

1 KATHRYN LEE BOYD, ESQ. (SBN 189496)  
lboyd@srbr-law.com

2 RAJIKA L. SHAH, ESQ. (SBN 232994)  
rshah@srbr-law.com

3 **SCHWARCZ, RIMBERG, BOYD & RADER, LLP**

4 6310 San Vicente Boulevard, Suite 360  
Los Angeles, California 90048  
5 Phone: (323) 302-9488  
6 Fax: (323) 931-4990

7 TERRI MARSH, ESQ. (*pro hac vice*)  
terri.marsh.hrlf@gmail.com

8 BRIAN PIERCE, ESQ. (*pro hac vice*)  
bjpierce@gmail.com

9 **HUMAN RIGHTS LAW FOUNDATION**

10 1615 L Street, NW, Suite 1100  
Washington, D.C. 20036  
11 Phone: (202) 697-3858  
12 Fax: (202) 355-6701

13 Attorneys for PLAINTIFFS

14 **UNITED STATES DISTRICT COURT**  
15 **FOR THE NORTHERN DISTRICT OF CALIFORNIA,**  
16 **SAN JOSE DIVISION**

17 DOE I, DOE II, Ivy HE, DOE III, DOE IV,  
18 DOE V, DOE VI, ROE VII, Charles LEE,  
19 ROE VIII, DOE IX, LIU Guifu, WANG  
20 Weiyu, and those individual similarly  
situated,

21 Plaintiffs,

22 vs.

23 CISCO SYSTEMS, INC., John CHAMBERS,  
24 Fredy CHEUNG, and DOES 1-100,

25 Defendants.

Case No. 5:11-cv-02449-EJD-PSGx  
Assigned to the Honorable Edward J. Davila,  
U.S.D.J.

**PLAINTIFFS' NOTICE OF MOTION AND  
MOTION FOR RECONSIDERATION**

*[Proposed Order filed concurrently herewith]*

**[Fed. R. Civ. P. 59(e) and 60(b)(6)]**

Hearing Date: March 5, 2014  
Time: 9:00 a.m.  
Courtroom: 4, 5th Floor

Action Filed: May 19, 2011  
SAC Filed: Sept. 18, 2013

1 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD HEREIN:**

2 **PLEASE TAKE NOTICE** that on March 5, 2015<sup>1</sup> at 9:00 a.m. or as soon thereafter as  
3 the matter may be heard before the Honorable Judge Davila, in Courtroom 4 of the United  
4 States District Court for the Northern District of California, San Jose Division, located at the  
5 Robert F. Peckham Federal Building, 280 South 1st Street, San Jose, California 95113,  
6 Plaintiffs Doe I, Doe II, Ivy He, Doe III, Doe IV, Doe V, Doe VI, Roe VII, Charles Lee, Roe  
7 VIII, Doe IX, Liu Guifu and Wang Weiyu and those individuals similarly situated (“Plaintiffs”),  
8 will and hereby do move this Court to reconsider its Order Granting Defendants’ Motion to  
9 Dismiss, filed on and dated September 5, 2014 (the “Order”), and to enter an order denying the  
10 Motion to Dismiss.

11 This motion is made pursuant to Fed R. Civ. P. 59(e), or in the alternative, pursuant to  
12 Rule 60(b)(6), on the grounds that the Order failed to consider the Second Amended  
13 Complaint’s (“SAC”) allegations in light of the Ninth Circuit’s guidance in *Doe v. Nestle USA,*  
14 *Inc.*, \_\_\_ F.3d \_\_\_, 2014 WL 4358453 (9th Cir. Sept. 4, 2014) (“*Nestle II*”), regarding aiding  
15 and abetting liability under the Alien Tort Statute (“ATS”) and the extraterritorial reach of the  
16 ATS, which were central to this Court’s dismissal of Plaintiffs’ claims. *Nestle II*, which was  
17 issued only one day prior to the Court’s filing of the Order, replaced the Ninth Circuit’s  
18 previous one-page opinion in the case issued on December 19, 2013 (“*Nestle I*”) – on which  
19 the Court relied in reaching its decision here – with a revised opinion containing extensive  
20 analysis of the very issues on which this Court based its Order. Had this Court followed the  
21 Ninth Circuit’s in-depth and directly on point analysis in *Nestle II* regarding (1) the pertinent  
22 standards to establish liability for aiding and abetting violations of international law, and (2)  
23 conduct sufficient to overcome the presumption against extraterritorial application of the ATS  
24 in the wake of *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669 (2013), Plaintiffs  
25 respectfully submit that this Court would have found Plaintiffs’ allegations sufficient to satisfy  
26

27 <sup>1</sup> Pursuant to this Court’s Standing Order Regarding Case Management in Civil Cases, counsel  
28 have conferred with opposing counsel to determine that the hearing date will not cause undue  
prejudice.

1 their pleading burden and to deny Defendants' motion to dismiss.

2 By this motion, Plaintiffs request that the Court reconsider its Order, and enter an order  
3 denying Defendants' Motion to Dismiss. The motion is based upon this Notice, the attached  
4 Memorandum in support, the files and records in this action, and any further evidence and  
5 argument that the Court may receive at or before the hearing.

6 In addition, pursuant to Local Rule 7-1(b), Plaintiffs hereby request that this motion be  
7 heard without oral argument.

8  
9 Dated: October 3, 2013

Respectfully Submitted,

10 By: /s/ Terri E. Marsh  
11 Terri E. Marsh  
12 HUMAN RIGHTS LAW FOUNDATION

13 By: /s/ K. Lee Crawford-Boyd<sup>2</sup>  
14 K. Lee Crawford-Boyd (Co-counsel)  
15 SCHWARCZ, RIMBERG, BOYD & RADER, LLP  
16 Attorneys for Plaintiffs: DOE I, DOE II, Ivy HE, DOE III,  
17 DOE IV, DOE V, DOE VI, ROE VII, Charles LEE, ROE VIII,  
18 DOE IX, LIU Guifu, and WANG Weiyu.

19  
20  
21  
22  
23  
24  
25  
26  
27  
28 <sup>2</sup> I have obtained the other signatory's concurrence in the filing of this document.

**TABLE OF CONTENTS**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

INTRODUCTION ..... 1

LEGAL STANDARDS ..... 1

ARGUMENT ..... 2

I. *NESTLE II* REQUIRES RECONSIDERATION OF THIS COURT’S APPLICATION OF THE STANDARD FOR AIDING AND ABETTING LIABILITY UNDER THE ATS ..... 2

    A. In Light of Nestle II, Plaintiffs’ Allegations Meet the Mens Rea Requirements for Aiding and Abetting Liability Under the ATS ..... 3

        1. In light of Nestle II, Plaintiffs’ allegations establish that Defendants acted with knowledge..... 3

            a. Defendants gained firsthand knowledge through Golden Shield designs which make the use of torture explicit. .... 4

            b. Plaintiffs allege extensive reporting on the widespread torture and persecution of Falun Gong in China, and the essential role of the Golden Shield in facilitating this torture and persecution ..... 6

            c. Defendants gained firsthand knowledge by maintaining a long-term presence in China involving intimate business dealings with the Chinese Communist Party and Ministry of Public Security. .... 8

        2. In light of Nestle II, the Court should find that knowledge is sufficient to establish the requisite mens rea. .... 10

        3. In light of Nestle II, Plaintiffs’ allegations also establish that Defendants acted purposefully..... 11

    B. In Light of Nestle II, Plaintiffs’ Allegations Meet the Actus Reus Requirements for Aiding and Abetting Liability Under the ATS. .... 15

