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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JOHN DOE I, Individually and on behalf of Proposed Class Members; JOHN DOE II, Individually and on behalf of Proposed Class Members; and JOHN DOE III, Individually and on behalf of Proposed Class Members;

Plaintiffs,

v.

NESTLÉ, S. A, NESTLÉ U.S.A., NESTLÉ Ivory Coast, ARCHER DANIELS MIDLAND CO., CARGILL INCORPORATED COMPANY, CARGILL COCOA, CARGILL WEST AFRICA, S.A

Defendants.

Case No. 2:**05-cv-5133-SVW-MRW**

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS

Date: January 9, 2017
Time: 1:30 P.M.
Ctrm: #6, 312 N. Spring St.
Judge: Honorable Stephen V. Wilson

Complaint Filed: July 14, 2005

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I. INTRODUCTION

Plaintiffs have sufficiently alleged that all three of the corporate Defendants in this case aided and abetted slavery and forced labor in Côte d'Ivoire. The six Plaintiffs were held against their will on cocoa farms in Côte d'Ivoire as children; there, they were beaten, tortured, and abused, and forced to work to harvest and produce cocoa. SAC ¶¶ 70–75. The Ninth Circuit has already found that Plaintiffs have sufficiently alleged that Defendants acted with the purpose to aid and abet slavery, in order to benefit from the lower cocoa prices that slavery provided, in providing advance payments to farms using child slavery, purchasing cocoa from the farms, providing farm equipment, visiting the farms and providing technical assistance. Defendants should be held liable for those actions because they both sufficiently touch and concern the United States and constitute the substantial assistance that is the *actus reus* for aiding and abetting.

While the Ninth Circuit has not spelled out as yet the test for touch and concern, it has explicitly rejected the "focus" test on conduct alone that Defendants continue to suggest. *Doe I v. Nestle USA, Inc.*, 766 F.3d 1013, 1028 (9th Cir. 2014) ("[S]ince the focus test turns on discerning Congress's intent when passing a statute, it cannot sensibly be applied to ATS claims, which are common law claims based on international legal norms."). The Ninth Circuit in *Mujica* indicated that it would apply a factor-based analysis that examines all circumstances and the nexus with the United States and the national interest, as the Fourth and Eleventh Circuits have also done. *Mujica v. AirScan Inc.*, 771 F.3d 580, 594 & n. 9 (9th Cir. 2014). [1]

[1] The Circuit could also adopt the test from the Breyer concurrence in *Kiobel*, which laid out three bright line rules which would definitively establish whether the case touches and concerns the United States. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659, 1671 (2013) (Breyer, J., concurring). Although *Mujica* indicated that U.S. citizenship alone was not enough, Plaintiffs maintain that any

Under this test, Plaintiffs in this case should prevail. The U.S. corporate defendants in this case took actions in the United States which constituted aiding and abetting of slavery in Côte d'Ivoire, and which harmed U.S. interests in stopping the flow of slave-made goods into the United States. The allegations in this case are more than enough to touch and concern the United States.

Nor can Defendants avoid liability on the theory that their assistance was not substantial. Plaintiffs have sufficiently alleged that Defendants had an "unprecedented degree of control" over the methods used for production—including enslaving children—on the farms they assisted. SAC ¶ 41. Defendants have acted to maintain and perpetuate the system of slavery, including by providing advance payments, tools and equipment, and exclusive purchasing agreements to farms using slavery. SAC ¶¶ 37–39, 41. This assistance, the Ninth Circuit has already found, was sufficiently alleged to have been with the purpose of aiding slavery. There is no question that this assistance was substantial.

Finally, Plaintiffs have standing to bring this claim against the companies that aided and abetted the people who held them in slavery. They have alleged an injury that is fairly traceable to the companies named.

II. PROCEDURAL HISTORY

Plaintiffs John Does I–VI are six former child slaves from Mali who were enslaved, brutally tortured, and forced to work harvesting cocoa in Côte d'Ivoire on plantations that produced cocoa exclusively for the Defendants. Plaintiffs appealed the district court's previous dismissal of their claims and after a lengthy appeal, the case was remanded with direction to allow them to file a Second

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one of the factors Justice Breyer enumerated in his concurrence should be sufficient to find that the case touches and concerns the United States.

Amended Complaint. *Nestle*, 766 F.3d at 1028–29. After the appeal, the remaining claim is for the aiding and abetting of forced labor and child slavery.

In remanding the case, the Ninth Circuit accepted that Plaintiffs had stated a substantive claim under the Alien Tort Statute, 28 U.S.C. § 1350. *Nestle*, 766 F.3d at 1022–23. The Ninth Circuit found that this claim met the standard laid out in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), and that corporations could be held liable for violations of the international prohibition on slavery. *Id*. Further, the Circuit found that Plaintiffs sufficiently alleged that Defendants assisted slavery in Côte d'Ivoire with the purpose of facilitating the slavery. *Nestle*, 766 F.3d at 1028–29. Thus, there is no remaining question as to whether there were sufficient allegations that the assistance occurred or whether it was with the appropriate *mens rea*.

The Ninth Circuit also already found that Plaintiffs sufficiently alleged that Defendants "control the production of Ivorian cocoa" and that they "had the means to stop or limit the use of child slavery." *Nestle*, 766 F.3d at 1017, 1025. In addition, the Ninth Circuit found that Plaintiffs sufficiently alleged that they were enslaved and tortured in order to produce Defendants' cocoa more cheaply. *Id*. at 1017. The Ninth Circuit also found that Plaintiffs sufficiently alleged that while aware of the child slavery, Defendants provided extensive support for the slavery, including money, equipment, and training, for the purpose of facilitating the slavery. *Id*. at 1017, 1024. There is no remaining question that Plaintiffs sufficiently alleged that Defendants' aid and assistance "facilitate[d] the use of forced child labor". *Id*. at 1017.

The Ninth Circuit remanded the case to allow Plaintiffs to amend their complaint in order to clarify just two narrow and specific issues: first, whether Plaintiffs' complaint met the new "touch and concern" standard articulated in *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013), and second,

whether Plaintiffs' complaint had sufficiently alleged an *actus reus* for aiding and abetting in light of the current state of international law. *Nestle*, 766 F.3d at 1026–27, 1028–29. As discussed below, the allegations of Plaintiffs' Second Amended Complaint meet both of these requirements.

III. FACTS

A. Defendants Were Responsible for Child Slavery in Côte d'Ivoire; They Dominated the Market and Actively Participated in the System of Child Slavery

Defendants' significant market share and exclusive buying arrangements with farms meant that they exerted a great deal of control over cocoa production in Côte d'Ivoire. Defendants dominate cocoa operations inside Côte d'Ivoire. *Nestle*, 766 F.3d at 1017. They are extensively present on the ground in Côte d'Ivoire, with numerous operations and relationships with the slave-holding farmers, as well as with multiple facilities in Côte d'Ivoire purchasing and processing cocoa from those farmers. SAC ¶¶ 24, 34–36. Defendant Cargill, Inc., for example, had "stations in all the major cocoa-growing regions" to purchase from its suppliers; opening at least two more from 2000 to 2001 alone; and had at least one processing facility inside Côte d'Ivoire. SAC ¶¶ 40, 59. Defendant Nestlé similarly directly purchased and processed cocoa inside Côte d'Ivoire, SAC ¶ 21. Defendant ADM purchased and processed cocoa in Côte d'Ivoire in addition to processing it in facilities in Massachusetts, New Jersey, and Wisconsin. SAC ¶¶ 41, 46.

Moreover, Defendants were directly involved with those enslaving children inside Côte d'Ivoire. Defendant Cargill, Inc., has "extensive on-the-ground networks" in Côte d'Ivoire which included not only its facilities, but direct and

exclusive relationships with the individual farms or collectives thereof enslaving the children; including, for example a partnership with 85 of the 101 cooperatives in Côte d'Ivoire. SAC ¶¶ 59, 39, 24 & n.1. Defendants Nestlé and ADM had the same relationships. SAC ¶¶ 36, 38, 41; *Nestle*, 766 F.3d at 1017. Defendants ADM, for example, acknowledged that its on-the-ground, exclusive relationships gave it "an unprecedented degree of control" over the farms enslaving children and their methods of production. SAC ¶ 41. Defendant Nestlé also noted that maintaining exclusive relationships on the ground allows Nestle to "actively participate" at that portion of the supply chain as well as "continually monitor" the farms. *Id*. ¶ 53. Numerous times per year, Defendants themselves visited the farms (as well as their other facilities in Côte d'Ivoire) to dictate the methods and manner of farming cocoa. *Id*. ¶ 37.[2] Indeed, it is through numerous visits that Defendants observed the enslaved children producing their cocoa firsthand. *Nestle*, 766 F.3d at 1017.

