an adequate remedy.

Last, under Rule 19(b)(4), the Plaintiffs here would *not* "have an adequate remedy if the action were dismissed." There is no "assurance" Plaintiffs "could sue effectively in another forum where better joinder would be possible." *Gen. Refractories Co.*, 500 F.3d at 321-22. Defendants do not assert Honduran courts would have personal and subject matter jurisdiction over claims against them nor do they waive any such limits. And Plaintiffs could not safely bring these claims – including against the absentees – in Honduras. Prior efforts to obtain redress resulted in serious violence and murder. *Supra* SoF at § II. The Court should reject Defendants' blithe suggestion that the people they are chartered to protect should file a suit that might get them killed. D.I. 54 at 29-30.

IV. IFC is subject to personal jurisdiction in Delaware.

A. IFC is subject to personal jurisdiction as AMC's alter ego.

Defendants do not dispute that AMC is subject to general jurisdiction in Delaware. They also do not contest that *if* IFC is AMC's alter ego, *then* it too is subject to general jurisdiction in Delaware; alter egos are "one entity for jurisdictional purposes." *Transfield ER Cape Ltd. v. Indus. Carriers, Inc.*, 571 F.3d 221, 224 (2d Cir. 2009) (internal quotation omitted).[18] Here, IFC and AMC are

[18] The Supreme Court "left intact [the] alter ego test for 'imputed' general jurisdiction." *Ranza v. Nike, Inc.*, 793 F.3d 1059, 1071 (9th Cir. 2015). *See also Transp. Ins. Co. v. Am. Harvest Baking Co.*, No. 15-663, 2015 U.S. Dist. LEXIS 168018, at *7 (D.N.J. Dec. 16, 2015) (alter ego can be used to establish general jurisdiction). Defendants' complaint about a lack of in-forum conduct, D.I. 54 at 32-33, confuses general and specific jurisdiction; the former requires no claim-related conduct.

alter egos: they have argued they are the same international organization; even without that admission, the fact that AMC and IFC actually operate as one suffices for alter ego jurisdiction.

1. A flexible, federal common law alter ego analysis applies here.

Delaware alter ego liability rules do not govern the jurisdictional alter ego analysis; federal common law applies. This is a federal question case under 22 U.S.C. § 282f, which "is part of a comprehensive statutory framework designed to implement an international agreement to which the United States is a party." *Int'l Fin. Corp. v. GDK Sys., Inc.*, 711 F. Supp. 15, 17-18 (D.D.C. 1989). Where, as here, there is a clear federal interest, *id.*, federal (common) law governs the alter ego analysis and "usually gives less respect to the corporate form than does the strict common law later ego doctrine." *See Bhd. of Locomotive Eng'rs v. Springfield Terminal Ry.*, 210 F.3d 18, 25-27 (1st Cir. 2000) (internal quotations omitted) (federal choice of law rules apply in federal question cases, and substantive federal rule justified where there is a strong federal interest). And federal law governs alter ego determinations for foreign sovereigns. *FNCB*, 462 U.S. at 621-23; *McKesson Corp. v. Islamic Rep. of Iran*, C.A. No. 82-0220, 1993 U.S. Dist. LEXIS 11792, at *58 (D.D.C. Aug. 23, 1993) (same).

Under federal law, a "less stringent" alter ego analysis applies for jurisdiction than for a determination of liability. *Enter. Rent-A-Car Wage Emp't Practices Litig.*, 735 F. Supp. 2d 277, 319 (W.D. Pa. 2010). Jurisdiction is about contacts with the forum, so the inquiry "should not be limited to traditional alter-ego jurisprudence but should encompass whether or not there is a single functional and organic identity." *In re Latex Gloves Prods. Liab. Litig.*, MDL Dkt. No. 1148, 2001 U.S. Dist. LEXIS 12757, at *12 (E.D. Pa. Aug. 22, 2001). Thus, the jurisdictional standard does not require fraud. *See Sugartown Worldwide LLC v. Shanks*, 129 F. Supp.3d 201, 205-06 (E.D. Pa. 2015); *cf. Marine Midland, N.A. v, Miller*, 664 F.2d 899, 904 (2d Cir. 1981).

2.Defendants argue that they are the same entity and operate as one.

Defendants themselves argue that they are alter egos: they admit "AMC is not a separate

international organization." D.C. Action, D.I. 17 at 12; *see also* D.I. 47 ¶¶ 83, 423. Under any rule, AMC and IFC are alter egos. Courts "[do] not defer to corporate boundaries that the defendant itself has disregarded." *In re Chocolate Confectionary Antitrust Litig.*, 674 F. Supp. 2d 580, 599 n.25 (M.D. Pa. 2009). And it would have the doctrine backward if Defendants could invoke their sameness to obtain immunity, and cast it aside to defeat jurisdiction; courts pierce the veil where the entities act as one but do *not* to confer immunity. *Somerlott*, 686 F.3d at 1157 and n.1 (Gorsuch, J., concurring).

Under federal law, a foreign sovereign-owned corporation that is not, in reality, a separate entity, "is not to be regarded as legally separate from its owners"; this principle applies in two circumstances: where the subsidiary "is so extensively controlled by [the sovereign] that a relationship of principal and agent is created," or where recognizing the sovereign and its subsidiary as distinct "would work fraud or injustice." *FNCB*, 462 U.S. at 629-30; *accord Rubin v. Islamic Republic of Iran*, 138 S. Ct. 816, 822-23 (2018). Likewise, under Delaware law, a parent and subsidiary will be treated as a single entity where they "operate[ ] as a single economic entity such that it would be inequitable . . . to uphold a legal distinction between them." *Mabon, Nugent & Co. v. Tex Am. Energy Corp.,* C.A. No. 8578, 1990 Del. Ch. LEXIS 46, at *14-15 (Apr. 12, 1990). Defendants admit they share a "complete unity of interest," D.I. 54 at 15, n.5, and they operate as a single unit.