II. *NESTLE II* REQUIRES RECONSIDERATION OF THIS COURT’S APPROACH TO EXTRATERRITORIALITY ..... 18

III. BECAUSE THE PLAINTIFFS ADEQUATELY ALLEGE AIDING AND ABETTING, THE COURT MUST ALSO RECONSIDER THE PLAINTIFFS’ ECPA CLAIMS ..... 20

CONCLUSION ..... 20

**TABLE OF AUTHORITIES****Page(s)****U.S. CASES**

1		
2		
3		
4	<i>Al-Shimari v. CACI Premier Technology,</i> 758 F.3d 516 (4th Cir. 2014) .....	18, 19
5	<i>Aziz v. Alcolac, Inc.,</i> 658 F.3d 388 (4th Cir. 2011) .....	10, 14
6		
7	<i>Brooks v. Wash. Mut. Bank,</i> 2013 WL 30064 (N.D. Cal. Jan. 2, 2013) .....	2
8		
9	<i>Doe v. Exxon Mobil Corp.,</i> 654 F.3d 11 (D.C. Cir. 2011) .....	10
10	527 F. App'x. 7 (D.C. Cir. 2013) .....	10
11	<i>Doe v. Nestle USA, Inc.,</i> ___ F.3d ___, 2014 WL 4358453 (9th Cir. Sept. 4, 2014) .....	<i>passim</i>
12		
13	<i>Kaplan v. Cent. Bank of Islamic Republic of Iran,</i> 2013 WL 4427943 (D.D.C. Aug. 20, 2013) .....	18
14		
15	<i>Khulumani v. Barclay Nat'l Bank Ltd.,</i> 504 F.3d 254 (2d Cir. 2007) .....	10
16	<i>Kiobel v. Royal Dutch Petroleum Co.,</i> 569 U.S. ___, 133 S.Ct. 1659 (2013) .....	1, 18
17		
18	<i>Marketquest Group, Inc. v. BIC Corp.,</i> 2014 WL 3726610 (S.D. Cal. July 25, 2014) .....	2
19		
20	<i>Mohammadi v. Islamic Republic of Iran,</i> 2013 WL 2370594 (D.D.C. May 31, 2013) .....	18
21	<i>Mwani v. Bin Laden,</i> 2013 WL 2325166 (D.D.C. May 29, 2013) .....	18
22		
23	<i>Presbyterian Church of Sudan v. Talisman Energy, Inc.,</i> 582 F.3d 244 (2d Cir. 2009) .....	10, 14
24		
25	<i>Morrison v. Nat'l Australia Bank Ltd.,</i> 130 S. Ct. 2869 (2010) .....	18
26		
27	<i>Sexual Minorities Uganda v. Lively,</i> 2013 WL 4130756 (D. Mass. Aug. 14, 2013) .....	18
28		

	<b>TABLE OF AUTHORITIES (cont'd)</b>	<b>Page(s)</b>
1		
2		
3	<i>Zimmerman v. City of Oakland</i> ,	
4	255 F.3d 734 (9th Cir. 2001) .....	2
5		
6	<u>INTERNATIONAL CASES</u>	
7		
8	<i>The Flick Case</i> ,	
9	6 Trials of War Criminals 1194 .....	10
10		
11	<i>The Ministries Case</i> ,	
12	14 Trials of War Criminals 622 .....	10
13		
14	<i>Prosecutor v. Blagojevic</i> ,	
15	No. IT-02-60-A, (ICTY, May 9, 2007) .....	10
16		
17	<i>Prosecutor v. Kayishema</i> ,	
18	No. ICTR-95-1-T, (ICTR, May 21, 1999) .....	10
19		
20	<i>Prosecutor v. Taylor</i> ,	
21	Case No. SCSL-03-01-A, (SCSL Sept. 26, 2013) .....	15
22		
23	<i>The Zyklon B Case</i> ,	
24	1 LAW REPORTS OF TRIALS OF WAR CRIMINALS 93 (1946) .....	10
25		
26	<u>OTHER INSTRUMENTS</u>	
27		
28	28 U.S.C. § 2512(2) .....	20
	Rome Statute of the International Criminal Court, Article 25(3)(c)	
	37 I.L.M. 999 (1998) .....	10
	Fed. R. App. P. 4(a)(4)(A) .....	2
	Fed. R. Civ. P. 59(e) .....	1, 2
	Fed. R. Civ. P. 60(b) .....	2
	Fed. R. Civ. P. 60(b)(6) .....	1, 2

**MEMORANDUM OF POINTS AND AUTHORITIES****INTRODUCTION**

Pursuant to Fed. R. Civ. P. Rule 59(e) and, in the alternative, 60(b), Plaintiffs Doe I, Doe II, Ivy He, Doe III, Doe IV, Doe V, Doe VI, Roe VII, Charles Lee, Roe VIII, Doe IX, Liu Guifu and Wang Weiyu, and those individuals similarly situated (collectively, “Plaintiffs”), respectfully request that the Court reconsider and amend its order and decision dismissing Plaintiffs’ Alien Tort Statute (“ATS”) and Electronic Communications Privacy Act (“ECPA”) claims with prejudice, and declining to exercise supplemental jurisdiction over Plaintiffs’ California state law claims and accordingly dismissing them without prejudice. In its order, dated September 5, 2014 (Docket Entry (“DE”) 153) (the “Order”), this Court did not consider the Ninth Circuit’s recently reissued opinion in *Doe v. Nestle USA, Inc.*, \_\_\_ F.3d \_\_\_, 2014 WL 4358453 (9th Cir. Sept. 4, 2014) (“*Nestle II*”), which was issued only one day prior to the Order. The Ninth Circuit withdrew its earlier, one-page opinion issued on December 19, 2013 (“*Nestle I*”) – on which the Court relied in reaching its decision here – replacing it in its entirety with a revised opinion containing extensive analysis of the very issues on which this Court based its Order. Had this Court followed the Ninth Circuit’s in-depth and directly on point analysis in *Nestle II* regarding (1) the pertinent standards to establish liability for aiding and abetting violations of international law; and (2) conduct sufficient to overcome the presumption against extraterritorial application of the ATS in the wake of *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669 (2013), Plaintiffs respectfully submit that this Court would have found Plaintiffs’ allegations sufficient to satisfy their pleading burden and to deny Defendants’ motion to dismiss.

Accordingly, Plaintiffs respectfully bring this motion to alter or amend the Order, or in the alternative for relief from the judgment.

**LEGAL STANDARDS**

This motion is made pursuant to Fed R. Civ. P. 59(e), or in the alternative, pursuant to Rule 60(b)(6), on the grounds that the Order failed to consider the Second Amended Complaint’s (“SAC”) allegations in light of the Ninth Circuit’s guidance in *Nestle II* regarding aiding and abetting liability under the ATS and the extraterritorial reach of the ATS, which were central to

1 this Court’s dismissal of Plaintiffs’ claims. “Where a ruling has resulted in final judgment, a  
 2 motion for reconsideration may be construed either as a motion to alter or amend judgment  
 3 pursuant to FRCP 59(e), or as a motion for relief from judgment pursuant to FRCP 60(b).”  
 4 *Brooks v. Wash. Mut. Bank*, 2013 WL 30064, \*1 (N.D. Cal. Jan. 2, 2013). “The standard for relief  
 5 under Rule 60(b) overlaps in part with the standard under Rule 59(e).” *Marketquest Group, Inc. v.*  
 6 *BIC Corp.*, 2014 WL 3726610, \*4 (S.D. Cal. July 25, 2014).