B. Defendants Acted to Maintain a System of Child Slavery that Benefited Them and Their Assistance was Substantial

Defendants provided assistance to slaveholding farms in Côte d'Ivoire in order to sustain and expand child slavery. *Nestle*, 766 F.3d at 1024. Defendants provided personal spending money, advance payments, and tools and equipment to slaveholders. SAC ¶ 37–39, 41; *Nestle*, 766 F.3d at 1026. They also gave slaveholders exclusive purchasing agreements that guaranteed them a market for

[2] Defendant Nestlé USA suggests Plaintiffs do not allege Nestlé's operations in Côte d'Ivoire, and thus inspections thereof, could have related to abuses on cocoa farms. Nestle Mot. 14. First, the Ninth Circuit found otherwise. *Nestle*, 766 F.3d at 1017 (9th Cir. 2014) (Defendants and their agents visit cocoa farms; defendants knew *firsthand* of child slavery through their visits). Second, this completely distorts the complaint, which clearly states that the operations included direct relationships with and purchasing from the farmers, as well as technical training and quality control visits throughout the year. SAC ¶¶ 36–38.

the cocoa produced. *Id*. Defendants provided technical assistance and training intended to "expand the farms' capacity" to generate products through child slavery. *Nestle*, 766 F.3d at 1017. In addition, Defendants provided numerous other forms of direct assistance to sustain the slave plantations, such as financing and fertilizer. *Id.*; SAC ¶¶ 37, 41, 55, 59.

For many years, Defendants provided these numerous different kinds of assistance, and they calibrated what assistance was needed through their on-the-ground monitoring of and direct relationships with slaveholders. *Nestle*, 766 F.3d at 1017; SAC ¶ 37. Decisions about whether to provide assistance and what kinds of assistance to provide were made within the United States, including Minnesota, Wisconsin, and other states. SAC ¶¶ 23, 34–35, 44–45.

Defendants also spent a substantial amount of money lobbying to destroy a bill that would have mandated that chocolate be labeled "slave free." *Nestle*, 766 F.3d at 1025; SAC ¶ 63–65. Their lobbying "guaranteed the continued use of" slave labor and was a but-for cause of ongoing slavery. SAC ¶ 66. Defendants also ensured the production of cocoa through child slavery would not be reduced by making specific, demonstrably false assurances to consumers that deceived them into thinking that the chocolate they were buying was made in a responsible way. SAC ¶¶ 51, 61.

C. Many of these Actions Were Taken in the United States.

All of the defendants are based in the United States and made decisions and took actions to support the system of child slavery from the United States. Defendant Nestlé, USA is a wholly owned U.S.-based subsidiary of Nestlé, SA. SAC at ¶ 35. Every major operational decision regarding Nestlé's U.S. market is made in or approved in the U.S. *Id.* Defendants ADM and Cargill, Inc., are headquartered in the U.S., and all of the companies' major operational decisions

are made or approved in the U.S. SAC ¶ 34. During all periods relevant to the Plaintiffs' injuries, Defendants Nestlé, ADM, and Cargill, Inc., had complete control over their cocoa production operations in Côte d'Ivoire. SAC ¶ 34–35.

The defendants frequently directed employees from their U.S. headquarters to inspect operations in Côte d'Ivoire. *Id.* The defendants also frequently directed employees from their U.S. headquarters to provide trainings to the farmers. *Id.* at ¶37; *Nestle*, 766 F.3d at 1017. These employees reported back to U.S. headquarters so U.S.-based decision-makers had accurate information about operations on the ground in Côte d'Ivoire. SAC ¶ 34–35. Defendants Nestlé, ADM, and Cargill, Inc., had the ability in the U.S. to take the necessary steps to eliminate their reliance on the use of child slaves to harvest their cocoa in Côte d'Ivoire. *Id.*; *Nestle*, 766 F.3d at 1024–25.

IV. ARGUMENT

A. Standard of Review

A complaint need only contain enough facts to state a claim that is plausible on its face. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). In deciding a motion under 12(b)(6), or under Rule 12(b)(1) where, as here, only a facial challenge is raised, a court must accept plaintiffs' factual allegations as true and draw all reasonable inferences in plaintiffs' favor. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014) (Court resolves a 12(b)(1) facial attack with same acceptance and inferences accorded to a 12(b)(6) motion), *cert. denied*, 135 S. Ct . 361 (2014); *Pride v. Correa*, 719 F.3d 1130, 1133 (9th Cir. 2013) (same).

B. Plaintiffs' ATS Claims Satisfy *Kiobel*'s Extraterritoriality Inquiry.

ATS claims displace the presumption against extraterritoriality when they "touch and concern" the United States. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669 (2013); *Nestle*, 766 F.3d at 1027 (same). Plaintiffs' claims touch and concern the United States for several reasons. First, Plaintiffs are alleging claims against U.S. national corporations. Second, they allege purposeful aiding and abetting of child slavery from the United States. Third, they allege decisionmaking in the United States and extensive lobbying to undermine protective measures Congress sought in order to avoid precisely the abuses Plaintiffs allege. Fourth, the conduct alleged has a substantial effect on U.S. industry, particularly on more law abiding companies. Fifth, the complaint alleges deliberate and extensive misrepresentations to Americans that purposefully – and successfully – beguiled many Americans into purchasing products made by child slaves.

Defendants seek to escape liability by asking the court to fashion a new test, arguing that *Kiobel* and the Ninth Circuit have been overruled in dictum and sub silentio. They have not been overruled; but even under Defendants' test, Plaintiffs allegations displace the presumption against extraterritoriality as the relevant conduct took place in the United States.

1. This Court Should Apply Either a Factor-Based Test Examining All the Circumstances of the Action or the Test Laid Out in the Breyer Concurrence of *Kiobel*.

As the Ninth Circuit expressly found in *Nestle*, *Kiobel* "articulates a new 'touch and concern' test" for ATS claims." 766 F.3d at 1027 (*citing Kiobel.*, 133 S. Ct. at 1669). What it means to "touch and concern" the United States has not yet been clarified by the Supreme Court. Aceves Decl. ¶ 7. In the concurrence of

Justices Breyer, Ginsburg, Sotomayor, and Kagan, Justice Breyer suggested that an ATS claim touches and concerns the United States when *any* of the following were true: 1) U.S. nationals were defendants; 2) "the defendant's conduct substantially and adversely affects an important American national interest, and that includes a distinct interest in preventing the United States from becoming a safe harbor (free of civil as well as criminal liability);" or 3) the tort took place on U.S. soil. *Kiobel*, 133 S. Ct. at 1671 (Breyer, J., concurring) (*citing Sosa v. Alvarez–Machain*, 542 U.S. 692, 732 (2004)).

In determining whether a claim touches and concerns the United States, this Circuit, along with others, uses a broad, factual analysis examining all the circumstances around the claims. *Al Shimari v. CACI Premier Technology, Inc.*, 758 F.3d 516, 527–28 (4th Cir. 2014); *see also*, *e.g.*, *Nestle*, 766 F.3d at 1028 (test is "amorphous."); Aceves Decl. ¶ 9. In any case, however, where aiding and abetting is provided *from the United States* with a guilty *mens rea*, the matter touches and concerns the United States. *See, e.g.*, *Licci by Licci v. Lebanese Canadian Bank, SAL*, 834 F.3d 201, 217 (2d Cir. Aug. 24, 2016); *Doe v. Exxon Mobil Corp.*, No. CV 01-1357(RCL), 2015 WL 5042118, *14 (D.D.C. July 6, 2015); *Sexual Minorities Uganda v. Lively*, 960 F. Supp. 2d 304, 323-24 (D. Mass. 2013); *Krishanti v. Rajaratnam*, No. 2:09-CV-05395 JLL, 2014 WL 1669873, at *10 (D.N.J. Apr. 28, 2014); *Mastafa v. Chevron Corp.*, 770 F.3d 170, 191 (2d Cir. 2014).

A touch and concern test that operates as a broad fact-based inquiry prevents "unintended clashes between our laws and those of other nations which could result in international discord." *Kiobel*, 133 S. Ct. at 1664. Enforcement of a "substantive norm. . .recognized by other nations" and part of customary international law could avert these clashes. *See Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d at 530. Moreover, a fact-based approach that examines territorial

and nationality consideration to determine adverse affects on U.S. interest dovetails perfectly with international law's view on legitimate assertions of State jurisdiction. *See S.S. "Lotus" (Fr. v. Turk.)*, Judgment, 1927 P.C.I.J. (ser. A) No. 10, at 19 (Sept. 7); Restatement (Third) of the Foreign Relations Law of the United States § 402 (1987); Ralph G. Steinhardt, *Determining Which Human Rights Claims "Touch and Concern" the United States: Justice Kennedy's Filartiga*, 89 Notre Dame L. Rev. 1695, 1707–14 (2014); Aceves Decl. ¶ 11.

