UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

CHEN GANG, DOES 1-3 et al.

Plaintiffs,

v.

ZHAO ZHIZHEN & DOES, 1-5 INCLUSIVE,

Defendants.

Civil Action No. 3:04CV01146(RNC)

DEFENDANT ZHAO ZHIZHEN'S OPPOSITION TO PROPOSED PLAINTIFFS' MOTION TO FILE A THIRD AMENDED COMPLAINT

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INTRODUCTION

This lawsuit was dismissed in September, 2013 – after three filed complaints and eight years of motion practice – based on Plaintiffs' failure in their Second Amended Complaint ("SAC") to establish jurisdiction of this Court under the Alien Tort Statute ("ATS") that could displace the presumption against its extraterritorial application as mandated by the U.S. Supreme Court in *Kiobel v. Royal Dutch Petroleum*. 133 S. Ct. 1659 (2013)

Proposed Plaintiffs' ("Plaintiffs") motion for leave to file a Third Amended Complaint ("TAC") should be denied with prejudice. This complaint not only repeats the conclusory, vague and speculative allegations of the previous complaints that Chinese television journalist Zhao Zhizhen used the Internet and television to broadcast anti-Falun Gong propaganda in China in order to aid and abet incitement of the Chinese *government's* prison and security forces to torture adherents of Falun Gong in China,[1] it now alleges that the exact same purported hate speech generated in China was part of a now "global" conspiracy by Mr. Zhao and others to suppress Falun Gong members in the United States.

Realizing the futility of their claims under *Kiobel*, Plaintiffs previewed these alleged new TAC "facts" in their opposition to dismissal of the SAC. This Court then

[1] The People's Republic of China ("PRC") has determined that Falun Gong "is not a religious belief or spiritual movement but an evil cult led by Li Hongzhi that seriously endangers the Chinese society and people," and that it has "seriously disrupted the law and order," and endangered social stability by inciting lawless and disruptive acts including sabotage and suicide bombings." Thus under Chinese law, the practice of Falun Gong is illegal and Chinese statutes duly promulgated by Chinese legal authorities set forth specific Falun Gong activities that are prohibited. Individuals who violate these laws are subject to arrest and defined penalties, including "reeducation through labor" and imprisonment for up to specified terms and forced labor. As will be set forth below, China's enactments and their implementation on Chinese territory are acts of state taken within Chinese territory, and therefore U.S. courts may not sit in judgment of them.

dismissed the SAC with exactly these new allegations in mind, specifically ruling that the ATS does not confer jurisdiction on the basis of Defendant Zhao "specifically direct(ing) his propaganda campaign [from China] toward United States citizens and residents." Slip op. at 6-7.

Despite this clear admonition and the numerous ATS cases, cited below, that are being dismissed based upon extraterritoriality, Plaintiffs continue to push ahead. They restate virtually their entire SAC and then, halfway through this bloated and repetitive 99-page, 247-paragraph proposed filing, they begin an ill-conceived effort to qualify for ATS jurisdiction by bootstrapping these same exact dismissed allegations of spreading hate speech against the Falun Gong by simply adding vague and incidental allegations of impact on a Chinese-American community in Flushing, New York.

As best as can be deciphered, the TAC alleges that Mr. Zhao, through the same website of the China Anti-Cult Association ("CACA") (a private Chinese organization in which Plaintiffs claim he has a key leadership role), purposely disseminated these materials to the United States in order to provide substantial assistance to a conspiracy to discredit, vilify, intimidate and incite violence by unnamed Chinese-Americans against Falun Gong members living primarily in Flushing. This purported conspiracy supposedly involves the CACA, the Chinese Communist Party and Chinese Central Television ("CCTV")[2] in China, as well as two private groups of Chinese-Americans it claims are agents of the CACA and a non-profit foundation based in Florida that purportedly shares a purpose to "suppress" the Falun Gong. None of these U.S. entities are named in the TAC, and none of them are believed to operate in Connecticut.

[2] CCTV is an instrumentality of the Chinese state. *See Chen v. China Central Television*, 2007 U.S. Dist. LEXIS 58503 at *2.