7 A court may grant a motion to alter or amend under Rule 59(e) if “(1) the district court is  
 8 presented with newly discovered evidence, (2) the district court committed clear error or made an  
 9 initial decision that was manifestly unjust, or (3) there is an intervening change in controlling  
 10 law.” *Zimmerman v. City of Oakland*, 255 F.3d 734, 740 (9th Cir. 2001). Under Rule 60(b), the  
 11 court may relieve a party from an order in specified circumstances, or for “any other reason that  
 12 justifies relief.” Fed. R. Civ. P. 60(b).

13 Further, this motion is timely pursuant to either Fed. R. Civ. P. 59(e) or 60(b)(6), because  
 14 it was filed within 28 days of the Court’s entry of Judgment. *See* DE 154 (Judgment entered  
 15 September 5, 2014); *see also Marketquest Group, Inc.*, 2014 WL 3726610 at \*4 (“A motion is  
 16 treated as a motion to alter or amend judgment under Rule 59(e) if it is filed within twenty-eight  
 17 days of entry of judgment; otherwise, it is treated as a Rule 60(b) motion for relief from a  
 18 judgment or order.”).<sup>3</sup>

## 19 ARGUMENT

### 20 I. NESTLE II REQUIRES RECONSIDERATION OF THIS COURT’S 21 APPLICATION OF THE STANDARD FOR AIDING AND ABETTING 22 LIABILITY UNDER THE ATS.

23 Plaintiffs sufficiently allege aiding and abetting liability under the ATS in light of *Nestle*  
 24 II, because the *Nestle II* analysis makes clear that Plaintiffs’ allegations meet both (1) the relevant  
 25 *mens rea* requirements, and (2) the relevant *actus reus* requirements.

26 \_\_\_\_\_  
 27 <sup>3</sup> In addition, if a party timely files a motion in the district court pursuant to Fed. R. Civ. P. 59(e)  
 28 or 60(b) (within 28 days after judgment is entered), “the time to file an appeal runs for all parties  
 from the entry of the order disposing of the last such remaining motion.” Fed. R. App. P.  
 4(a)(4)(A).



1           **A. In Light of *Nestle II*, Plaintiffs’ Allegations Meet the *Mens Rea* Requirements for**  
2           **Aiding and Abetting Liability Under the ATS.**

3           In light of *Nestle II*, Plaintiffs’ allegations meet the *mens rea* requirements for aiding and  
4           abetting liability. First, *Nestle II* makes clear that Plaintiffs easily establish knowledge. Second,  
5           the *Nestle II* analysis militates in favor of applying a knowledge standard for aiding and abetting  
6           liability. Third, even if the Court holds that purpose is required, Plaintiffs’ allegations are  
7           sufficient to meet this standard in light of *Nestle II*.

8                   **1. In light of *Nestle II*, Plaintiffs’ allegations establish that Defendants acted with**  
9                   **knowledge.**

10           Applying the knowledge standard, this Court held that “[e]ven if Defendants knew that the  
11           Golden Shield was used by Chinese authorities to apprehend individuals, including Plaintiffs,  
12           there is no showing that Defendants also knew that Plaintiffs might then be tortured or forcibly  
13           converted.” DE 13. However, the Ninth Circuit’s reasoning in *Nestle II* makes clear that  
14           Plaintiffs’ allegations here are sufficient to support an inference that Defendants knew that its  
15           work on the Golden Shield, and especially its “gargantuan system of Falun Gong specific  
16           features,” SAC ¶ 5, would not only be used to apprehend Plaintiffs but also to facilitate torture  
17           and other abuses suffered by them.

18           In *Nestle II*, plaintiffs alleged that the defendants aided and abetted child slavery by  
19           providing assistance to Ivorian farmers. *See* Slip Op. at 8. The Ninth Circuit dispatched the  
20           “knowledge” requirement with an ease and brevity that indicates knowledge is not likely to be a  
21           substantial hurdle to establishing liability in most ATS cases. *Nestle II*’s application of the  
22           “knowledge” requirement is dealt with in full in the “Background” section of the opinion with  
23           this language:

24                   The defendants are well aware of the child slavery problem in the  
25                   Ivory Coast. They acquired this knowledge firsthand through their  
26                   numerous visits to Ivorian farms. Additionally, the defendants knew  
27                   of the child slave labor problems in the Ivorian cocoa sector due to  
28                   the many reports issued by domestic and international  
                    organizations.

Slip Op. at 8. Accordingly, the Ninth Circuit relied on two independent bases to establish that the  
defendants acted knowingly: (1) the defendants’ firsthand knowledge gained through numerous

1 visits to Ivorian farms, and (2) the existence of widespread reports on the practice of child slavery  
 2 in the Ivory Coast. As such, Plaintiffs’ allegations here are sufficient to establish Defendants’  
 3 knowledge, because (1) Defendants gained firsthand knowledge through Golden Shield designs  
 4 making the use of torture explicit; (2) Plaintiffs allege widespread reporting on the torture of  
 5 Falun Gong and the essential role of the Golden Shield in facilitating that torture; and (3)  
 6 Defendants gained firsthand knowledge through their long-term presence in China involving  
 7 intimate business dealings with the Chinese Communist Party and Ministry of Public Security.

8 **a. Defendants gained firsthand knowledge through Golden Shield designs**  
 9 **which make the use of torture explicit.**

10 The plaintiffs in *Nestle* alleged that defendants gained firsthand knowledge of the  
 11 underlying abuses by visiting Ivorian farms several times per year. *See Nestle II*, Slip Op. at 8.  
 12 Similarly, Plaintiffs here allege that Defendants gained firsthand knowledge that the Golden  
 13 Shield would be used to facilitate the torture of Falun Gong through Defendants’ designs and  
 14 other documents making the use of torture explicit.

15 Plaintiffs allege that San Jose Defendants’ Golden Shield designs integrated several Falun  
 16 Gong-specific features “specifically to give Chinese security access to the sensitive information  
 17 to facilitate the *zhuanhua* (forced conversion through torture) of Falun Gong believers based on  
 18 their individual social and economic circumstances, and the amount of leverage that can be  
 19 exercised against them through threats against family members, fellow adherents, and others.”  
 20 SAC ¶ 85. “*Zhuanhua*” is a Chinese term meaning “forced conversion through torture.” SAC ¶  
 21 85. The terms “*zhuanhua*,” “forced conversion,” “ideological conversion,” and “torture” are used  
 22 throughout Plaintiffs’ allegations in connection with Defendants’ mental state and conduct. *See*  
 23 SAC ¶¶ 9, 19, 32, 78, 79, 83-85, 88-91, 98-101, 106, 111, 117, 119, 122-124, 127, 131, 171, 193,  
 24 279, 281, 299, 302, 315, 318, 327, 342.<sup>4</sup> San Jose Defendants’ designs integrated Falun Gong-

25 <sup>4</sup> Similarly, Plaintiffs cite the definition of the term “*douzheng*” as “the term of art used to  
 26 describe persecutory campaigns comprising persecution and torture”, SAC ¶ 61, “against internal  
 27 and external enemies...conducted outside the authority of the state and without the constraint of  
 28 legal due process or any form of objective hearing or state regulation” SAC ¶ 31. The term has  
 historically been applied to a number of violent persecutory campaigns, including “various ‘Strike  
 Hard Campaigns’ of the 1990s” such as the campaign against Falun Gong. SAC ¶ 34. This term is  
 also used throughout Plaintiffs’ allegations in connection with San Jose Defendants’ mental state