The only other case in this circuit to examine the *Kiobel* question, *Mujica v. AirScan Inc.*, 771 F.3d 580, 594 & n. 9 (9th Cir. 2014), found that although U.S. nationality was not sufficient on its own, it was a factor to weigh in considering whether the claim touched and concerned the United States. *See also*, *Exxon*, 2015 WL 5042118 at *7 (citing *Mujica*); *Al-Shimari*, 758 F.3d at 530. When a Defendant is a national of the United States and aids and abets violations of international law from the United States the claim fits "comfortably within the limits described in Kiobel." *Lively*, 960 F. Supp. 2d at 322. As outlined below, Defendants are U.S. nationals and aid and abet forced child labor from the United States, and thus *Kiobel* is comfortably displaced. The relevant conduct included decisionmaking and lobbying. *See, e.g.*, *Mujica*, 771 F.3d at 596 (acknowledging that while the conduct therein did not displace *Kiobel*, presumption had previously been displaced where, in distinction to *Mujica* "managers in the United States approved the misconduct and attempted to cover it up.") (citing *Al Shimari*, 758 F.3d at 530-31).

Moreover, even beyond aiding and abetting, it is clear that a great many aspects of Plaintiffs' claims touch and concern the United States, satisfying the factors laid out in *Mujica* and *Al-Shimari*. *Mujica*, 771 F.3d at 594; *Al Shimari*, 758 F.3d at 528. Defendants are U.S. national corporations. Moreover, the United States government has stated that there is a national interest in preventing the flow

of slave-made goods into this country, as they contravene American values and have an effect on the U.S. market and on competitors. Aceves Decl. ¶ 10; *see Al Shimari*, 758 F.3d at 527, 531 (embracing Breyer's *Kiobel* concurrence, and presence of adversely affected "national interest," as indicating claims touch and concern the United States under *Kiobel*; finding it displaced where Defendants undermined Congressional desire to hold U.S. citizens accountable for the violation at issue).

2. Unlike in *Kiobel*, Conduct Capable of Displacing the Presumption Against Extraterritoriality Did Occur in the United States; For That Reason, This Case "Touches and Concerns" the United States.

Relevant conduct occurred in the United States, and thus Plaintiffs' claims touch and concern the United States. Defendants ignore Plaintiffs' allegations of U.S. conduct when they argue that this case must be dismissed because all of the relevant conduct occurred outside the U.S. Nestlé Mot. 10; ADM and Cargill Mot. 5–11. Their attempt to analogize *Kiobel* to this case directly contradicts the Ninth Circuit's remand on extraterritoriality, which held that "unlike the claims at issue in *Kiobel II*, part of the conduct underlying [Plaintiffs'] claims occurred within the United States." 766 F.3d at 1028. Defendants' assertion that the "SAC can be dismissed as extraterritorial without resort" to *Kiobel*'s touch and concern test clearly fails. Instead, the Ninth Circuit's remand requires a broad "fact-based analysis" of whether the claims displace the presumption against extraterritorial application. *Al Shimari*, 758 F.3d at 528 (citing *Kiobel*, 133 S. Ct. at 1669); *see also Nestle*, 766 F.3d at 1017 (cautioning that the test is "amorphous").

a. Plaintiffs' Clear Allegations that Defendants Aided and Abetted Child Slavery from the U.S. Touch and Concern the United States.

Plaintiffs satisfy *Kiobel* because Defendants aided and abetted the child slavery endured by Plaintiffs from the United States. This aiding and abetting of slavery touches and concerns the United States because aiding and abetting slavery is a distinct violation of international law. As Judge Bea noted in dissenting from the denial of rehearing *en banc* in this case, "aiding and abetting a crime [of child slavery] is itself a crime . . . ." *Doe I v. Nestle USA, Inc.*, 788 F.3d 946, 948 (9th Cir. 2015). This undisputed and fundamental principle of law is one with which the majority in remanding the case also agreed. *See Nestle*, 766 F.3d 1020 ("The specific norms underlying the plaintiffs' ATS claim are the norms against aiding and abetting slave labor, which the defendants allegedly violated . . . ."). Aiding and abetting is a violation of the law of nations under the Alien Tort Statute. 28 U.S.C. § 1350 (West); *Nestle*, 766 F.3d at 1024 (Plaintiffs have stated "a claim for aiding and abetting.").

Courts stress this explicitly. *See, e.g.*, *Lively*, 960 F. Supp. 2d at 316 (acts "[a]iding and abetting in the commission of a crime . . . [are] international law violations"); *Mastafa v. Chevron Corp.*, 770 F.3d 170, 185–86 (2d Cir. 2014) (aiding and abetting is "conduct constituting . . . offenses under the law of nations."). Every court that has considered this basic point has found that aiding and abetting is actionable under the law of nations. *See, e.g.*, *Doe v. Exxon Mobil Corp.*, No. CV 01-1357 (RCL), 2015 WL 5042118 *15 (D.D.C. July 6, 2015); *Rajaratnam*, 2014 WL 1669873, at *10; *Licci by Licci v. Lebanese Canadian Bank, SAL*, 834 F.3d 201, 219 (2d Cir. Aug. 24, 2016).

Because aiding and abetting is an international law violation, when conduct comprising aiding and abetting occurs within the United States, it clearly touches

and concerns the United States, and *Kiobel* is displaced. Thus the fact that the harm or fruition of Defendants' acts occur outside the United States is clearly not dispositive when the allegation is aiding and abetting. [3] *See*, *e.g.*, *Rajaratnam*, 2014 WL 1669873, at *10 (chiding Defendants for their "focus on the fact that all of the harm to Plaintiffs occurred" elsewhere); *Sexual Minorities Uganda v. Lively*, 960 F. Supp. 2d 304, 321–22 (D. Mass. 2013) ("The fact that the impact of Defendant's conduct was felt in Uganda cannot deprive Plaintiff of a claim.").

The cases Defendants attempt to contort to suggest their proposition that Plaintiffs' allegations do not displace *Kiobel* (ADM Mot. 9) specifically indicate that the allegations do displace Kiobel. *See Licci*, 834 F.3d at 217 (financial transactions in the United States that ultimately aid atrocities abroad displace *Kiobel*); *Mastafa*, 770 F.3d at 191 (same, although *mens rea* not met); *see also, e.g.*, *Rajaratnam*, 2014 WL 1669873, at *10 (providing funds from United States for atrocities committed abroad displaces *Kiobel*); *Exxon*, 2015 WL 5042118 at *14 (D.D.C. July 6, 2015). Thus, as Plaintiffs have alleged that conduct amounting to aiding and abetting took place in the United States, they have stated sufficient claims to displace the presumption of extraterritoriality.

b. Plaintiffs Have Alleged Five Types of Conduct Which Comprise Aiding and Abetting Under International Law and Which Occurred in the United States.

There are five distinct types of conduct Defendants engaged in from the United States that constituted aiding and abetting under international law: decisionmaking and direction of efforts from the United States; providing funds,

[3] Defendants assert *Kiobel* immunizes aiding and abetting child slavery from within the United States because the ultimate slavery occurred in Côte d'Ivoire. *See* ADM and Cargill Mot. 11 ("The fact that Plaintiffs suffered their injuries in Africa is therefore fatal to their claims."); Nestlé Mot. 10, 11 (same).

including unrestricted advance payments, from the United States; preparation and sending of supplies and technical assistance from the United States; concealment of the extent of the problem from United States consumers and legislators; and actions to stop regulation of the industry.

First, U.S.-based decisionmaking on the key actions that established, facilitated, maintained, and protected Defendants' use of child slavery occurred in the United States. This conduct satisfies *Kiobel*. "Decisions to provide assistance that will have a substantial effect on a violation of customary international law are part of a course of conduct that gives rise to a claim for aiding and abetting under the ATS," and where they occur in the United States, displace the presumption against extraterritoriality. *Exxon*, 2015 WL 5042118 at *14; *see also, e.g.*, *Sexual Minorities Uganda v. Lively*, 960 F. Supp. 2d 304, 323-24 (D. Mass. 2013). *Exxon* found sufficient allegations that the Defendant (EMC) had made U.S.-based decisions to "facilitate the underlying offenses and to provide the means by which those offenses were carried out." *Exxon*, 2015 WL 5042118 at *14. Such U.S.-based decisions, "in combination with the fact of EMC's U.S. based incorporation and principal place of business, demonstrate that plaintiffs' claims against EMC sufficiently touch and concern the United States." *Id.* The same allegations are present here. Defendants are similarly based in the United States. SAC ¶¶20, 22–24. Further, Defendants similarly decided in the United States to "facilitate the underlying offenses and to provide the means by which those offenses were carried out." *Exxon*, 2015 WL 5042118 at *14; *see Nestle*, 766 F. 3d at 1017. (Defendants "supply money, equipment, and training to Ivorian farmers [that] will facilitate the use of forced child labor."); SAC ¶¶34–35 (For each of the U.S. defendants, "every major operational decision . . . is made in or approved by the U.S.").