Defendants argue only that Plaintiffs have not alleged "commingling, fraudulent transfers and disregard of the separate corporate structure," D.I. 54 at 31. These factors are not required.[19] "No one aspect" of the parent-subsidiary relationship "disposes of the [alter-ego] analysis"; instead courts assess their "functional interrelationship:" whether the parent owns all the subsidiary's stock; whether the two companies share officers, directors, employees; whether their operations are integrated; and whether the parent exercises control or provides instruction to the subsidiary.

[19] The case Defendants cite does not say commingling or fraudulent transfers are necessary, it merely found them sufficient. *Reach & Assocs., P.C. v. Dencer*, 269 F. Supp. 2d 497, 506 (D. Del. 2003).

Chocolate Confectionary, 674 F. Supp. 2d at 598.

AMC and IFC are one entity under any measure of "functional interrelationship," because IFC's control over AMC, including day-to-day operations, *see Rubin*, 138 S.Ct. at 823, is so extensive. IFC approves and jointly manages all AMC investments; IFC wholly owns AMC; AMC projects are limited to activities IFC could perform; IFC approves AMC's board members and its CEO chairs AMC's Board; AMC *must* comply with IFC's "operational policies" and project requirements, and IFC staff oversee compliance; IFC and AMC share their principal and other offices, as well as employees; AMC employees follow IFC's employment policies; IFC includes AMC on its consolidated financial statements, and IFC benefits from AMC's acts, *see Rubin*, 138 S.Ct. at 823, since AMC's purpose is to further IFC's mission. D.I. 47 ¶¶ 81, 88, 90-96, 424-25; D.I. 25-2 ¶¶ 3, 5-6; D.I. 54 at p. 3-4; D.I. 55-1 at 22-23. IFC's control exceeds the "usual supervision," and their functional integration is manifest. *Chocolate Confectionary*, 674 F. Supp. 2d at 598.

B. Jurisdiction is proper because IFC was joined under Rule 19.

IFC was joined as a required party under Rule 19(a). D.I. 47 ¶ 52. Personal jurisdiction exists over parties added under Rule 19, and served within 100 miles of the court. Fed. R. Civ. Proc. 4(k)(1)(B). Defendants **do not** dispute IFC is required under Rule 19(a) or that it was served within 100 miles of the court; IFC is therefore subject to personal jurisdiction.

IFC argues *only* that Plaintiffs cannot invoke the "bulge" rule because it is an original party. D.I. 54 at 32. They are wrong. IFC was *added* as a defendant in an amended complaint that specifically invoked Rule 4(k)(1)(B). D.I. 47 ¶ 52. A party amended into a complaint is not an "original" party. *Nelson v. Adams USA, Inc.*, 529 U.S. 460, 466-67 (2000). Thus, plaintiffs may invoke Rule 4(k)(1)(B) to establish jurisdiction over a defendant *added* by amendment. *See Atl. Mut. Ins. Co. v. CSX Expedition*, 00 Civ. 7668, 2002 U.S. Dist. LEXIS 1979, at *3-6 (S.D.N.Y. Feb. 6, 2002).

Defendants' cases do not suggest a party cannot invoke Rule 4(k)(1)(B) when they amend in

a required party.[20] And neither the plain meaning of the word "joined" nor the Rule's commentary limits *how* a party can be joined. Rules 19 and 4(k)(1)(B) provide the flexibility "to bring before the court all persons whose joinder would be desirable for a just adjudication." 7 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1604 (3d ed. 2018). Courts reject Defendants' formalism. *See e.g.*, *Chang Young Bak v. Metro-North R. Co*, No. 12-CV-3220, 2013 WL 1248581, at *3-4 (S.D.N.Y. Mar. 26, 2013) (if party is necessary, "there may be a persuasive reason to overlook the fact it was not joined pursuant to Rule 19, and find personal jurisdiction under Rule 4(k)(1)(B)").[21]

V. Plaintiffs have adequately alleged Defendants' liability.

A. The Court should deny Defendants' Rule 12(b)(6) motion as premature.

Defendants' request that the Court decide the legal sufficiency of Plaintiffs' claims is premature. "Cases from within the Third Circuit support deferring choice of law determinations at the pleadings stage." *Agrofresh v. Essentiv LLC*, No. 16-662, 2018 U.S. Dist. LEXIS 218379, at *20-21 & n.6 (D. Del. Dec. 27, 2018) (collecting cases). This case is in its early stages, and the choice of law analysis (and even the determination of which choice of law principles apply) is complex: this is a federal question case, *supra* § IV.A.1, involving an international organization; filed in a Defendant's home state of Delaware; where the tortious commercial activity occurred in D.C.; and the injuries were suffered in Honduras. No discovery has occurred, and many facts relevant to the analysis remain unexplored. As in *Agrofresh*, it is premature to decide what law applies.[22] That means the

[20] They address "original parties" named in original complaints. *See Pierce v. Globemaster Balt, Inc.*, 49 F.R.D. 63, 67 (D. Md. 1969); *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).