1 specific databases with “public security command and dispatch centers, intelligence and  
2 information analysis centers, mobile and front line police technology,” “police stations, police  
3 detention centers, black jails, public security mental hospitals, rehabilitation clinics, ‘love and  
4 care’ rehabilitation centers, labor camps, and other facilities,” so that these locations could  
5 “access the profiled information stored in the apparatus and use it to forcibly convert” Falun  
6 Gong practitioners. SAC ¶¶ 86, 98(g)-(h). Defendants’ designs explicitly designate “the Falun  
7 Gong specific 610 Office...along with repeated mention of the vast system of detention centers,  
8 such as re-education through labor camps, public security hospitals and even mental hospitals,  
9 jails and ad hoc detention facilities devoted to ideological conversion through torture.” SAC ¶ 78.  
10 Defendants designed and implemented features for the “storing of forced conversion sessions in  
11 information systems readily available for continual use and reuse against the same individual”  
12 and for “sharing of effective forced conversion sessions with other security to enable them to  
13 learn how best to force the Falun Gong adherent to renounce his religious belief.” SAC ¶ 98(i)-(j).  
14 San Jose Defendants designed and implemented “a dynamic information management system that  
15 could keep up with the believers’ changes in life style, thoughts, moods, susceptibility to threats,  
16 and other factors which had to be recorded meticulously in order to ensure successful *zhuanhua*.”  
17 SAC ¶ 100. The need to “constantly obtain, update, and cross-reference information about  
18 individual Falun Gong adherents throughout this entire ‘lifetime’ in the system was closely and  
19 conspicuously tied to many forms of human rights abuses.” *Id.* This “lifetime” information  
20 system for each Falun Gong adherent “required the integration of their initial identification, and  
21 every subsequent piece of data associated with them [including] each and every interrogation,  
22 each and every forced conversion, torture/forced conversion, and further incarceration, release,  
23 medical ‘treatment’...death resulting from torture and other abuses, notes of security officers  
24 handling their case, and a wealth of other information.” SAC ¶ 101.

25         These designs, developed by the Defendants in San Jose, make explicit the need to  
26 analyze and gather sensitive information on Falun Gong practitioners and distribute it to 610

27  
28 and conduct. *See* SAC ¶¶ 61, 62, 64, 65, 67, 71, 83, 108, 117, 121, 127, 129, 175, 179, 185, 187,  
190, 193, 199, 203, 205, 209, 212, 216, 431, 440, 450, 454.

1 office locations, psychiatric hospitals, detention centers and other locations where torture was  
 2 carried out, for the purpose of using this information during interrogations and forced conversion  
 3 (torture) sessions. Defendants thus necessarily had firsthand knowledge that Falun Gong  
 4 practitioners were tortured through the use of the Golden Shield.

5 **b. Plaintiffs allege extensive reporting on the widespread torture and**  
 6 **persecution of Falun Gong in China, and the essential role of the Golden**  
 7 **Shield in facilitating this torture and persecution.**

8 Plaintiffs cited numerous public reports – from the U.S. State Department, the U.S.  
 9 Congressional-Executive Commission on China, the U.S. Commission on International Religious  
 10 Freedom, the United Nations, independent international human rights organizations, and both  
 11 Western and Chinese major media outlets – documenting the widespread torture and persecution  
 12 of apprehended individuals in China, especially Falun Gong practitioners, from at least 1999  
 13 onwards. SAC ¶¶ 48-50, 159-65, 167, 173.

14 This Court conceded that Plaintiffs’ allegations show that Defendants knew that the  
 15 Golden Shield would be used for “its security purpose – the apprehension of individuals  
 16 suspected of violating Chinese law through identifying, locating, profiling, tracking, monitoring,  
 17 investigating, and surveillance of such individuals.” DE 13. *Nestle II* makes clear that a  
 18 defendant’s knowledge of underlying human rights abuses can be sufficiently established by a  
 19 plaintiff’s allegations of widespread reporting on those abuses. Slip Op. at 8. Therefore, based  
 20 upon the widespread reporting that China tortures individuals whom it apprehends, if the  
 21 Defendants knew they were substantially assisting the apprehension of individuals in China, they  
 22 also knew they were substantially assisting the torture of many of those individuals.

23 Even if these reports alone were not sufficient, Plaintiffs allege that reporting on the  
 24 subject was not limited merely to the fact that apprehended Falun Gong practitioners are tortured,  
 25 but was also specifically focused on the role played by the Golden Shield in facilitating this  
 26 persecution and torture, including:

- 27 • **U.S. Department of State, the United Nations, Independent Human Rights**  
**Organizations, and Western Media Outlets:** “The use of the Golden Shield apparatus to  
 28 further the persecutory campaign against Falun Gong...has been reported widely in western

1 media outlets since 1999, and has been documented and universally condemned, beginning in  
2 1999, by the U.S. Department of State, the United Nations, and a number of international  
3 human rights organizations...” SAC ¶ 51.

- 4 • **Defendants’ Internal Reports:** The fact that Falun Gong practitioners were being tortured  
5 through the Golden Shield apparatus was documented in numerous reports directly received  
6 by high-level managers and directors of Defendant Cisco Systems, Inc. (“Cisco”), in which  
7 the persecutory “purpose of the Golden Shield network was clearly stated.” *See* SAC ¶¶ 65,  
8 210, 216. Cisco’s Public Security sales team was “tasked with accessing and sharing with  
9 company superiors all public security information about the Golden Shield, including public  
10 security related reports emphasizing the ‘*zhuanhua*’ purpose of the databases...” SAC ¶ 91.  
11 This team also communicated announcements by Communist Party media and local  
12 government websites which reiterated “Communist Party orders to use the Golden Shield to  
13 suppress Falun Gong,” including reports stating the “need for Falun Gong databases, which  
14 would enable the categorization of Falun Gong believers according to their susceptibility to  
15 forced conversion tactics and thus to ‘solve the problem of [their] forced  
16 conversion...easily.’” *See* SAC ¶ 88-90, 116-124. Defendants’ own reports “confirm that  
17 local security officers...used the Golden Shield as the means to identify, capture and forcibly  
18 convert Falun Gong adherents.” SAC ¶ 112.
- 19 • **Shareholder Resolutions and Public Demonstrations:** Defendants also received reports in  
20 the form of several Cisco shareholder resolutions presented to Cisco’s Board of Directors,  
21 including Defendant Chambers, between 2002 and 2010, identifying concerns regarding  
22 human rights abuses and demanding an investigation into Cisco’s complicity in these abuses.  
23 In each instance, the Board of Directors issued a statement recommending that shareholders  
24 reject the proposed investigations. *See* SAC ¶¶ 166, 174, 217. Beginning in 2003-2004,  
25 “physical demonstrations, including exhibitions depicting how Falun Gong believers were  
26 subjected to torture in China, were conducted outside Cisco’s offices in San Jose by members  
27 of the United States Falun Gong community.” SAC ¶ 167; *see also* SAC ¶ 177 (Cisco’s  
28 Senior Director of Corporate Communications, Terry Alberstein, wrote a letter in 2005

1 published in the *Taipei Times* directly responding to allegations that Cisco contributed to  
 2 human rights abuses in China through its work on the Golden Shield).  
 3 Defendants therefore knew of the widespread torture and persecution of Falun Gong practitioners  
 4 in China, and that the Golden Shield was used to facilitate this campaign.