Second, providing funds which come from or even pass through the United States to foreign direct perpetrators is part of a course of aiding and abetting which

displaces *Kiobel*. In *Licci*, the court considered allegations that the defendants aided Hezbollah's crimes by providing funds (or rather, allowing themselves to be used for the provision of funds to Hezbollah). *Licci*, 834 F.3d at 214-19. The court found the presumption against extraterritoriality was displaced because the funds to the direct perpetrator passed through a U.S. bank, which is a sufficient part of a course of aiding and abetting to displace the presumption against extraterritoriality. *Id*. at 217 (citing *Mastafa*, 770 F.3d at 170). The presumption was displaced even though the defendant in that case was Lebanese Canadian Bank, a Lebanese bank with "no branches, offices or employees in the United States." If wire transfers through a bank in New York that abet a crime abroad touch and concern the United States with sufficient force to displace the presumption, then there should be no question that Defendants' conduct here in supplying funds and training for the entire slave-based operation touches and concerns the United States.

Similarly, in *Rajaratnam*, the court found that providing funds from the United States to direct perpetrators elsewhere sufficiently displaced the presumption against extraterritoriality. 2014 WL 1669873 at *10. And, like *Licci*, *Mastafa* supports Plaintiffs' claim. *Mastafa*, 770 F.3d at 191 (finding that Defendants' U.S.-based financial transactions touched and concerned the U.S. with sufficient force to displace the presumption against extraterritoriality, though, in that case, the *mens rea* was not met).

Much more than being financial conduits for offshore acts (as was the case in *Licci*), Defendants here provide direct financial and other substantial support from the United States to the direct perpetrators of the crime. *See*, *e.g.*, SAC. ¶¶ 37-38, 40-41; *Nestle*, 766 F.3d at 1017.

Third, Defendants sent additional supplies, or funds for supplies, as well as extensive training from the United States. These supplies facilitated the use of

forced child labor. *Nestle*, 766 F.3d at 1017; SAC. ¶¶ 37, 50, 62. People based in the United States performed the technical assistance and training. *See, e.g.*, *Nestle*, 766 F. 3d at 1017 ("The technical support is meant to expand the farms' capacity" , and "the defendants or their agents visit farms several times per year as part of the training . . . ."); SAC ¶ 37 ("Training . . . visits occur several times per year and require frequent and ongoing visits by Defendants directly . . . ."); SAC ¶¶ 34-35 ("At all times relevant to the injuries to the Plaintiffs, Defendants ADM and Cargill regularly had employees from their U.S. headquarters inspecting their operations in Côte d'Ivoire . . . ."); SAC ¶ 35 ("Nestle regularly had employees from their . . . U.S. headquarters inspecting their operations in Côte d'Ivoire . . . ."). A reasonable inference can be drawn that Defendants' employees prepared in the United States for those trips, were given directions as to how to assist farmers, and were educated on what to do and expect abroad.

Fourth, Defendants ensured the production of cocoa through child slavery would not be reduced by publishing specific, false assurances to consumers which beguiled them into continuing to support Defendants and the slave-holding farms. SAC ¶¶ 51; 52-61. In addition to constituting aiding and abetting, such beguiling "affects an important American national interest," that Americans are aware that they are purchasing products made from child slaves. *Id.*; Aceves Decl. ¶ 10. Further, the misleading statements also gave Defendants an unfair market advantage in the United States. Everts Decl. ¶ 9. Defendants' access to the U.S. market, and their financial success here based on false assurances to U.S. consumers, SAC ¶¶ 51-61, allowed them to dominate the U.S. market and mislead its consumers. Everts Decl. ¶ 9. Though other U.S. businesses can and do exist without child slavery, Everts Decl. ¶¶ 4, 6, none will be able to compete comparably, without also purposefully using child slaves. Everts Decl. ¶ 9.

Fifth, Defendants spent millions of dollars within the United States lobbying to destroy a bill that had resoundingly passed the House of Representatives and would have required Defendants' imported cocoa to be "slave free." *Nestle*, 766 F.3d at 1017; SAC ¶ 63-64. Their lobbying successfully derailed that bill. *Id*. This sort of lobbying is sufficient to displace *Kiobel*'s presumption. *See, e.g.*, *Krishanti v. Rajaratnam*, No. 2:09-CV-05395 JLL, 2014 WL 1669873, at *10 (D.N.J. Apr. 28, 2014) (the fact that defendant's money was purportedly used in attempt to persuade U.S. officials to remove group from Foreign Terrorist Organization list was significant in determining displacement of *Kiobel*); *Mastafa*, 770 F.3d at 190 ("U.S.-based attempts to skirt the sanctions regime" displace *Kiobel*). Defendants' lobbying and dissembling Congress also further concerns the United States. Congress was manifestly concerned about precisely the violation at issue here. SAC ¶ 63. Defendants' orchestrated dissembling to the U. S. Congress directly undercut that concern, and permitted the violations Congress sought to end to continue unpunished. SAC ¶¶66-67; *see, e.g.*, *Al Shimari*, 758 F.3d at 531 (4th Cir. 2014) (finding claim touched and concerned the United States given, *inter alia*, Congress had indicated a statutory will to prohibit the harm in question). Defendants' extensive lobbying "guaranteed the continued use of" slave labor, *Nestle*, 766 F.3d at 1017; and was indeed a but-for cause thereof. SAC ¶ 66.[4]

[4] Nor does the First Amendment protect Defendants from the use of lobbying as evidence of their aiding and abetting and as evidence that they acted within the United States, as Nestle claims. Nestle Mot. 22. "It is well-established that speech that constitutes criminal aiding and abetting is not protected by the First Amendment." *Lively*, 960 F. Supp. 2d at 329 (D. Mass. 2013) (citing *United States v. Bell*, 414 F.3d 474, 483–84 (3d Cir.2005); *Nat'l Org. for Women v. Operation Rescue*, 37 F.3d 646, 656 (D.C.Cir.1994); *United States v. Freeman*, 761 F.2d 549, 552 (9th Cir.1985); and *Rice v. Paladin Enterprises, Inc.*, 128 F.3d 233, 242–43 (4th Cir.1997)); *see also United States v. Moss*, 604 F.2d 569, 571 (8th Cir. 1979) (Defendants are not immunized from aiding and abetting a crime because the form

Individually, any of these five types of conduct would allow a reasonable inference that Defendants' aided and abetted child slavery from the United States, and this touches and concerns the United States. Aceves Decl. ¶ 10–12. This court should allow this case to move forward so that the true extent of Defendants' conduct can be revealed.

3. Defendants' Operations Have a Substantial Effect on Domestic Industry and the National Interest, and Thus Touch and Concern the United States.

In determining which claims "touch and concern" the United States with "sufficient force," the Court should consider whether "the defendant's conduct substantially and adversely affects an important American national interest, and that includes a distinct interest in preventing the United States from becoming a safe harbor (free of civil as well as criminal liability) for a torturer or other common enemy of mankind." *Kiobel*, 133 S. Ct. at 1671 (Breyer, J., concurring). Moreover, profits reaped from violations of international law within the United States touch and concern the United States. *See, e.g.*, *Mastafa*, 770 F.3d at 182 (noting that where support for a violation came from the United States, the fact that "profits reaped from" the actions "were recouped in the United States" touched and concerned the United States so as to displace the presumption against extraterritoriality.)

Congress has expressed a national interest in stopping the flow of slave-made goods into the United States. In addition to repeatedly expanding and reauthorizing the TVPRA, the United States, with bipartisan support, amended the Tariff Act to improve Customs enforcement over goods made with forced labor.

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of their assistance was to "espouse[] a political cause aimed at changing the . . . law in the United States.").

Trade Facilitation and Trade Enforcement Act of 2015, Pub. L. No. 114-125, §910, 130 Stat. 122, 239-40. The repeal of the prior "consumptive demand exception" makes it illegal for Nestlé USA, Cargill, Inc., and ADM to import goods made by child slaves.

With 21,000 employees, forty-two manufacturing facilities, six distribution centers, and fifty-eight sales offices, Defendant Nestlé USA is one of the largest food and beverage companies in the United States. SAC ¶ 20. According to its own accounts, ninety-seven percent of households in the United States purchase Nestlé products. Nestlé, Nestlé in the United States: Creating a Shared Value Report 5 (2014), http://www.nestleusa.com/asset-library/documents/creatingsharedvalue/download_report/nusa_csv_report_2014%20final-7%20lores.pdf.

Similarly, Defendant Cargill, Inc., is one of the largest private corporate providers of food and agricultural products and services in the country. Cargill's "influence over the food we eat, in terms of where it comes from and how it is produced, is staggering." SAC ¶ 39. Defendant ADM is also a significant part of the United States food industry; it operates several processing plants in California. SAC ¶ 22.