[21] If Defendants' formalism were to defeat jurisdiction under the bulge rule, Plaintiffs will simply "join" IFC by motion. If the Court were to determine there is no basis for personal jurisdiction at all, it should not dismiss but transfer to the D.C. district court under 28 U.S.C. § 1631. *See D'Jamoos ex rel. Estate of Weingeroff v. Pilatus Aircraft Ltd.*, 566 F.3d 94, 110 (3d Cir. 2009).

[22] *Zazzali v. Hirschler Fleischer, P.C.*, 482 B.R. 495, 517 (D. Del. 2012); *Graboff v. The Collern Firm*, C.A. No. 10-1710, 2010 WL 4456923, at *8 (E.D. Pa. Nov. 8, 2010).

Court should defer ruling on the legal sufficiency of Plaintiffs' claims. *Id.*

Even if the court could make a choice of law determination, Defendants assume that Delaware choice of law principles apply and that they point to Honduran law. Both assumptions are questionable. In federal question cases, federal common law choice of law rules control. *Pfizer Inc. v. Elan Pharm. Research Corp.*, 812 F. Supp. 1352, 1359 (D. Del. 1993). *See also supra* § IV.A.1. And even under a Delaware analysis, courts first determine "whether there is an actual conflict of law between the proposed jurisdictions." *Bell Helicopter Textron, Inc. v. Arteaga*, 113 A.3d 1045, 1050 (Del. 2015). Under the depecage principle, the conflict search should be done issue by issue. *See Pittman v. Maldania, Inc.*, No. 00C-01-029, 2001 Del. Super. LEXIS 549, at *7-9 (Super. Ct. Del., July 31, 2001). Here, Defendants do not identify any conflicts, on any issue. So, Delaware law would apply. *Otto Candies, LLC v. KPMG LLP,* C.A. No. 2018-0435, 2019 WL 994050 *16 (Del. Chanc. Feb. 28, 2019).

If there is a conflict, "the court determines which jurisdiction has the most significant relationship to the occurrence and the parties." *Arteaga*, 113 A.3d at 1050. Defendants' facile argument that Honduran law applies to the entire case because the injuries were suffered there, D.I. 54 at 33, ignores depecage, and the interests of the federal government (which set up a comprehensive scheme to govern the IFC) and D.C. (where the aiding, abetting, negligence and unjust enrichment took place). Since Defendants have not argued that Plaintiffs fail under federal common law or D.C. law, their motion must be denied. *See Graboff*, 2010 WL 4456923, at *8.

B. If it applies, Plaintiffs state claims under Honduran law.

Under Honduran law, "anyone who by act or omission causes injury to another person (a tort), must repair that injury." Declaration of Tirza del Carmen Flores Lanza (Flores Decl.) ¶ 28; *accord* Declaration of Víctor Antonio Fernández Guzmán (Fernández Decl.) ¶¶ 5, 7.[23] The Civil Code provides for liability and damages for any "illicit acts or omissions or acts in which any type of fault

[23] Fernández adopted the Flores Declaration in full. Fernández Decl. ¶¶ 5, 7.

or negligence is involved" when those acts cause harm. Flores Decl. ¶¶ 28, 30. And anyone "who reaps economic benefit from a crime is obliged to return said benefit to the victim(s)." *Id.* at ¶ 33. Defendants are liable for their willful and negligent acts and omissions that harmed Plaintiffs, and for profiting from Dinant's crimes. *Id.* at ¶ 38. Their Honduran law arguments are meritless.

First, it does not matter whether the Code specifically provides for "lender liability," Fernández Decl ¶¶ 11, 17; *contra* D.I. 54 at 34; there is also no specific code provision for truck-driver liability, for example. Article 1346 applies to *everyone* who is negligent, *id.*, and Defendants cite no provision exempting financiers. D.I. 55-1 at 153-154; D.I. 54 at 34. And Defendants are not mere arms-length lenders; they lend only if their lending *enables* projects such as Dinant's to move forward, and they take an active role in project design and supervision. *Supra* SoF § I. They are liable just like anyone else who causes harm. Fernández Decl ¶ 17.

Second, Honduras does not require a criminal conviction before bringing a civil claim. Fernández Decl ¶ 14; Flores Decl. ¶38; *Contra* D.I. 54 at 34-35. Plaintiffs' claims are "causes of action arising out of civil liability," which "may be carried out independently of any action stemming from a criminal act." Flores Decl. ¶ 38. A conviction is only needed to use a "fast-track" procedure for civil damages. D.I. 55-1 at 154.[24] Defendants' expert admits that in addition to the "fast-track procedure," an "ordinary declarative process under the Code of Civil Procedure" also exists. D.I. 55-1 at 160. While the Criminal Code can provide guidance for what constitutes "illicit" behavior, it does not limit the conduct that is civilly actionable. *See* Fernández Decl. ¶ 16. There is also no requirement that Defendants employed Dinant. *See* Fernández Decl ¶¶ 11, 17; Flores Decl. ¶ 37.[25]

Third, Plaintiffs allege a cognizable duty; in Honduras, as here, negligent behavior can derive

[24] Even if a criminal conviction were a *procedural* prerequisite, it is not required here because only *substantive* foreign law could apply.

[25] Legal persons can be held liable for damages under the Civil Code. Fernández Decl. ¶ 15.

from a general duty to act with prudence and not to harm others. Fernández Decl ¶¶ 11-12; *Contra* D.I. 54 at 35. While the determination of causation requires a factual analysis that is premature at this stage, Plaintiffs adequately allege causation. *See* Flores Decl. ¶¶ 28, 34-38; *infra* § V.C.1 & 2.