5 **c. Defendants gained firsthand knowledge by maintaining a long-term**  
 6 **presence in China involving intimate business dealings with the Chinese**  
 7 **Communist Party and Ministry of Public Security.**

8 The Defendants' firsthand knowledge of the torture and persecution of Falun Gong can  
 9 also be inferred, in light of *Nestle II*, through Plaintiffs' numerous allegations demonstrating that  
 10 the Defendants maintained a long-term presence in China, including numerous visits by high-  
 11 level Cisco executives and the establishment of intimate relationships with high-ranking Chinese  
 12 Communist Party and Public Security perpetrators of the crackdown on Falun Gong. Specifically,  
 Plaintiffs allege:

- 13 • **Firsthand Visits to China:** Defendants sent its San Jose "Advanced Services Team" to  
 14 project sites in China, which implemented and optimized features enabling Chinese security  
 15 "to access the profiled information stored in the apparatus and use it to forcibly  
 16 convert...Falun Gong." See SAC ¶¶ 85, 86, 97(b), 145, 146. Defendant Chambers and other  
 17 Cisco executives frequently visited China and met with high-ranking officials and key  
 18 perpetrators of the Falun Gong crackdown, including then-President and Party General  
 19 Secretary Jiang Zemin, in order to cultivate and maintain personal relationships. See SAC ¶¶  
 20 59, 69, 133, 196-203.
- 21 • **Visits to Online Training Sessions:** Defendants hosted and visited online training sessions,  
 22 in which Defendants "offered Cisco-developed software to facilitate the suppression of Falun  
 23 Gong believers," describing Falun Gong believers as "viruses" and "despicable." See SAC ¶¶  
 24 66, 97(b), 194.
- 25 • **Long-Term Presence in China:** Cisco has operated "extensively in China since 1994," with  
 26 direct oversight from San Jose headquarters. SAC ¶ 168. Defendants in San Jose developed  
 27 "reciprocal-benefit relationships ('*guanxi*') with highly influential Party leaders, public  
 28 security officers," and others to "help Cisco develop and maintain a stronghold in the

1       lucrative security technology market in China,” requiring “a high level of familiarity with, and  
2       providing extensive support to, the persecutory purpose of the Golden Shield apparatus.” SAC  
3       ¶ 58. In 1998, Cisco began operating in China through a subsidiary in order to accumulate  
4       “social capital for the U.S. company through their well-established relationships with high-  
5       ranking members of the Party,” which required “the promise to meet the anti-Falun Gong  
6       objectives of the Golden Shield project.” SAC ¶ 137. Cisco also operated through the China  
7       Research and Development Center (“CRDC”) beginning in 2004, which was established “to  
8       manufacture Cisco products in China including Golden Shield parts and other technology  
9       used to ‘*douzheng*’ Falun Gong in China.” SAC ¶¶ 204, 205. Defendants distributed  
10       marketing materials “at trade shows across China,” demonstrating “their intention to meet the  
11       persecutory objectives of the apparatus.” SAC ¶ 70.

- 12       • **Due Diligence and Continual Assessments of the Chinese Market:** Defendants “conducted  
13       continual assessments of their investments in the Chinese market;” performed “due diligence  
14       reports” on “the intended and actual use of Cisco technology in China” and on “shareholder  
15       inquiries about the persecutory uses of the apparatus”; and “conducted careful review of types  
16       of Internet and other activity the Golden Shield was developed to identify and repress,  
17       including Falun Gong specific components and features.” SAC ¶¶ 129, 130, 168.

18       When viewed through the lens of *Nestle II*, which relied on publicly available reports and  
19       firsthand knowledge gained through defendants’ visits, it is implausible that similar publicly  
20       available reports, together with firsthand knowledge gained through San Jose Defendants’ design  
21       and implementation of the Golden Shield and Defendants’ long-term presence in China, did not  
22       give rise to Defendants’ awareness that China violently and illegally persecutes Falun Gong  
23       practitioners, and that the Golden Shield was intended to be used, and was in fact used, to carry  
24       out this violent and illegal persecution.

25               **2. In light of *Nestle II*, the Court should find that knowledge is sufficient to**  
26               **establish the requisite *mens rea*.**

27       In the Order, this Court acknowledged the uncertain state of the law in the Ninth Circuit  
28       regarding the requisite *mens rea* standard to meet aiding and abetting liability under international



1 law, and accordingly applied “the more lenient standard identified...in [*Nestle I*], which does not  
2 require the allegation of specific intent for *mens rea*.” DE 12. However, the Ninth Circuit in  
3 *Nestle II*, while declining to decide “whether a purpose or knowledge standard applies to aiding  
4 and abetting ATS claims” (Slip Op. at 22), found that a knowledge standard “dates back to the  
5 Nuremberg tribunals,” (Slip Op. at 20 (citing *The Zyklon B Case*, 1 LAW REPORTS OF TRIALS OF  
6 WAR CRIMINALS 93 (1946); *The Flick Case*, 6 Trials of War Criminals (T.W.C.) 1194, 1216-17,  
7 1220-21; *The Ministries Case*, 14 T.W.C. 622)), and “has been embraced by contemporary  
8 international criminal tribunals,” which “consistently apply” a knowledge standard. *Nestle II*, Slip  
9 Op. at 20 (citing *Prosecutor v. Blagojevic*, No. IT-02-60-A, ¶ 127 (ICTY, May 9, 2007);  
10 *Prosecutor v. Kayishema*, No. ICTR-95-1-T, ¶ 205 (ICTR, May 21, 1999); *Khulumani v. Barclay*  
11 *Nat’l Bank Ltd.*, 504 F.3d 254, 277-79 (2d Cir. 2007) (Katzmann, J., concurring); *Doe v. Exxon*  
12 *Mobil Corp.*, 654 F.3d 11, 33-34 (D.C. Cir. 2011) *vacated on other grounds by* 527 F. App’x. 7  
13 (D.C. Cir. 2013)).

14 The Ninth Circuit declined to articulate a standard because plaintiffs’ allegations there  
15 satisfied the purpose standard (*Nestle II*, Slip Op. at 22), and because two sister circuits have held  
16 in favor of a purpose standard. Slip Op. at 21 (citing *Aziz v. Alcolac, Inc.*, 658 F.3d 388, 399-400  
17 (4th Cir. 2011); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 259 (2d  
18 Cir. 2009) (“*Talisman*”). But the Ninth Circuit found that these circuits reached this conclusion  
19 only because they took the language of Article 25(3)(c) of the Rome Statute of the International  
20 Criminal Court, 37 I.L.M. 999 (1998), which contains the word “purpose,” “at face value,”  
21 (*Nestle*, Slip Op. at 22), implying that a more complete analysis of the Rome Statute would lead  
22 to the opposite conclusion, as was argued here in Plaintiffs’ Opposition Brief. *See* DE 123 at 18-  
23 19.

24 As such, the Court should, considering the Ninth Circuit’s analysis in *Nestle II* favoring a  
25 knowledge standard in conjunction with Plaintiffs’ Opposition Brief, conclude that a knowledge  
26 standard applies, thus concluding its *mens rea* analysis.



1                   **3. In light of *Nestle II*, Plaintiffs’ allegations also establish that Defendants acted**  
2                   **purposefully.**

3                   If the Court instead finds that purpose is required, the Ninth Circuit’s reasoning in *Nestle*  
4                   II militates in favor of finding that Plaintiffs’ allegations meet such a standard.