Collectively, Defendants' actions have a substantial impact on domestic industry due to their large corporate presence in the United States' food market. *See e.g.*, *Nestle*, 766 F. 3d at 1017 (Defendants dominate *at least* 70% of the world's cocoa market). Their reliance on cocoa beans produced by slave labor helps to prop up their large industry presence by keeping their production costs and prices low, and crowding out U.S. corporations that obey the law and are unable to compete because they do so. As in *Mastafa*, Defendants reap profits in the United States; indeed, enormous ones. Given their use of child slaves, Defendants enjoy

the profits of a monopoly on cocoa that has placed law-abiding companies at a major disadvantage. Everts Decl. ¶ 9.

4. *Kiobel*'s and the Ninth Circuit's Touch and Concern Test Governs, but Even If It Does Not, a "Focus" Test is Met.

In *Nestle*, the Ninth Circuit expressly found that, *Kiobel* "articulates a new 'touch and concern' test" for ATS claims." 766 F.3d at 1027. *Nestle* emphasized at great length that the touch and concern test applies, and *Morrison*'s focus test ***does not*****:** the two tests share only a relationship of "informative precedent." *Nestle*, 766 F.3d at 1028. *RJR Nabisco, Inc. v. European Cmty.* is similar, holding that *Kiobel* and *Morrison* are related and can be mutually informative precedent, but *Kiobel*'s test is different. 136 S. Ct. 2090, 2101 (2016). Clearly, *RJR* has not overruled the Ninth Circuit's application of it in *Nestle* in dicta and sub silentio.

RJR applied a "focus test" solely to the RICO statute to address its extraterritoriality and unsurprisingly, in discussing extraterritoriality, referenced *Kiobel* as informative precedent on the general issue. *RJR*, 136 S. Ct. at 2101. *RJR* held that if relevant conduct occurs domestically, the RICO statute applies, and for RICO, the statute's "focus" is the sole basis for determining "relevant conduct." *Id.* Rather than overrule or modify it, *RJR* specifically stated that *Kiobel* is *different*, and it was not the ATS' focus that determined "relevant conduct." *Id.* *RJR*'s dictum thus affirms *Nestle*'s conclusion that *Kiobel* and *Morrison* may have a relationship of informative precedent, but they are different tests. *RJR*'s dictum, however Defendants choose to spin it, is not "clearly irreconcilable" with *Nestle*, thus *Nestle* controls. *In re Deitz*, 760 F.3d 1038, 1049 (9th Cir. 2014).

Even *if* the clearly rejected focus test for which Defendants advocate applies, such conduct obviously involves the focus of the statute. The focus of the ATS is – at minimum – violations of the law of nations, as even Defendants admit. Since

this includes aiding and abetting, conduct involving aiding and abetting from the United States clearly involves the focus of the statute and satisfies *Kiobel*. *See, e.g.*, *Licci*, 834 F.3d at217; *Mastafa*, 770 F.3d at 191; *Rajaratnam*, 2014 WL 1669873 at *10; *Exxon*, 2015 WL 5042118 at *14; *Sexual Minorities Uganda v. Lively*, 960 F. Supp. 2d 304, 323–24 (D. Mass. 2013).

C. Plaintiffs' Allegations Satisfy The *Actus Reus* Standard for Aiding and Abetting under International Law.

In *Nestle*, the Ninth Circuit declined to adopt a standard for *actus reus* and vacated the court's order, allowing Plaintiffs to amend their complaint consistent with the Ninth Circuit's finding that Defendants had acted purposefully in facilitating slavery, and in light of two international law cases, *Prosecutor v. Perisic*, Case No. IT–04–81–A (Int'l Crim. Trib. for the Former Yugoslavia Feb. 28, 2013), and *Prosecutor v. Taylor*, Case No. SCSL–03–01–A (Sept. 26, 2013). *Nestle*, 766 F.3d at 1026. As *Taylor* clearly establishes, and exactly as the Ninth Circuit suggested, the *actus reus* for aiding and abetting requires substantial assistance, but not specific direction. Plaintiffs allege extensive, sweeping assistance that Defendants directly provided to the plantations, and which morpe than meet the substantial assistance standard. Defendants' assistance to the slaveholders' farms includes not only their direct assistance, but also the assistance furnished through Cote d'Ivoirian subsidiaries, with whom Plaintiffs successfully allege an agency relationship. Finally, even if, as Defendants incorrectly suggest, specific direction were required, it is clear that – given the Ninth Circuit's finding that Defendants purposefully facilitated slavery – it is more than a plausible inference that Defendants directed their assistance for slavery.

1. The *Actus Reus* for Aiding and Abetting Requires "Substantial Assistance," and Not "Specific Direction."

The sole legal dispute remaining as to whether Plaintiffs have alleged sufficient facts to satisfy the international standard for aiding and abetting is whether the *actus reus* prong[5] is satisfied by a showing of "substantial assistance," as Plaintiffs assert, or whether it requires that Defendants additionally provided "specific direction," as Defendants assert. In arguing for the much more stringent specific direction test, Defendants point to two international law cases, *Perisic* and *Taylor*, as dispositive "confirmation" that the specific direction standard is required under international law. Nestle Mot. at 16 (citing *Prosecutor v. Perisic*, Case No. IT–04–81–A (ICTY Feb. 28, 2013); *Prosecutor v. Taylor*, Case No. SCSL–03–01–A (Sept. 26, 2013)); ADM and Cargill Mot. at 16-18. *Perisic* is anomalous and immediately superseded by *Sainovic*, IT-05-87-A (2014), and *Taylor* directly supports Plaintiffs' position.

Domestic cases since *Perisic* and *Taylor* support Plaintiffs' position. The Ninth Circuit strongly suggested that specific direction had nothing to do with the intent of the perpetrator, noting "widespread substantive agreement [that] the *actus reus* of aiding and abetting liability is established by assistance that has a substantial effect on the crimes, not the particular manner in which such assistance is provided." *Nestle*, 766 F.3d at 1026 (citing *Taylor*, Case No. SCSL–03–01–A at ¶ 475) (internal quotation marks omitted). The Ninth Circuit suggested that *Perisic*'s mischaracterization of "specific direction" derived from the fact that, where referenced, the term did not actually describe an element of the *actus reus*. *Id.* at 1026. Instead, the focus of *actus reus* is the relationship between the

[5] The Ninth Circuit has already found that Plaintiffs have satisfied the *mens rea* standard. *Nestle*, 766 F.3d at 1026.

defendants and the commission of the crime – whether the former had a substantial effect on the latter. *Id.*

Indeed, last year another federal district court faced this identical issue on remand. *Exxon*, 2015 WL 5042118 at *11 (D.D.C. July 6, 2015). After a long discussion of the issue, *id.* at *10-12, the court concluded that specific direction was not an element of aiding and abetting. *Id.* at * 11 (*citing Nestle*, 766 F.3d at 1026). *Exxon* was persuaded by the Ninth Circuit's holding that:

> this controversy appears to be a fight about the name to be applied in describing the "widespread substantive agreement about the *actus reus* of aiding and abetting." *Nestle*, 766 F.3d at 1026. That widespread agreement, in the *Nestle* court's view, is that there must be a "causal link between the defendants and the commission of the crime." *Id.* [This Court] does agree that terms like "specific direction" . . . are better understood as glosses on the underlying *actus reus*, [and not] a functional component.

Exxon, 2015 WL 5042118 at *12 (D.D.C. July 6, 2015).

Other post-*Perisic* cases agree that specific direction is not required to establish *actus reus*. For example, in *Licci*, 834 F.3d. at 214-19, the Second Circuit held that plaintiffs sufficiently stated a claim against Lebanese Canadian Bank for aiding and abetting in violation of the laws of nations. The bank's *actus reus* was allowing its banking services to be used by direct perpetrators. *Id.* at 215. Rather than require that the bank provided "specific direction" that its services support the crime at issue, the court upheld the claim on the basis that the bank "provide[d] practical assistance to the principal which ha[d] a substantial effect on the perpetration of the crime." *Id.* at 217 (citing *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 259 (2d Cir. 2009)). While Plaintiffs have listed multiple domestic decisions, directly relevant and post-*Perisic*, rejecting specific direction as a component of aiding and abetting, Defendants neglect to

point to a single other domestic case that would support their argument. *See* ADM and Cargill Mot. 15-18; Nestlé Mot. 16-18.

Contrary to Defendants' assertions, *Perisic* does not set the standard under international law for *actus reus*. *See generally* Scheffer Decl. Defendants rely exclusively on arguing that the specific direction standard set forth in *Perisic* is the more universal of the standards. *See, e.g.*, ADM & Cargill Mot. at 18; Nestle Mot. at 16. Clearly, that is not so as Defendant Nestlé was forced to admit "*Taylor* expressly '[did] not agree with the *Perisic* Appeals Chamber[]' on this issue." Nestle Mot. at 18; *see also* ADM & Cargill Mot. at 18. In fact, in *Taylor*, the Special Court for Sierra Leone expressly rejected specific direction, describing it as a novel deviation from "settled principles of law." *Taylor*, Case No. SCSL–03–01–A, at ¶¶ 478, 480; *see also* Scheffer Decl. ¶¶ 22–28. The Ninth Circuit accepted this description. *Nestle*, 766 F.3d at 1026 (citing *Taylor*, Case No. SCSL–03–01–A at ¶ 475).