C. Plaintiffs state claims under Delaware law.

1. Plaintiffs adequately allege Defendants aided and abetted Dinant.

Defendants admit, D.I. 54 at 36, they can be liable for "the tortious conduct of another, if [they] . . . [knew] that the other's conduct constitutes a breach of duty and [gave] substantial assistance or encouragement to the other so to conduct himself." Restatement § 876.[26] Plaintiffs plainly meet this standard.

First, Defendants clearly knew Dinant's conduct was tortious and that it was engaged in serious violence in the Aguán when they gave it millions of dollars. Specifically, Plaintiffs allege: Defendants knew of Dinant's violence and land-grabbing in the Aguán *before* disbursing the first $15 million, and their knowledge only grew as they continued financing Dinant, including through Banco Ficohsa, waiving their own requirements to do so. *Supra* SoF § II.B. & C.[27]

Although Defendants concede the standard is knowledge, they also erroneously claim Plaintiffs must show some intent to assist the wrongful act. D.I. 54 at 36. But "shared intent" is not required. *Failla v. City of Passaic*, 146 F.3d 149, 157-58 (3d Cir. 1998). Section 876(b) explicitly establishes, and Delaware courts hold, that the *mens rea* is knowledge.[28] The nation's leading aiding

[26] Delaware relies on the Restatement § 876 for "the parameters of secondary liability." *Prairie Capital III, Ltd. P'ship v. Double E Holding Corp.*, 132 A.3d 35, 63 (Del. Ch. 2015).

[27] Defendants looked the other way, and gave Dinant and Ficohsa *repeated* extensions for compliance with the Performance Standards, while they were killing farmers in the Aguán. *Supra* at SoF § II.B.

[28] *E.g. In re Dole Food Co., Stockholder Litig.*, No. 9079-VCL, 2015 Del. Ch. LEXIS 223, at *139 (Del. Ch. Aug. 27, 2015); *Lake Treasure Holdings, Ltd. v. Foundry Hill GP LLC*, No. 6546-VCL, 2014 Del. Ch. LEXIS 205, at *34-35 (Del. Ch. Oct. 10, 2014); *In re Rural Metro Corp. Stockholders Litig.,* 88 A.3d 54, 98-99 (Del. Ch. 2014); *Kuhns v. Hiler,* No. 7586-VCG, 2014 Del. Ch. LEXIS 47, at *69-74 (Ch. Mar. 31, 2014). Defendants cite *Jenkins v. Williams*, No. 02-331, 2008 U.S. Dist. LEXIS 37247 (D. Del. May 7, 2008), but it misstated *Anderson v. Airco, Inc.*, 2004 Del. Super. LEXIS 393, which held

and abetting decision, *Halberstam v. Welch*, 705 F.2d 472, 487-88 (D.C. Cir. 1983), confirms that "general awareness" suffices. Applying Section 876(b) under D.C. law, the D.C. Circuit held a burglar's wife liable for murder. "[I]t was not necessary" for the wife to even know her husband was committing burglary, let alone a murder; "it was enough that she knew he was involved in some type of personal property crime." *Id.* at 488; *accord Aetna Cas. and Sur. Co. v. Leahey Const. Co.*, 219 F.3d 519, 533-34 (6th Cir. 2000) (knowledge sufficient).[29] If intent were required, Defendants' knowing, years-long support of Dinant's illicit expansion "evidences a deliberate long-term intention" to make the venture succeed, and plausibly establishes intent. *Halberstam*, 705 F.2d at 488.

Second, Plaintiffs sufficiently allege "substantial" assistance. "[T]he success of the tortious enterprise clearly required [funding], and [Defendants'] role in that" was not just "substantial" as in *Halberstam*, 705 F.2d at 488, it was indispensable. Funding a violent organization, and thereby "putting [it] in a position to continue and intensify its terror campaign . . . readily meets the definition of 'substantial assistance.'" *In re Chiquita Brands Int'l, Inc. Alien Tort Statute & S'holder Derivative Litig.*, 190 F. Supp. 3d 1100, 1119 (S.D. Fla. 2016). Moreover, substantiality is a fact-specific inquiry that cannot generally be resolved even on summary judgment, let alone on the pleadings. *Cf. In re Chiquita Brands Int'l, Inc.*, 284 F. Supp. 3d 1284, 1317-18 (S.D. Fla. 2018) (summary judgment denied where "reasonable jurors could debate whether financial contributions of the magnitude and timing . . . were a material and substantial factor in enhancing [ ] terror capabilities").

Defendants' assistance vastly increased Dinant's ability to commit crimes. Defendants

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that the standard is only "knowledge," *Id.* at *23, as the post-*Jenkins* decisions cited above confirm.

[29] Defendants cite inapposite cases. *Taylor v. Am. Chemistry Council*, 576 F.3d 16, 35 & n.21 (1st Cir. 2009), addressed Massachusetts law, which is out of step with Section 876(b). *See also Juhl v. Airington* 936 S.W.2d 640, 644 (Tex. 1996) (same) (quoting *Payton v. Abbott Labs*, 512 F. Supp. 1031, 1035 (D. Mass. 1981)). *Goldberg v. UBS AG*, 660 F. Supp. 2d 410, 425 (E.D.N.Y. 2009), takes its "desire" standard from a criminal case, an approach the Third Circuit rejected. *Failla*, 146 F.3d at 157-58. Also where the abettor benefits from the wrong the *knowledge* requirement "may be less strict"; constructive notice suffices. *Gould v. American-Hawaiian S.S. Co.,* 535 F.2d 761, 780 (3d Cir. 1976).