5                   In concluding that the defendants in *Nestle* acted purposefully, the Ninth Circuit looked to  
6                   the defendants’ profit motive to infer that they intentionally supported the use of child slavery  
7                   because it was the cheapest form of labor available. *See* Slip Op. at 22. The defendants “have not  
8                   merely profited by doing business with known human rights violators;” rather, they had a “plan to  
9                   benefit from the use of child slave labor.” *Id.* at 23. Here, Defendants had the same “myopic focus  
10                  on profit over human welfare” as the defendants in *Nestle* (Slip Op. at 26). Just as the *Nestle*  
11                  defendants “intended to pursue all options available to reduce their cost for purchasing cocoa”  
12                  and thereby increase their profits (Slip Op. at 22), San Jose Defendants here intended to pursue all  
13                  options available not only to gain access to the lucrative and growing Chinese market, but to  
14                  continue to support this market in order to maintain their competitive edge and increase their  
15                  return. The Golden Shield market is described as “lucrative” throughout Plaintiffs’ allegations,  
16                  SAC ¶¶ 55, 58, 126, 187, including the allegation that Defendants’ San Jose internal files  
17                  “acknowledged that the purpose of the Golden Shield was to *douzheng* Falun Gong and described  
18                  this goal as a lucrative business opportunity for the company.” SAC ¶ 187. Since 1994, Defendant  
19                  Chambers and other Cisco executives “consistently claimed [China’s] market as one of the  
20                  company’s key targets for future expansion.” SAC ¶ 168. Western technology companies,  
21                  including Cisco, knew that the “most important goal” of the Golden Shield was the persecution of  
22                  Falun Gong, and that “gaining a threshold in the Chinese security market required the design,  
23                  development, and promotion of technology specifically tailored for this purpose.” SAC ¶ 56. San  
24                  Jose Defendants created a marketing campaign “to win contracts to design and develop the  
25                  Golden Shield,” SAC ¶ 72, and the “anti-Falun Gong purpose of the apparatus...played a  
26                  significant role” in this marketing campaign. SAC ¶ 58; *and see generally* SAC ¶¶ 58-74. San  
27                  Jose Defendants “expressed willingness to meet the stated purpose of the Golden Shield  
28                  apparatus, i.e., to *douzheng* Falun Gong through identification, tracking, interrogation and

1 ideological conversion,” which “result[ed] in Cisco being awarded Golden Shield contracts.”  
2 SAC ¶ 193. Based on its “overwhelmingly effective marketing campaign,” Cisco was selected  
3 “on successive occasions to design and implement many Golden Shield components marketed as  
4 part of the Cisco ‘life cycle,’” including several anti-Falun Gong features. SAC ¶ 74. San Jose  
5 Defendants “authorized the creation of the China Research and Development Center (‘CRDC’) in  
6 China...to avoid US export controls and gain a more competitive edge in the Chinese technology  
7 market.” SAC ¶ 205. By 2007, Defendants in San Jose had managed the implementation of a  
8 three-tiered Golden Shield network in several Chinese provinces, SAC ¶ 107, thereby  
9 “cement[ing] Cisco’s place as one of the top foreign technology providers in the Chinese market  
10 and further incentiviz[ing] Cisco to provide more and more effective solutions.” SAC ¶ 108.  
11 Thus, the allegations are clear that San Jose Defendants specifically designed the Golden Shield  
12 to facilitate torture in order to gain access to one of the largest markets in the world, cement and  
13 maintain Cisco’s status as the world’s leading networking company, and turn a tremendous profit  
14 – regardless of the consequences for Plaintiffs and the millions of others targeted for persecution  
15 in China. Accord *Nestle II*, Slip Op. at 22.

16 The Ninth Circuit in *Nestle II* further supports its finding of purpose with allegations that  
17 “defendants had enough control over the Ivorian cocoa market that they could have stopped or  
18 limited the use of child slave labor by their suppliers.” Slip Op. at 23. “[A]long with other large  
19 multinational companies, the defendants effectively control the production of Ivorian cocoa.” *Id.*  
20 at 8. The defendants “did not use their control to stop the use of child slavery...but instead  
21 offered support that facilitated it.” *Id.* at 23-24.

22 Here, Plaintiffs similarly allege facts indicating that Defendants, along with other large  
23 multinational companies, were in a position to control the design and implementation of the  
24 “gargantuan system of Falun Gong specific features” to which the Chinese Communist Party may  
25 not otherwise have had access and which were essential to the widespread campaign of torture  
26 and persecution. For example, Plaintiffs allege that the Chinese Communist Party and Chinese  
27 security sought out companies like Cisco because “Chinese engineers did not have the expertise  
28 to develop these technologies,” SAC ¶ 55; that “Cisco recommended the use of many of these

1 first-of-a-kind features,” which were “developed specifically to aid Chinese security officers” in  
2 the “interrogation” and “torture” of Falun Gong and which Party officers “could not have  
3 envisioned based on their lack of expertise; even technical experts in China lacked the experience,  
4 training, or resources to develop these cutting edge innovative solutions,” SAC ¶ 76; that  
5 Defendants “also recommended to Chinese security more advanced features for the Golden  
6 Shield...[including] networked apparatus tasked with identification, profiling, high-level tracking,  
7 interrogating and forcibly converting through torture,” SAC ¶ 181; and that “[w]ithout the  
8 information collected and assembled through the Golden Shield, it would not have been possible  
9 to carry out the human rights and other violations against [Plaintiffs] in the same manner, or at  
10 all.” SAC ¶ 225, *see also* SAC ¶ 106 (“Without Cisco’s networked technology...Public Security  
11 and Office 610 officers would not have been able to obtain sensitive information from almost  
12 anywhere in China such as home and work addresses, purchases, financial information, contact  
13 with other Falun Gong members, past Falun Gong activities, IP addresses, and family information  
14 (used for interrogation and forced conversion practices/purposes).”).

15 Thus, while the level of control Defendants had over the Chinese market is not identical to  
16 the *Nestle* defendants in the Ivory Coast (due simply to the fact that the two cases involve markets  
17 for different goods), San Jose Defendants here still made the same legally relevant *purposeful*  
18 *choice*: although defendants in *Nestle* had the power to choose a form of labor other than child  
19 slave labor but chose child slave labor anyway, Defendants here had the power to withhold or  
20 limit the unprecedented technological innovations that enabled the widespread torture of Plaintiffs  
21 but chose instead to create and provide China with continued access to them. If, in *Nestle II*, “the  
22 defendants’ failure to stop or limit child slavery supports the inference that they intended to keep  
23 that system in place” (Slip Op. at 24), then here, the Defendants’ outright provision of torture-  
24 facilitating Golden Shield technology supports the inference that they intended to keep the  
25 widespread and violent campaign of torture in place.

26 The San Jose Defendants’ plan to benefit from China’s widespread persecution of Falun  
27 Gong practitioners “distinguishes this case from other ATS decisions where the purpose standard  
28 was not met.” *Nestle II*, Slip Op. at 23 (citing *Talisman*, 582 F.3d at 262; *Aziz*, 658 F.3d at 394,

1 401). In *Talisman*, the underlying human rights atrocities carried out by the Sudanese military  
2 “ran contrary to the defendant’s goals in the area, and even forced the defendant to abandon its  
3 operations.” *Nestle II*, Slip Op. at 23 (citing *Talisman*, 582 F.3d at 262). Similarly, in *Aziz*,  
4 “plaintiffs alleged that the defendants sold chemicals knowing they would be used to murder  
5 Kurds in northern Iraq, but failed to allege that the defendants had anything to gain from the use  
6 of chemical weapons.” *Nestle II*, Slip Op. at 23 (citing *Aziz*, 658 F.3d at 394, 401). Indeed, the  
7 plaintiffs in *Aziz* made only a “sole reference” to the defendant’s intentional conduct: the  
8 defendant placed a chemical “into the stream of international commerce with the purpose of  
9 facilitating the use of said chemical in the manufacture of chemical weapons to be used, among  
10 other things, against the Kurdish population in northern Iraq.” *Aziz*, 658 F.3d at 401. The court  
11 there found this allegation “cursory” and “untethered to any supporting facts.” *Id.* Plaintiffs here,  
12 by contrast, nowhere allege that the torture and persecution of Falun Gong ran contrary to  
13 Defendants’ goals or that Defendants were forced to abandon their operations as a result of these  
14 atrocities, as in *Talisman*. Further, where plaintiffs in *Aziz* alleged that the defendant engaged in  
15 an arms-length business transaction – the placement of a non-customized product into the stream  
16 of commerce – and simply labeled this behavior “purposeful” without further support for such a  
17 claim, Plaintiffs here, as discussed above, allege numerous facts showing that San Jose  
18 Defendants went well beyond an arms-length business transaction by planning, designing,  
19 constructing, and maintaining a massive, unprecedented, long-term technological project with  
20 customized anti-Falun Gong systems and features which were specifically directed to enable,  
21 among other things, torture through the identification, analysis, storage, and distribution of  
22 sensitive information used to interrogate and forcibly convert Falun Gong practitioners.