In a consistent line of cases following *Perisic*, and tellingly ignored by Defendants, the ICTY itself explicitly diverged from *Perisic* on the issue of specific direction. In *Prosecutor v. Sainovic*, the ICTY conducted a thorough analysis of its jurisprudence, and held that it "unequivocally rejects" specific direction, "as it is in direct and material conflict . . . with customary international law." IT-05-87-A (2014) at ¶ 1650. The Court stated that the absence of specific direction as an essential ingredient of the *actus reus* standard "has been constantly and consistently applied in determining aiding and abetting liability." *Id.* *Taylor* found *Perisic* was never even *intended* to reflect customary international law, but at best the ICTY's statute, *Taylor*, Case No. SCSL–03–01–A, at ¶ 476 & n. 1438. *Sainovic* clarified that the *Perisic* standard is no longer at use even at the ICTY. IT-05-87-A (2014) at ¶ 1650. *See also Popovic et. al*, IT-05-88-A, Appeal Judgment ¶1758 (ICTY Jan. 30, 2015) ("specific direction' is not an element of

aiding and abetting liability under customary international law"); *Prosecutor v. Stanisic*, IT-03-69-A, Appeal Judgment ¶106 (ICTY Dec. 9, 2015) (overturning trial court that used specific direction standard to acquit defendants).

The *Sainovic* decision follows a long history of cases rejecting the specific direction requirement. Scheffer Decl. ¶ 14. In 2004, for example, the ICTY held that *actus reus* for the purposes of aiding and abetting liability "consists of practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime." *Prosecutor v. Blaskic*, IT-95-14-A, Appeal Judgment, ¶ 46 (ICTY Jul. 29, 2004). Similarly, in 2001, the ICTY explicitly endorsed a definition of aiding and abetting liability that neither referred to specific direction nor contained equivalent language. *Čelebići Camp, Prosecutor v Delalić* (Zejnil), Case No IT-96-21-A, Appeal Judgment, ¶ 352 (ICTY 2001) (Int'l Crim. Trib. for the Former Yugoslavia Feb. 20, 2001) (quoting ¶ 327 of the trial court opinion).

The ICTY has further acknowledged that substantial assistance is the proper standard under customary international law. *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, Trial Judgment ¶ 234 (Dec. 10, 1998) ("The position under customary international law seems therefore to be best reflected in the proposition that the assistance must have a substantial effect on the commission of the crime."); *see also, e.g.*, *Prosecutor v. Gotovina and Marka*, IT-06-90-A, Appeal Judgment ¶ 127 (ICTY Nov. 16, 2012) (stating that "for an individual to be held liable for aiding and abetting, he must have substantially contributed to a crime and must have known that the acts he performed assisted the principal perpetrator's crime"); *Prosecutor v. Brdanin*, IT-99-36-A, Appeal Judgement ¶ 151 (ICTY Apr. 3, 2007) (same basis for *actus reus*); *Proscutor v. Krstic*, IT-98-33-A, Appeal Judgement ¶ 137 (ICTY Apr. 19, 2004) (containing no mention of specific direction).

Further, the International Criminal Tribunal for Rwanda (ICTR) has defined aiding and abetting liability as akin to substantial assistance under Article 6(1) of the tribunal's statute. Scheffer Decl. ¶¶ 29–35. Both the ICTY and the ICTR have concluded that aiding and abetting are distinct aspects of any crime, and the commission of one or the other is sufficient to invoke liability. *Prosecutor v. Ayakesu*, Case No. ICTR-96-4, Trial Judgment, (Sept. 2, 1998) at ¶ 484; *Prosecutor v. Kvocka*, Case No. IT-98-30/1, Trial Judgment, (ICTY Nov. 2, 2001) at ¶ 254. Aiding requires "giving assistance to someone," while abetting involves "facilitating the commission of an act by being sympathetic thereto." *Id.* "Specific direction" is not required. *See, e.g.*, *Prosecutor v. Karera*, Case No. ICTR-01-74-A, Appeal Judgment, ¶ 321 (Feb. 2, 2009); *Prosecutor v. Ntagerura et al.*, Case No. ICTR-99-46-A, Appeal Judgment, ¶ 370 (Jul. 7, 2006); *Prosecutor v. Nahimana et al.*, Case No. ICTR-99-52-A, Appeal Judgment, ¶ 482 (Nov. 28, 2007); *Prosecutor v. Taylor*, Case No. SCSL–03–01–A, Appeal Judgment, at ¶¶ 478, 480 (Sept. 26, 2013).

Defendants' "specific direction" standard has no credible support in the law. That Defendants did not inform the Court of the uniform and overwhelming rejection of *Perisic*, both domestically and internationally, renders Defendants' position untenable.

2. Plaintiffs Sufficiently Allege Defendants Provided Substantial Assistance for Child Slavery.

Plaintiffs have alleged assistance that was extensive, including money, equipment, and training. *Nestle*, 766 F.3d at 1017. That assistance "facilitate[s] the use of forced child labor." *Id.* at 1017; *id.* at 1025 (same). Indeed, the extensive, effective assistance had a substantial effect on the crimes.

Facing the same issue on remand, *Exxon* defined substantial assistance as follows:

> [A]ssistance is substantial when the underlying crime 'probably would not have occurred in the same way had not someone acted in the role that the accused [aider and abettor] in fact assumed.' In accordance with this principle, a defendant may render substantial assistance by providing "the means by which a violation of the law is carried out."

Exxon, 2015 WL 5042118 at *9 (citing *Prosecutor v. Tadic*, Case No. IT-94-1-T, Trial Court Opinion and Judgment, ¶ 688 (ICTY May 7, 1997) and *In re S. African Apartheid Litig.*, 617 F. Supp. 2d 228, 259 (S.D.N.Y. 2009).

Defendants' assistance included advance payments and personal spending money, supplies (including fertilizer, tools and equipment), and numerous trainings intended to "expand the farms' capacity" for production using child slavery. *Nestle*, 766 F.3d at 1017; SAC ¶ 37, 41, 50, 55, 59. These allegations constitute substantial, indeed crucial, assistance. *See, e.g.*, *Exxon*, 2015 WL 5042118 at *14 (providing funds and material that are used for violations is substantial assistance); *see also, e.g., In re Chiquita Brands International, Inc. Alien Tort Statute and Shareholder Derivative Litigation*, 2016 WL 3247913, at *14 (S.D.Fla. Jun. 1, 2016) (finding U.S. officers' corporate assistance "readily meets" substantial assistance when they "caused substantial amounts of money and material support to be supplied to the AUC . . . . putting the AUC in a position to continue and intensify" its violations.). Additionally, money payments to persons or groups who will use it to, inter alia, commit crimes alone has a substantial effect on the crime. *See, e.g.*, *Rajaratnam*, 2014 WL 1669873 at *10; *Mastafa*, 770 F.3d. Defendants' assistance had a substantial effect because the monetary support allowed the farmers to "utilize fund[s]" to perpetuate child slavery. *See Licci*, 834 F.3d at 218.

Defendants state that providing funds to human rights abusers, without more, does not constitute aiding and abetting but is "simply doing business."

ADM Mot. 20–21 (citing *In re South African Apartheid Litig.*, 617 F. Supp. 2d 228, 257, 269 (S.D.N.Y. 2009)). Defendants obfuscate that there is more here: The Ninth Circuit explicitly rejected this position that Defendants were merely "[d]oing business," and contrasted it with Plaintiffs' sufficient allegations that Defendants were "purposefully supporting child slavery." *Nestle*, F.3d at 1025–1026. Paying for a crime is quintessential aiding and abetting, though – incredibly – Defendants suggest otherwise. *See, e.g*, *Licci*, 834 F.3d at 201 *Rajaratnam*, 2014 WL 1669873, at *10; *Mastafa*, 770 F.3d at 184–85.

In addition to the funds, training, and equipment, Defendants spent millions of dollars lobbying, which was more than "substantial," it successfully "guaranteed the continued use of" slave labor, *Nestle*, 766 F.3d at 1017; and was indeed a but-for cause thereof. SAC ¶ 66. Defendants also ensured the demand for production of cocoa through child slavery would not be reduced through specific, false assurances to consumers in order to lull them into continuing to support Defendants and the slave-holding farms. SAC ¶¶ 51; 52–61.

3. U.S. Defendants' Assistance to Farmers for U.S. Cocoa Includes Any Assistance Provided by Their Agents, including Subsidiaries in Côte d'Ivoire.

U.S. Defendants' substantial assistance includes the numerous forms of aid they provided to the farmers and farming cooperatives that were the direct perpetrators of slavery. It also includes the aid they provided to the direct perpetrators through agents acting on their behalf.