supplied the tens of millions of dollars Dinant needed to expand its palm oil production. *Supra* SoF § II.B. That expansion involved Dinant increasing and consolidating its control over contested land. *Id.* By giving Dinant the ability to expand and consolidate, Defendants also gave them incentive to intimidate or kill more farmers with competing land claims so that it could acquire or hold more land. *Id.* And their loans enabled Dinant to quadruple its security forces and upgrade their weapons, *id.*, giving Dinant an increased ability to commit this violence. *See Boim v. Holy Land Found. for Relief & Dev.*, 549 F.3d 685, 698 (7th Cir. 2008) ("if you give money to an organization that you know to be engaged in terrorism, the fact that you earmark it for the organization's nonterrorist activities does not get you off the liability hook"). Defendants' assistance satisfies any substantiality test."[30]

Contrary to what Defendants suggest, D.I. 54 at 37-38, aiding and abetting liability focuses on the assistance to the perpetrator, not whether the assistance caused the harm; "[a]n aider-abettor is liable for damages caused by the main perpetrator." *Halberstam*, 705 F.2d at 478; *see also Linde v. Arab Bank, PLC*, 882 F.3d 314, 330-31 (2d Cir. 2018) (substantiality test is not causation). If causation were central, an abetting theory would be useless, since it would essentially duplicate negligence, but with a higher *mens rea*.[31] And all abetting cases involve a third party's acts; if that party's independent act absolved the abettor, abettors would never be liable.

Comment d to Section 876 says that it is *sufficient* if the assistance is "a substantial factor in

[30] Other factors under Section 876 confirm Defendants' assistance was substantial. "[R]esponsibility for the same amount of assistance increases with the blameworthiness of the tortious act." *Halberstam*, 705 F.2d at 484 n.13. The assault and murder here could hardly be more blameworthy. Likewise, defendants' knowledge that Dinant had murdered farmers and was continuing to do so strongly supports substantiality. *See id.* at 488. So too does Defendants' years-long support. *See id.*

[31] If Defendants mean to suggest but-for causation is required, they are wrong. *Linde*, 384 F. Supp. 2d at 584-85 (no requirement that suicide bomber would not have acted but for bank's assistance) (citing *Halberstam*); *Aetna*, 219 F.3d at 537 (holding substantial assistance does not mean *necessary* assistance). Indeed, a bank's mere transfer of *someone else's* money suffices. *E.g. Wultz*, 755 F. Supp. 2d at 50, 57; *Linde*, 384 F. Supp. 2d at 576, 584-85. In any event, the expansion, and thus the violence, would not have happened without Defendants' funding.

causing the resulting tort," not that this is necessary. D.I. 54 at 37.[32] Regardless, comment d supports Plaintiffs; it directs the inquiry to the Section 876 factors referenced above, which, Defendants do not argue. In any event, since Defendants' funding gave Dinant motive and means to harm Plaintiffs, it was a substantial factor. *See Strauss v. Credit Lyonnais, S.A.*, 925 F. Supp. 2d 414, 432-34 (E.D.N.Y. 2013) (finding juror could conclude under ATA proximate cause standard that funds bank sent terrorist group was a "substantial reason" group could perpetrate terrorist acts).

Defendants also suggest, without support, that their money must have been specifically used to harm these specific plaintiffs. D.I. 54 at 38. Plaintiffs do allege that, *see supra* SoF § II.B, D.I. 47 ¶ 230, but it is unnecessary. *In re Chiquita Brands Int'l*, 792 F. Supp. 2d at 1338-39; *see also Strauss*, 925 F. Supp. 2d at 433 (Plaintiffs need not "trace specific dollars to specific attacks."); *Halberstam*, 705 F.2d at 488 (amount of assistance is measured by how much it abets the pattern of crime, not individual acts). In *Halberstam*, the defendant who assisted a burglary enterprise was liable for murder, because one who abets a wrongful act "may be liable for other reasonably foreseeable acts done in connection with it," and "violence and killing [wa]s a foreseeable risk." 705 F.2d at 483-84, 488. So too here. Defendants funded Dinant's expansion on contested lands, knowing Dinant used violence against those who challenged its land claims; "violence and killing [was] a foreseeable risk."

Finally, Defendants say they provided "routine professional services," but they did not just "aid the tortfeasor in remaining in business," D.I. 54 at 38 (quoting *El Camino Res., LTD v. Huntington Nat'l Bank*, 722 F. Supp.2d 875, 907 (W.D. Mich. 2010); as has just been noted, they aided the tort. The act need not be "obviously nefarious." *Halberstam*, 705 F.2d at 482. Courts have found liability for providing otherwise routine banking services. *E.g. Aetna*, 219 F.3d at 536; *FDIC v. First*

[32] *Mens rea*, *actus reus* and proximate cause are all issues for the jury and not proper for a motion to dismiss. *E.g.*, *Harrison v. Missouri P. R. Co.*, 372 U.S. 248, 249 (1963); *Doe v. U.S.*, 718 F.2d 1039, 1042-43 (11th Cir. 1983); *Threaf Properties, Ltd. v. Title Ins. Co. of Minnesota*, 875 F.2d 831, 838-39 (11th Cir. 1989); *In re Dole Food Co., Stockholder Litig.,* No. 9079-VCL, 2015 Del. Ch. LEXIS 223, at *139 (Ch. Aug. 27, 2015).

Interstate Bank of Des Moines, NA, 885 F.2d 423, 425-28, 430-31, 436 (8th Cir. 1989); *Linde v. Arab Bank, PLC*, 384 F. Supp. 2d 571, 584 (E.D.N.Y. 2005).