23 Therefore, if this Court finds that purpose is a required element for establishing aiding and  
24 abetting liability, it should follow the guidance provided by *Nestle II* and find that Plaintiffs have  
25 sufficiently alleged that San Jose Defendants acted purposefully.

26 **B. In Light of *Nestle II*, Plaintiffs’ Allegations Meet the *Actus Reus* Requirements**  
27 **for Aiding and Abetting Liability Under the ATS.**

28 *Nestle II* confirms that the required *actus reus* “is providing assistance or other forms of

1 support to the commission of a crime,” and that the assistance must be at least “substantial.” Slip  
2 Op. at 26. The Ninth Circuit stops short, however, of endorsing the disputed “additional  
3 requirement that the assistance must be specifically directed towards the commission of the  
4 crime,” concluding instead, after surveying numerous international criminal cases, that “there is  
5 widespread substantive agreement” that *actus reus* “is established by assistance that has a  
6 substantial effect on the crimes, not the particular manner in which such assistance is provided.”  
7 *Id.* at 26-27 (quoting *Prosecutor v. Taylor*, Case No. SCSL-03-01-A, ¶ 481 (SCSL Sept. 26,  
8 2013)). Thus, “[w]hat appears to have emerged is that there is less focus on specific direction and  
9 more of an emphasis on the existence of a causal link between the defendants and the commission  
10 of the crime.” *Nestle II*, Slip Op. at 27. The Ninth Circuit remanded to allow the *Nestle* plaintiffs  
11 to amend their complaint in light of its discussion of the international cases.

12 This Court determined that “the allegations in the SAC do not show that Defendants’  
13 conduct had a substantial effect on the perpetration of alleged violations against Plaintiffs.” DE  
14 12-13. While the Court did not elaborate further on this point, it should reconsider its conclusion  
15 in light of the guidance provided by *Nestle II*.

16 Under *Nestle II*, Plaintiffs’ allegations must demonstrate a “causal link” between  
17 Defendant’s design and implementation of the Golden Shield and the torture and other abuses  
18 suffered by the Plaintiffs, regardless of the “particular manner” in which Defendants provided  
19 their assistance. Such a causal link is established by Plaintiffs’ allegations detailing the use by  
20 Chinese security officials of San Jose Defendants’ Golden Shield technology to carry out mental  
21 and physical torture of Falun Gong detainees:

- 22 • **Identification and analysis of sensitive information used to torture Plaintiffs:** San Jose  
23 Defendants provided technology to identify, log, and analyze sensitive information used by  
24 Chinese security officials during the interrogation, torture and forced ideological conversion  
25 of Plaintiffs, including “home and work addresses, purchases, financial information, contact  
26 with other Falun Gong members, past Falun Gong activities, IP addresses, and family  
27 information,” SAC ¶ 106, “online ID numbers; physical locations; history of engagement in  
28 Falun Gong activities or association with the religion; history of detention and efforts at

1 forced conversion through torture; and ‘surveillance levels,’ indicating the degree of difficulty  
2 likely to be involved in the forced conversion process, with advice as to how to convert Falun  
3 Gong believers based on this and other typologies,” SAC ¶ 122, as well as “biometric data,”  
4 SAC ¶ 131. San Jose Defendants provided “maintenance of a dynamic information  
5 management system that could keep up with the believers’ changes in life style, thoughts,  
6 moods, susceptibility to threats, and other factors which had to be recorded meticulously to  
7 ensure successful” ideological conversion. SAC ¶ 100. San Jose Defendants provided  
8 technology to analyze this data, including a “library of ‘signatures,’ i.e., carefully analyzed  
9 patterns of Falun Gong Internet activity,” SAC ¶ 80, identified by Cisco’s Ironport software  
10 product, which was marketed as the “only product capable of recognizing over 90% of Falun  
11 Gong pictorial information,” and which “required Cisco’s extensive and long-term  
12 identification and analysis of Internet activity unique to Falun Gong practitioners.” SAC ¶  
13 97(c). “[W]ith the approval of Defendants in San Jose, Cisco intentionally incorporated the  
14 Falun Gong-specific signatures into security software upgrades at regular intervals to ensure  
15 Falun Gong activities and individuals were identified, blocked, tracked and suppressed.” *Id.*

- 16 • **Storage of this sensitive information in specific Falun Gong databases:** Defendants  
17 provided Falun Gong databases which enabled “the categorization of Falun Gong believers  
18 according to their susceptibility to forced conversion tactics,” and which stored “sensitive  
19 information about Falun Gong practitioners who have been previously detained and/or  
20 apprehended, thereby enabling Chinese security officers to use the information to interrogate,  
21 forcibly convert and torture practitioners in part based on their previous encounters with  
22 Chinese security.” SAC ¶¶ 88, 111. Defendants “ensured that the apparatus could handle the  
23 exact types of data that the Golden Shield would compile, store and make available to  
24 Chinese security.” SAC ¶ 131. Communist Party reports detail the ways this technology  
25 allows them to “solve the problem [of transformation] easily” by “creating a detailed, highly  
26 effective, flexible and free-flowing information database” with “family composition, contact  
27 information, information of their sons and daughters, where they live etc.” SAC ¶ 89.

28

- 1 • **Integration of Falun Gong databases with other systems:** Defendants integrated Falun  
2 Gong databases with “public security command and dispatch centers, intelligence and  
3 information analysis centers, mobile and front line police technology,” “police stations, police  
4 detention centers, black jails, public security mental hospitals, rehabilitation clinics, ‘love and  
5 care’ rehabilitation centers, labor camps, and other facilities.” SAC ¶ 98(g)-(h). These secure  
6 connections to databases allowed “for thorough cross-checking of names, affiliations, political  
7 behavior, family history, and ‘footprints.’” SAC ¶ 68. Defendants integrated Falun Gong  
8 databases with information systems, notification systems, and Cisco security software “not  
9 only to enable the identification and tracking of Falun Gong, but also and specifically to give  
10 Chinese security access to the sensitive information to facilitate the *zhuanhua*...of Falun  
11 Gong believers based on their individual social and economic circumstances, and the amount  
12 of leverage that can be exercised against them through threats against family members, fellow  
13 adherents, and others.” SAC ¶ 85.

14 This type of sensitive information was in fact essential to the specific instances of torture suffered  
15 by individual Plaintiffs. SAC ¶¶ 237, 247, 256, 269, 273, 289, 292, 313.

16 Thus, there is a strong, specifically alleged causal link between the actions of the  
17 Defendants and the abuses suffered by the Plaintiffs. In light of *Nestle II*, the Court should  
18 therefore reconsider its conclusion that the Defendants’ conduct did not have a substantial effect  
19 on the perpetration of the torture and other abuses suffered by Plaintiffs.