Defendants cannot escape this liability by arguing that Plaintiffs have waived all theories of agency; nor can they escape it by arguing that the complaint is overly unclear when it refers to "Nestlé" in reference to acts committed by Nestlé USA through its agent in Côte d'Ivoire, and/or as agent of Nestlé SA.

a. Plaintiffs May Allege Agency, including that Nestlé USA acted as an agent of Nestlé SA.

Plaintiffs did not waive all theories of agency liability for aiding and abetting as Defendants contend. Plaintiffs chose not to appeal the claim below that Defendants were direct violators of Plaintiffs' human rights through Ivoirian farmers acting as their agents—they did not waive any possible claim of agency.[6] Plaintiffs retained the argument that Defendants aided and abetted the farmers, which of course does not exclude them from arguing such aiding and abetting occurred through agents. Plaintiffs contend that at all relevant times, Ivoirian Defendants were agents of the similarly named U.S. Defendants, who are therefore liable for the actions committed by their respective agents within the scope of that agency. SAC ¶ 27.

Defendant Nestlé also suggests Plaintiffs' claims fail because they "contradict" themselves by suggesting that Nestlé USA and SA both bear liability for furthering child slavery in Côte d'Ivoire. Nestlé Mot. 13-14. That is no contradiction. Nestlé SA tasked Nestlé USA with the U.S. market. SAC ¶ 35. In the course of handling the U.S. market, Nestlé USA facilitated slavery on Ivoirian farms: monitoring, inspecting, and managing these farms from the United States. *Id*. Whether Nestlé did so with the assistance of Nestlé Côte d'Ivoire, or at the behest of Nestlé SA neither absolves Nestlé USA of liability, nor renders it improper to refer to Nestlé USA's involvement with Nestlé SA in such a transaction as "Nestlé."

[6] *See* ECF No. 138 at 96, 100 ("As an alternative to the aiding and abetting theories of liability, Plaintiffs also attempt to hold Defendants directly liable as the principals of the Ivorian farmers who allegedly violated Plaintiffs' human rights. . . . The Court rejects Plaintiffs' arguments that the Defendants are liable for the Ivorian farmers' actions under an agency theory.").

b. Plaintiffs allege Defendant Cargill West Africa Operated as an Agent of Cargill Incorporated; Defendant Nestlé Côte d'Ivoire acted as an Agent of Defendants Nestlé USA.

Defendants only argue, wrongly, that Plaintiffs have waived all agency claims; Defendants cannot – and do not – argue that Plaintiffs' complaint fails to allege agency. Plaintiffs' complaint clearly suffices to allege agency. According to the Ninth Circuit, domestic tort law is the appropriate standard for agency liability in ATS claims. *Nestle*, 766 F.3d at 1021. ("Determining when a corporation can be held liable therefore requires a court to apply . . . domestic tort law to determine whether recovery from the corporation is permissible."). Under California law, "[a]n agent is one who represents another, called the principal, in dealings with third parties." Cal. Civ. Code § 2295. "An agency relationship may be informally created. . . . All that is required is conduct by each party manifesting acceptance of a relationship whereby one of them is to perform work for the other under the latter's direction." *Malloy v. Fong*, 37 Cal. 2d 356, 372, 232 P.2d 241, 251 (1951). Agency may be created not only by positive conduct, but by "conduct or neglect on the part of the alleged principal creating a belief in the minds of third persons that an agency exists, and a reasonable reliance thereon by such third persons." *Lovetro v. Steers*, 234 Cal. App. 2d 461, 475 (1965). Moreover, under California law, "agency may be created by ratification." 3 Witkin, Summary 10th (2005) Agency, § 95, p. 142. Agency may also be established where services performed by a subsidiary are "sufficiently important to the foreign corporation" that it would perform the services itself if the subsidiary itself did not exist. *Chan v. Society Expeditions, Inc.*, 39 F.3d 1398, 1405 (9th Cir. 1994); *see also, e.g., Doe v. Unocal Corp.*, 248 F.3d 915, 928 (9th Cir. 2001

"The existence of an agency relationship and the extent of the authority of the agent are questions of fact for the jury, unless the evidence is susceptible of but

one inference." *Cal. Viking Sprinkler Co. v. Pac. Indem. Co.*, 213 Cal. App. 2d 844, 850 (1963) (citation omitted). If, like the U.S. Defendants, Cote d'Ivoirian affiliates were also involved in facilitating child slavery to export cocoa to the United States, there is a *strong* inference that they did so as work for the U.S. defendants and/or by representing themselves to be doing the same. *Certainly*, the complaint is not solely susceptible to the contrary inference.

Under any of these tests plaintiffs successfully allege that, to the extent Cargill West Africa facilitated child slavery for cocoa exports to the United States, it operated as an agent of Cargill, Inc. Cargill, Inc. had complete control over Cargill West Africa, SA's operations. SAC ¶ 34. By continuing to accept and import from its West African affiliate, it ratified the affiliate's actions. SAC ¶ 25. Considering the importance of Cargill, Inc.'s cocoa distribution and production, a reasonable inference is that Cargill, Inc. would do the work Cargill West Africa currently performs if the subsidiary did not exist. SAC ¶ 24-25. Indeed, Defendant ADM, otherwise similarly situated to Cargill, Inc. but without a subsidiary, does precisely this. *See, e.g.*, SAC ¶¶ 41-42.

Plaintiffs also sufficiently allege that to the extent Nestlé Côte d'Ivoire facilitated child slavery for cocoa exports to the United States, it operated as an agent of Nestlé USA. Nestlé USA, either purely through its own volition, or at the behest of Nestlé SA, had complete control over the farms producing cocoa for the United States and thus, to the extent Nestlé Côte d'Ivoire was involved in these operations, had complete control over them. SAC ¶ 35 ("Every major operational decision regarding Nestle's U.S. market is made in or approved in the U.S. . . . At all times . . . Nestle had complete control over its cocoa production operations in Côte d'Ivoire, and had the ability to control in the U.S. [the method of labor in farms in Côte d'Ivoire].").

Where an agency relationship exists between corporate entities, the principal is liable for the acts of its agent. *Bowoto*, 312 F. Supp. 2d at 1238. As such, Cargill, Inc. and Cargill Cocoa's assistance for aiding and abetting Ivoirian farmers includes that assistance provided by Cargill West Africa within the scope of its agency, and Nestlé USA's assistance for aiding and abetting includes that provided by Nestlé Côte d'Ivoire in the scope of that agency.

Thus, to the extent that Defendants Nestlé USA, or Cargill, Inc. argue that it was offshore subsidiaries, not the U.S. companies, that provided any portions of the required "substantial assistance," such acts are imputed to the U.S. Defendants under an agency theory.

4. Though International Law Does Not Require it, Plaintiffs Sufficiently Allege "Specific Direction" of Defendants' Assistance.

Even if this Court were to apply the discredited *Perisic* ruling and find that specific direction is a requisite component of the *actus reus* analysis, Plaintiffs' allegations are sufficient to satisfy this standard. It is certainly "plausible" that Defendants' support was *in fact* directed to "encourage" the child slavery at issue – that was precisely why Defendants provided it. The Ninth Circuit already accepted for the purposes of this case that Defendants "sought to accomplish their own goals by supporting violations of international law," and "intended to support the use of child slavery as a means of reducing their production costs." *Nestle*, 766 F.3d at 1024, 1025. It is well beyond "plausible" that Defendants' desire to support slavery to reduce costs was the reason for the support they gave. In fact, the inference is so immediately apparent that even the *Perisic* Court's overly narrow definition of *actus reus* would support a criminal conviction based on the facts alleged here, where the Ninth Circuit has already noted that Plaintiffs sufficiently alleged purpose. Case No. IT–04–81–A at ¶ 37 ("In many cases, evidence relating

to other elements of aiding and abetting liability *may* be sufficient to demonstrate specific direction. . . . . [E]vidence regarding an individual's state of mind may serve as circumstantial evidence that assistance . . . was specifically directed towards charged crimes.").

Moreover, even according to *Perisic*, specific direction need not be explicitly considered when relevant acts or conduct are "not remote from[] the crimes of principal perpetrators." *Id*. at ¶ 38. "Where such proximity is present, specific direction may be demonstrated implicitly through discussion of other elements of aiding and abetting liability." *Id*. Defendants exhibited such proximity: several times throughout every year Defendants had employees visit Côte d'Ivoire and meet with farmers (the principal perpetrators of child slavery), whom they directly and "continually monitor." SAC ¶¶ 37, 53. Defendants also maintained exclusive relationships with the farmers: namely, "extensive on-the-ground networks" through which they "actively participate[d]" with the slaveholding farms, over whom they had an "unprecedented degree of control." SAC ¶¶ 41, 53, 59; *see also, e.g.*, SAC ¶¶ 24 & n.1; 36, 38–39. Defendants further had established presences in Côte d'Ivoire through their numerous facilities, including, e.g., "stations in all the major cocoa-growing regions," and ongoing operations throughout the country. SAC ¶ 49; *Id.* at ¶¶ 21, 40–41.