2. Defendants are liable for negligently funding murder and violence.

Defendants do not deny that funding Dinant's expansion – despite knowing its ownership of the land was hotly disputed and that it "settled" land disputes with violence – was unreasonable. Nor do they deny that the murders were foreseeable. Because they owed Plaintiffs a duty and their breach caused Plaintiffs' injuries, they are liable for negligence.

Defendants exist to help people like Plaintiffs, but say they owed Plaintiffs no duty. D.I. 54 at 39. They are wrong. Defendants owed Plaintiffs a duty of care, for a number of reasons.

First, "anyone who does an affirmative act is under a duty" to exercise reasonable care "to protect [others] against an unreasonable risk of harm" arising from the act. *Rogers v. Christina School Dist.*, 73 A.3d 1, 7 (Del. 2013) (quoting Restatement § 302, comment a). This includes where "the foreseeable action of . . . a third person" creates the harm. *Id.* (quoting Restatement §302). Everyone has a duty to avoid conduct that risk harms by third persons, if they should have "reasonably foreseen" the third party's act. *See Sirmans v. Penn*, 588 A. 2d 1103, 1106-08 (Del. 1991) (finding potential negligence involving third party's crime); Restatement § 302B, and comments e(H), f.[33]

Here, Defendants acted affirmatively: providing funds which encouraged and enabled the expansion and killing; suggesting that Dinant employ Honduran military (associated with serious human rights violations); and continuing to finance as the violence escalated. Defendants owed Plaintiffs the ordinary duty of care, because the violence Plaintiffs suffered was foreseeable, and actually known, when Defendants acted. *Supra* SoF § II.B. & C.

Ignoring all of this, Defendants claim that they had no duty "to control" Dinant or "protect" plaintiffs absent a "special relationship." D.I. 54 at 39. Defendants' own cases recognize the special

[33] Delaware generally follows the Restatement (Second) of Torts regarding duty. *Rogers*, 73 A.3d at 7.

relationship principle applies to negligent *omissions*, not where, as here, liability is based on Defendants' affirmative acts. *Rogers*, 73 A.3d at 7; *Doe 30's Mother v. Bradley*, 58 A.3d 429, 448 (Super. Ct. Del., 2012); *accord Riedel v. ICI Americas Inc.*, 968 A.2d 17, 21-23 (Del. 2009).

Since the special relationship principle does not apply, it makes no difference whether it "especially" applies to lenders. D.I. 54 at 39.[34] Lenders have no special immunity from ordinary negligence and can be liable for their financing that creates or contributes to foreseeable harms. *E.g.*, *Connor v. Great W. Sav. & Loan Ass'n*, 69 Cal. 2d 850, 865 (1968). And again, IFC was no ordinary lender; it had extraordinary supervisory control over Dinant. *Supra* § IV.A. The sort of factors courts consider in the lender context are easily met. *See Connor*, 69 Cal. 2d at 864-67. Ultimately, it does not matter that Defendants are lenders: they can be held liable for funding murder.

Second, one who creates a dangerous situation thereafter owes a duty to exercise reasonable care to *prevent* harm. *Pipher v. Burr*, No. 96C-08-011-WTQ, 1998 Del. Super. LEXIS 26, *32-33 & n.13 (Sup. Ct. Del., Jan. 29, 1998); Restatement § 321. Since Defendants' loans created risks that Dinant would harm Plaintiffs, they owed Plaintiffs a duty, which they breached by failing to exercise reasonable care; indeed their action plan perpetuated if not intensified the carnage. *Supra* SoF § II.

Third, Defendants "render[ed] services to" Dinant that were for Plaintiffs' "protection" and are thus "liab[le] to [Plaintiffs] for [the] physical harm resulting from their failure to exercise reasonable care" in the rendering. *See Handler Corp. v. Tlapechco*, 901 A.2d 737, 747 (Del. 2005) (citing Restatement § 324A). IFC helps clients manage their social risks and impacts. *Supra* SoF § I. Here, for example, Defendants developed and required Dinant to adhere to a plan to employ Honduran soldiers as security. *Supra* SoF § II. These acts were imprudent, were "relie[d]" on by Dinant and "increase[d] the risk" to Plaintiffs," thus Defendants are liable. *Handler*, 901 A.2d at 747.

[34] Defendants' cases are about *omissions*, not affirmative acts. In *Lerner v. Fleet Bank, N.A.*, 459 F.3d 273, 286-87 (2d Cir. 2006), plaintiffs sued for failing to protect plaintiffs. *El Camino Res., LTD*, 722 F. Supp.2d at 907, merely noted in *dicta* that a bank had no duty to "discover customer wrongdoing."

Fourth, if a special relationship were required, Defendants' contractual control over Dinant to enforce IFC's commitments to host communities ought to suffice. *Supra* SoF § I.

Plaintiffs do not assert a boundless duty or a "general duty to society." D.I. 54 at 40, (quoting *Hamilton v. Berretta, U.S.A. Corp.*, 750 N.E.2d 1055, 1060 (N.Y. 2001)). Defendants have a duty to these Plaintiffs because they should have anticipated that their acts would endanger "one in the position of the injured plaintiff"; harm to a specific individual need not be foreseen. *Sirmans*, 588 A. 2d at 1107-08. Here, Defendants knew precisely the type of people they placed at risk: Dinants' neighbors, particularly those who claimed Dinant stole their land.