20 **II. NESTLE II REQUIRES RECONSIDERATION OF THIS COURT’S APPROACH  
21 TO EXTRATERRITORIALITY.**

22 *Nestle II* rejected the approach to extraterritoriality in ATS claims put forth by Justices  
23 Alito and Thomas in their *Kiobel* concurrence (133 S.Ct. at 1669), which urges the adoption of  
24 the “focus” test from *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010), to  
25 determine whether ATS claims sufficiently “touch and concern” the United States. *See Nestle II*,  
26 Slip Op. at 30-31. Under this test, the presumption against extraterritoriality is rebutted only if the  
27 event or relationship that was the focus of congressional concern is in the United States. *See id.* at  
28 30 (discussing *Morrison*, 561 U.S. at 266). Thus, Justices Alito and Thomas argued “a putative



1 ATS cause of action will fall within the scope of the presumption against  
2 extraterritoriality...unless *the domestic conduct is sufficient to violate an international law norm*  
3 that satisfies *Sosa*'s requirements..." *Kiobel*, 133 S.Ct. at 1670 (emphasis added).

4 The Ninth Circuit found the Alito-Thomas concurrence unpersuasive in *Nestle II*,  
5 however, determining that the focus test "cannot sensibly be applied to ATS claims." Instead, the  
6 Ninth Circuit deemed the majority's "touch and concern" language to be a "new...test for  
7 determining when it is permissible for an ATS claim to seek the extraterritorial application of  
8 federal law." *Nestle II*, Slip Op. at 29, 30; *see also Al-Shimari v. CACI Premier Technology*, 758  
9 F.3d 516, 528-531 (4th Cir. 2014) (stating that "We disagree with the defendants' argument,  
10 which essentially advances the view expressed by Justices Alito and Thomas" and instead  
11 requiring "a fact-based analysis" of factors such as the citizenship of the corporation, the  
12 citizenship of the individual agents and employees, the contractual relationship with the United  
13 States, the U.S. defendants' tacit approval of the underlying violations, and the United States'  
14 interest in regulating the conduct).<sup>5</sup>

15 The Ninth Circuit remanded to allow plaintiffs to amend in light of *Kiobel*, noting that  
16 "we are unable to conclude that amendment would be futile, because *unlike the claims at issue in*  
17 *[Kiobel]*, the plaintiffs contend that part of the conduct underlying their claims occurred within  
18 *the United States.*" *Nestle II*, Slip Op. at 31 (emphasis added). Although the Ninth Circuit  
19 declined to determine the issue, it is clear that domestic acts which merely *aid and abet* the  
20 underlying violations may be sufficient to "touch and concern" the United States – even if all of  
21 the acts constituting the underlying violations occurred abroad. *See Nestle II*, Slip Op. at 7-8  
22 (conduct violating the international law norm against child slavery all occurred in Ivory Coast).

23 This Court, however, appears to have followed the Alito-Thomas approach. DE at 10

24 <sup>5</sup> A fact-based analysis has also been advanced in the wake of *Kiobel* by a number of district  
25 courts. *See Kaplan v. Cent. Bank of Islamic Republic of Iran*, 2013 WL 4427943 (D.D.C. Aug.  
26 20, 2013) (applying factors-based test); *Sexual Minorities Uganda v. Lively*, 2013 WL 4130756  
27 (D. Mass. Aug. 14, 2013) (applying factors-based test and denying motion to dismiss based on  
28 U.S. conduct and residence); *Mwani v. Bin Laden*, 2013 WL 2325166 (D.D.C. May 29, 2013)  
(applying factors-based test and denying motion to dismiss based on U.S. conduct and interests);  
*Mohammadi v. Islamic Republic of Iran*, 2013 WL 2370594, \*14–15 (D.D.C. May 31, 2013)  
(applying factors-based test).



1 (“The domestic conduct of the Defendants is not, as set forth by Justices Alito and Thomas,  
2 ‘sufficient to violate an international law norm’” because the international law violations  
3 themselves (e.g., torture) were not “planned or directed” domestically).<sup>6</sup> In light of the Ninth  
4 Circuit’s rejection of this approach, this Court should reconsider this matter and find that  
5 Plaintiffs’ claims do sufficiently “touch and concern” the United States under *Kiobel*. While  
6 *Nestle II* does not set forth a specific “touch and concern” test, this Court could look to the fact-  
7 based analysis put forth in *Al-Shamari* 758 F.3d at 530-31, in which a number of factors weigh in  
8 favor of a finding that the Plaintiffs’ claims touch and concern the United States: Cisco is a U.S.  
9 corporation, SAC ¶ 22; managers and employees who are American citizens directed and planned  
10 the Golden Shield project from San Jose headquarters, SAC ¶¶ 126-35; and the United States has  
11 an interest in regulating the conduct, as evidenced by U.S. condemnations of the persecution of  
12 Falun Gong in China, SAC ¶¶ 48, 51, 164, 173, and by U.S. export controls on crime-control  
13 products sold to China, SAC ¶ 205. Plaintiffs further allege that San Jose Defendants gave tacit  
14 approval to the abuses by marketing and designing the Golden Shield, including designs enabling  
15 “Chinese security at public security psychiatric hospitals, public security hospitals, 610 office  
16 locations, to access...profiled information...and use it to forcibly convert...Falun Gong,” SAC ¶  
17 86. In addition, implementation of the project was assigned to an “Advanced Services  
18 Team...offered by San Jose Defendants,” SAC ¶ 145, and San Jose headquarters “controlled all  
19 decision-making and related management over the project.” SAC ¶ 108.

20 As such, Plaintiffs’ claims sufficiently “touch and concern” the United States.  
21  
22  
23

---

24 <sup>6</sup> Although “planning or directing” is not required in light of *Nestle II*, it remains the case that by  
25 integrating Falun Gong databases with “public security command and dispatch centers,  
26 intelligence and information analysis centers, mobile and front line police technology,” “police  
27 stations, police detention centers, black jails, public security mental hospitals, rehabilitation  
28 clinics, ‘love and care’ rehabilitation centers, labor camps, and other facilities,” SAC ¶ 98(g)-(h),  
“not only to enable the identification and tracking of Falun Gong, but also and specifically to give  
Chinese security access to the sensitive information to facilitate the *zhuanhua*...of Falun Gong  
believers,” SAC ¶ 85, Defendants in effect “planned” an entire system for carrying out acts of  
torture.

1 **III. BECAUSE THE PLAINTIFFS ADEQUATELY ALLEGE AIDING AND**  
2 **ABETTING, THE COURT MUST ALSO RECONSIDER THE PLAINTIFFS’**  
3 **ECPA CLAIMS.**

4 This Court determined that Defendants are exempt under section 2512(2) the ECPA  
5 because its “business is the manufacture, assembly, and sale of wire or electronic communication  
6 service and it created the Golden Shield system as part of its normal course of business in China.”  
7 DE 153 at 13. However, because Plaintiffs’ allegations are sufficient to establish that Defendants  
8 aided and abetted torture and other serious human rights violations for all the reasons stated  
9 herein, it cannot possibly be the case that Defendants were acting in the normal course of  
10 business. As such, this matter merits reconsideration as well.

11 **CONCLUSION**

12 Because the Court’s previous Order dismissing Plaintiffs’ claims declined to consider the  
13 Ninth Circuit’s decision in *Nestle II* and is inconsistent with it for all the reasons stated herein,  
14 Plaintiffs respectfully request that the Court reconsider its previous Order and alter or amend its  
15 decision to allow Plaintiffs’ claims to go forward.

16 Pursuant to Local Rule 7-1(b), Plaintiffs further request that this motion be heard without  
17 oral argument.

18 Dated: October 3, 2014

Respectfully Submitted,

19 By: /s/ Terri E. Marsh  
Terri E. Marsh  
HUMAN RIGHTS LAW FOUNDATION

20 By: /s/ K. Lee Crawford-Boyd  
21 K. Lee Crawford-Boyd  
22 SCHWARCZ, RIMBERG, BOYD & RADER, LLP  
23 Attorneys for Plaintiffs  
24  
25  
26  
27  
28