Moreover, Defendants controlled the labor on the farms, and whether the farms did or did not adopt slave labor. *Nestle*, 766 F.3d at 1025. Given the fact that Defendants monitored and controlled the overall labor and production process, even were specific direction not discredited, a reasonable inference here is that this included the workers who were child slaves.

D. Plaintiffs Have Article III Standing

The Defendants advance a novel standing argument that is really nothing more than an effort to add another layer to the already complex *Kiobel* test. If Plaintiffs have satisfied *Kiobel*, then they are suing under a federal law that can apply extraterritorially to address their allegations of injury. That inquiry addresses any proper remoteness issue in this case. However, even if we now address the basic standing question, Plaintiffs easily meet it. Constitutional standing requires only that (1) the plaintiff have suffered an injury in fact, (2) which is fairly traceable to the challenged action of the defendant, and (3) which may be redressed by a favorable court decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). Defendants do not—because they cannot—dispute that Plaintiffs have suffered an injury in fact that this court can remedy. Rather, they improperly attempt to cloak the merits of this case in "standing" by arguing that the Plaintiffs' injury is not fairly traceable to the Defendants' conduct. This argument fails on both legal and factual grounds.

First, as a practical matter, this case has been litigated in federal court for eleven years without Defendants, or any court, raising the issue of standing. Decades-long jurisprudence instructs that "standing is an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan*, 504 U.S. at 560. This issue is so essential that "federal courts are *required* sua sponte to examine jurisdictional issues such as standing." *Bernhardt v. County of Los Angeles*, 279 F.3d 862, (9th Cir. 2002) (quoting *B.C. v. Plumans Unified Sch. Dist.*, 192 F.3d 1260, 1264 (9th Cir. 1999). And yet, for eleven years, no court has challenged the Plaintiffs' standing.

Instead, the Ninth Circuit has implicitly decided the Plaintiffs have standing. "[T]he jurisdictional question of standing precedes . . . analysis of the merits." *Equity Lifestyle Props., Inc. v. Cnty. of San Luis Obispo*, 548 F.3d 1184, 1189 n.

10 (9th Cir.2008). It is a matter of basic procedure, repeated by the Supreme Court numerous times, that an appellate court cannot assess the merits of a case without first finding there is standing. "When the lower federal court lacks jurisdiction, [Appellate Courts] have jurisdiction . . . . not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit." *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986), *citing United States v. Corrick*, 298 U.S. 435, 440 (1936). "Every federal appellate court has a special obligation to satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review." *Id.* (*citing Mitchell v. Maurer*, 293 U.S. 237, 244 (1934); *see also*, *e.g.*, *Juidice v. Vail*, 430 U.S. 327, 331–32 (1977). It could not be any clearer. Where standing

> ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause. *On every writ of error or appeal, the first and fundamental question is that of jurisdiction . . . . This question the court is bound to ask and answer for itself*, even when not otherwise suggested. [This] threshold matter springs from the nature and limits of the judicial power of the United States and is *inflexible and without exception.*

Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94–95 (1998) (internal citations omitted) (emphasis added).

Third, even if constitutional standing could properly be raised by Defendants now, eleven years after the case was filed, the argument is meritless. A facial challenge of jurisdiction is only appropriate when the jurisdictional allegations are "clearly ... immaterial, made solely for the purpose of obtaining jurisdiction or where such a claim is wholly unsubstantial and frivolous." *Bell v. Hood*, 327 U.S. 678, 682 (1946). More specifically, "when the jurisdictional facts and the facts central to a tort claim are inextricably intertwined,' the district court ordinarily should withhold a determination regarding subject matter jurisdiction and proceed to the merits of the case." *Al Shimari v. CACI Premier Tech., Inc.*, No. 15-1831,

2016 WL 6135246, at *4 (4th Cir. Oct. 21, 2016) (ruling on a 12(b)(1) motion challenging ATS claims). In evaluating standing "at the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we 'presume that general allegations embrace those specific facts that are necessary to support the claim.'" *Id.* (quoting *National Wildlife Federation*, 497 U.S. 871, 889 (1990)); *see also Dep't of Commerce v. U.S. House of Reps.*, 525 U.S. 316, 329 (1999).

United States v. Students Challenging Regulatory Agency Procedures illustrates why Defendants' effort to challenge Plaintiffs' assertion that they have suffered an "injury in fact" fails. 412 U.S. 669 (1977). The plaintiffs, an environmental group, sued multiple railroad companies claiming a rail rate increase for freight created an injury to their use and enjoyment of natural resources. *Id.* at 673-676. They alleged that the increase would increase the use of non-recyclable commodities as compared to recyclable goods, leading to the need to use more natural resources to produce such goods, which could lead to more dumping of refuse that could be discarded in national parks in the Washington area. *Id.* at 688. The Court held the allegations were sufficiently specific. *Id.* Comparatively, Plaintiffs' specific allegations of horrific injuries they suffered are much more specific and give them standing.

Plaintiffs' allegations, as credited by the Ninth Circuit, also adequately demonstrated that their injury is fairly traceable to the Defendants' conduct. Where a court's remedial order will result in a "substantial probability" that a plaintiff's asserted injury will be redressed, an "actionable causal relationship" exists. *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 264 (1977); see also *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 74 (1978) ("these injuries 'fairly can be traced to the challenged

action of the defendant,' … or put otherwise, that the exercise of the Court's remedial powers would redress the claimed injuries").

Plaintiffs have alleged the time period in question with specificity. SAC ¶¶12–13. Plaintiffs have set forth the specific farms from which they were rescued, the specific farms where the Defendants' maintain exclusive buyer/supplier relationships and the specific regions in Côte d'Ivoire at issue. SAC ¶¶38–41. It is hardly speculative to trace Plaintiffs' injuries to aiding and abetting by Defendants, as Defendants dominate the market in Côte d'Ivoire. *Nestle*, 766 F.3d at 1017. The Ninth Circuit has already found that the assertion of market control is sufficiently alleged. *Id*. Plaintiffs have sufficiently alleged that Defendants dominate the market for chocolate in Ivory Coast. *Allen v. Dairy Farmers*, 748 F.Supp. 2d 323 (finding that the fact-intensive inquiry into market power means that allegations that Defendants control the market should not be dismissed pre-discovery). But for the Defendants' unilateral goal of sourcing the cheapest cocoa in Côte d'Ivoire and maintaining exclusive buyer/supplier relationships with slave holders, there is a substantial probability that the Plaintiffs would not have been enslaved. As the Plaintiffs' injuries are fairly traceable to Defendants, the case should not be dismissed. *See, e.g., Shimari*, 2016 WL 6135246, at *4.

Moreover, injunctive relief from this Court prohibiting the Defendants from engaging in slavery systems in the future would prevent the sort of injuries Plaintiffs suffered from reoccurring. For these reasons, the Defendants' standing challenge must be dismissed.

E. If the Court Finds that the Complaint is Not Sufficient, Plaintiffs Should be Given Leave to Amend.

In the event the Court finds any of Plaintiffs' allegations insufficient, Plaintiffs request leave to amend pursuant to Fed. R. Civ. P. 15(a). *See Eminence*

Capital, LLC v. Aspeon, Inc., 316 F.3d 1048, 1052 (9th Cir. 2003). That Plaintiff has amended once is immaterial for dismissals. In such instances "leave to amend should be granted unless the district court determines that the pleading could not possibly be cured by the allegation of other facts." *Levine v. Safeguard Health Enterprises, Inc.*, 32 F. App'x 276, 278 (9th Cir. 2002) (*citing Bly–Magee v. California*, 236 F.3d 1014, 1019 (9th Cir.2001)); *see also, e.g., Aspeon*, 316 F.3d at 1052 (dismissal without leave to amend is "not appropriate unless it is clear on de novo review that the complaint could not be saved by amendment.").

In particular, leave to amend is warranted if the court finds it necessary because the parties did not meet and confer concerning clarity regarding the names of defendant corporations. In the brief meet and confer held between the parties, the Defendants raised only the two issues raised by the Ninth Circuit—specific direction and *Kiobel*—and did not ask the Plaintiffs to amend or clarify their complaint on any other points.

V. CONCLUSION

The allegations of Plaintiffs' Second Amended Complaint satisfy the two specific issues of the Ninth Circuit's remand. Plaintiffs show that, with the proper legal standard applied, their allegations satisfy *Kiobel* because the claims "touch and concern" the United States. On the second issue, Plaintiffs show that their complaint sufficiently alleges *actus reus* for aiding and abetting because Defendants provided substantial assistance to the plantations that enslaved the Plaintiffs. Defendants' motions to dismiss should be denied.

DATED: November 7, 2016,

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