Plaintiffs also adequately allege proximate cause. Since Defendants argue only "the same reasons" they raised with respect to substantial assistance, D.I. 54 at 41, they have no argument. *Supra* § V.C.1. In any case, Defendant's act need not be a "substantial factor" in causing the harm; proximate cause includes "any cause which in a natural and continuous sequence produces the injury and without which the result would not have occurred," no matter how insubstantial a cause it is. *Culver v. Bennett*, 588 A.2d 1094, 1099 (Del. 1991). Plaintiffs meet this test; the expansion would not have gone forward without IFC and they would not have been murdered or abused if Defendants had not funded that expansion. *Supra* SoF § II.A. & B.

The fact that Dinant security committed the violence does not break the causal chain. There can be more than one proximate cause, and a third party's acts are not a superseding cause where they are reasonably foreseeable. *Duphily v. Del. Elec. Coop., Inc.*, 662 A.2d 821, 829 (Del. 1995).[35] Defendants *knew* their funding risked violence. In addition, Plaintiffs satisfy Restatement § 324A, which also shows proximate cause. *Johnson v. Abbe Eng'g Co.*, 749 F.2d 1131, 1133 (5th Cir. 1984).

[35] *Accord Sirmans,* 588 A.2d at 1106-07. "If the likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act whether innocent, negligent, intentionally tortious, or criminal does not prevent the actor from being liable for harm caused thereby." Restatement § 449.

3. Defendants were unjustly enriched.

An unjust enrichment claim lies where "defendants secured a benefit," which "it would be unconscionable to allow them to retain." *Shock v. Nash*, 732 A.2d 217, 232 (Del. 1999). One who obtains a benefit as a result of another's trespass or conversion is liable in restitution to the victim. Restatement (Third) of the Law, Restitution and Unjust Enrichment, § 40 (2011). A defendant cannot retain unjust benefits – like profits from financing land theft and a reign of terror – even if he "is not a wrongdoer" and received the benefits honestly. *Schock*, 732 A.2d at 232-33.

Defendants' sole argument – that there is no direct relationship between Defendants' enrichment and Plaintiffs' impoverishment because a plaintiff must act for defendant's benefit – is based on an inapposite *contract* case. D.I. 54 at 41-42 (citing *Vichi v. Koninklijke Philips Elecs. N.V.*, 62 A.3d 26, 59-60 (Del. Ch. 2012). Contract is about *mutual benefit*; so it makes sense to ask whether a plaintiff sought to benefit the defendant, but that makes little sense in tort. Plaintiffs did not intend to benefit Dinant when it took their land, but Dinant was still unjustly enriched. D.I. 54 at 42.

In any event, Defendants' enrichment *is* directly related to Plaintiffs' impoverishment. Dinant repaid Defendants based on lands and profits unjustly taken and held at Plaintiffs' expense. The fact that Defendants funded, and then benefitted from, egregious behavior distinguishes Defendants from others doing business with Dinant.

D. AMC is liable for IFC's acts, in addition to its own.

AMC is liable for IFC's acts because AMC "is not to be regarded as legally separate from its owners." *FNCB*, 462 U.S. at 629-30. Defendants admitted "AMC is not a separate international organization," D.I. 47 ¶ 423, and the facts bear that out. *Supra* § IV.A.[36] Given IFC's extensive

[36] Since this case involves third parties' rights and the status of an international organization's subsidiary, principles common to federal common law and international law should apply here as in *FNCB*. *See* 462 U.S. at 620-23. But Plaintiffs also meet the Delaware standard. *Supra* § IV.A.

control over AMC, they are principle and agent or alter egos.[37] *Id.*

VI. Plaintiffs' claims are timely.

A. Any minor's claims are timely, even without equitable tolling.

Juana Doe VII was eight when the case was filed, D.I. 47 ¶ 678, and is not subject to a limitations period. Del. Code Ann. tit. 10, § 8116. So too for the claims of minor class members.

B. Claims for recent murders and invasions are timely, even without tolling.

All claims, including class ones, based on abuses in the two years prior to filing – e.g., wrongful death, assault – are timely. Del. Code Ann. tit. 10, § 8119.[38]

The negligent and intentional infliction of emotional distress and trespass claims are rooted in violence and intimidation that the people of Panamá *continue* to suffer. Dinant is carrying out an ongoing program of aggression against the Panamá Plaintiffs and class. *Supra* SoF § II.B. Each of these interferences causing emotional distress gives rise to a new claim, and many of them have occurred within the undisputed limitations periods. *See, e.g.*, *Boney v. City of Dover*, 1994 Del. Super. LEXIS 142 *10-13 (Super. Ct. Del., Jan. 25, 1994) (one-time failure to place plaintiff on proper pay scale was ultimate source of claim, but each underpaid check created new claim with new limitations period). This analysis also governs the claims of any class member.

C. Unjust enrichment claims did not accrue until Dinant repaid its loan to IFC.

Plaintiffs' unjust enrichment claims accrued when Defendants were unjustly enriched; *i.e.* when Dinant repaid IFC with interest in November 2017. A claim accrues at the time of the "wrongful act," which for an unjust enrichment claim, is when the defendant "obtain[s] the benefit."

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[37] Courts apply the same alter-ego principles to LLCs and corporations. *E.g. Blair v. Infineon Techs. AG*, 720 F. Supp. 2d 462, 470 (D. Del 2010); *Bd. of Trs. of the Trucking Emps. of N. Jersey Welfare Fund, Inc.-Pension Fund v. 160 E. 22nd St. Realty*, LLC, No. 15-889, 2016 U.S. Dist. LEXIS 118916, at *6, 23-26 (D.N.J. Sept. 2, 2016); *In re Kitchin*, 445 B.R. 472, 481-83 (Bankr. E.D. Pa. 2010).

[38] Plaintiffs will submit further briefing about the dates and nature of injuries to individual plaintiffs under seal if the Court requests, but refrain from doing so here to protect their identities.

Vichi, 62 A.3d 26 at 42-43. Under Defendants' theory that the claims arose when the lands were taken by Dinant, *contra* D.I. 54 at 43, Plaintiffs' claims may have been barred before Defendants were enriched. Although statutes of limitations do not control equitable claims, courts usually apply the analogous statute. *IAC/InterActiveCorp v. O'Brian,* 26 A.3d 174, 177 (Del. 2011). Defendants admit the analogous limitation is three years. D.I. 54 at 43. Thus, Plaintiffs' claims are timely.

Even if the triggering event was Plaintiffs' impoverishment, the claims are not barred.[39] Courts permit equitable claims to proceed even though the statute has run if "unusual conditions or extraordinary circumstances make it inequitable" to bar the suit. *IAC/InterActiveCorp*, 26 A.3d at 177-78 (quoting Pom. Eq. Juris. 1441). Here, intimidation, violence and murder justifiably prevented Plaintiffs from bringing their claims earlier, as detailed in the next section.

D. Plaintiffs' claims were equitably tolled until 2017.

After funding a pattern of murder that prevented Plaintiffs from seeking redress, Defendants now claim Plaintiffs filed their claims too late. They are wrong. Plaintiffs' claims were equitably tolled by "the perpetual violence and instability that racked [Honduras]" and Plaintiffs' "justifiable fear of violent reprisal by potential defendants or defendants' allies." *Jane W. v. Thomas*, 354 F. Supp. 3d 630, 635 (E.D. Pa. 2018). *See also Arce v. Garcia*, 434 F.3d 1254, 1263, 1265 (11th Cir. 2006); *Chavez v. Carranza*, 559 F.3d 486, 494 (6th Cir. 2009).[40]

Defendants cite fiduciary cases to argue extreme violence does not toll if the plaintiff knows of her injury. D.I. 54 at 44. Nonsense. Neither case involved or addressed violence; they addressed a narrow situation wherein investors can assume their fiduciary acts in good faith, and self-dealing

[39] Plaintiffs were impoverished when they were evicted from disputed land. D.I. 47 ¶¶ 331-332, 546.

[40] Courts toll claims where circumstances prevent Plaintiffs from asserting their rights. *New Castle County v. Halliburton NUS Corp.*, 111 F.3d 1116, 1125-26 (3d Cir. 1997). Delaware and federal courts recognize "the same" bases for tolling. *Owens v. Carman Ford, Inc.*, C.A. No. N12C-12-214, 2013 Del. Super LEXIS, at *7-8 (Sept. 20, 2013).

claims are tolled until an investor actually discovers the breach. *See In re Dean Witter P'Ship Litig.*, C.A. No. 14816, 1998 Del. Ch. LEXIS 133, at *21-22 (July 17, 1998); *EBS Litig. LLC v. Barclays Glob. Inv'rs, N.A.*, 304 F.3d 302, 305 (3d Cir. 2002) (applying *Dean Witter*). These cases do not supplant the general rule that tolling applies where a plaintiff was "prevented from asserting his rights in some extraordinary way." *Owens v. Carmen Fora, Inc.*, C.A. No. N12C-12—214 2013 Del. Super. LEXIS, at *7-8 (Super. Ct. Del., Sept. 20, 2018).[41]

Here, "Plaintiffs' Complaint is rife with allegations sufficient to establish, for pleading purposes, that the limitations period . . . should be tolled until the date of filing" the D.C. Action. *Jane W.*, 354 F. Supp. 3d at 635.[42] After IFC's loan unleashed a wave of violence, it was too dangerous for Aguán residents to seek redress that might implicate Dinant. The 2012 murder of Antonio Trejo and 2013 murder of his brother, José, were direct attacks on lawyers seeking accountability for Plaintiffs' communities; indeed, up to 2017, when Plaintiffs' originally filed suit, Dinant has committed dozens of violent acts against Aguán residents who challenged it. *Supra* SoF § II.B. The Court recognized these risks, permitting Plaintiffs to proceed by pseudonym. D.I. 26.

CONCLUSION

Defendants are not above the law. They knowingly bankrolled murder, and like anyone else, they can be held liable for doing so. Defendants' motion should be denied in its entirety.

[41] Defendants suggest Honduran tolling law may apply, but that is incorrect. *In re Chiquita Brands Int'l, Inc. Alien Tort Statute & S'holder Derivative Litig.*, 190 F. Supp. 3d 1100, 1124 (S.D. Fla. 2016) (tolling Colombia law claims under federal equitable principles). Indeed, if the Court needed to determine which law applies to tolling, it is premature to do so. *Arcelik A.S. v. E. I. du Pont de Nemours & Co.*, No. 15-961-LPS, 2018 U.S. Dist. LEXIS 45728, at *22-23 (D. Del. Mar. 20, 2018).

[42] A complaint may "only" be dismissed on limitations grounds if the allegations "rule out the possibility that the statute of limitations should have been tolled." *Wisniewski v. Fisher*, 857 F.3d 152, 157-58 (3d Cir. 2017). Equitable tolling is generally not resolved on a motion to dismiss. *In re Cmty. Bank of N. Virginia*, 622 F.3d 275, 301-02 (3d Cir. 2010) (collecting cases).

Dated: June 14, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Misty A. Seemans, hereby certify that on June 14, 2019, I caused to be electronically filed a true and correct copy of the foregoing document with the Clerk of the Court using CM/ECF, which will send notification that such filing is available for viewing and downloading to the following counsel of record:

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