These new and highly frivolous allegations fail to establish violations of established international law. Even taken together with the previous claims already dismissed by this Court, not only does the TAC fail to come close to satisfying the presumption against extraterritorial application in *Kiobel*, but it also utterly fails to satisfy the specificity of pleading requirements established by the Supreme Court in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), or other decisions which require heightened pleading standards for ATS and First Amendment cases.

Moreover, even if the "new" allegations in the TAC were shown to substantially impact the United States or to meet the required specificity of the pleading standards, which they do not, the TAC again attempts to criminalize speech that is a mixture of opinion, invective, hyperbole and facts. That speech assails Li Hongzhi, ridicules his teachings and warns that Li's claims to supernatural powers and his discouragement of medical treatment and family values in favor of loyalty to his teachings were dangerous to both Falun Gong followers and Chinese society at large, while urging society to take a strong stand against the group.

Again, none of the speech allegedly proffered by Plaintiffs – all originating in China and transmitted via the Internet − can be ruled as "directed to inciting or producing *imminent lawless action* and . . . likely to incite or produce such action" (the test of *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969), and its progeny) and therefore it cannot be punished without violating the First Amendment. Moreover, as the TAC alleges the incitement occurred in the United States it must exclusively be judged by U.S. law and

constitutional standards, and not international law.[3] Not only does the TAC attempt to use U.S. law to hold Mr. Zhao liable under the ATS for purported opinions he expressed in China that are generally available and completely legal in this country, it now attempts to connect vague and conclusory allegations of an implausible conspiracy to amorphous allegations of "crimes" that allegedly occurred in the United States based upon words that – to the extent they are specified – cannot possibly be considered incitement under the First Amendment. Even if this Court were to view the alleged statements through the prism of aiding and abetting a criminal action, none of these allegations meet the requisite pleading requirements.

This Court has already ruled that Plaintiffs' claims of violations of norms of international law do not sufficiently "touch and concern" the United States to provide jurisdiction under the ATS. The "new" allegations in the TAC do not even attempt to claim that any violation of the norm of international law, such as torture or extrajudicial killings, actually took place within the United States. Instead, Plaintiffs appear to argue that because some nominal activity took place in the United States emanating from the same conspiracy to suppress the Falun Gong, (all of which arose years after the filing of the First Amended Complaint in 2004), all of the activities in the conspiracy should be accepted as "touching and concerning" the United States under *Kiobel*. These are unsupportable notions; as this Court has already found, even if Mr. Zhao specifically directed tortious conduct toward the United States via the Internet, the alleged violations

[3] Even if this Court viewed this matter from the perspective of international law, the United States' position on international law (evidenced by international treaty reservations and treaty implementing legislation passed by the U.S. Congress as set forth below) is that that a statement cannot be considered to violate a universal norm of international law if it fails to meet the *Brandenburg* standard.

of the norms of international law were carried out in the context of actions that occurred in China, and this Court has no jurisdiction. Slip op. at 8-9.

Thus, for the reasons stated within and as previously set forth in Mr. Zhao's opposition to the SAC,[4] the proposed TAC is futile, prejudicial and cannot relate back to the original amended complaint. Nothing has changed since the Motion to Dismiss the SAC was filed regarding the doctrines of act of state, political question, international comity and "case-specific deference" apply, because no matter how it is couched, this suit is indisputably directed at the People's Republic of China ("PRC") through Mr. Zhao. For these reasons, Plaintiffs' Motion for Leave to Amend should be denied, this time with prejudice.

THE THIRD AMENDED COMPLAINT'S ALLEGATIONS

The TAC largely repeats the allegations in the SAC and Defendant will not review these allegations wholesale, as they have already been dismissed as inadequate to state a claim. However, by brief summary: Plaintiffs allege that Defendant Zhao was Executive Director of Wuhan Radio and Television Bureau (a government media regulatory body), Director of the Wuhan Television Station, and Chief Editor of the well-known TV science series, "Light of Science," broadcast not only on WTV, but also daily on the primary nationwide Communist Party television organ, CCTV, from 1986 until at least 2003 and that since November 2000 was a "leading" member of the Standing Committee of the Executive Council of the CACA, a private, not-for-profit association based in China. TAC at ¶ 4. Plaintiffs allege the CACA was created to develop and

[4] There is no dispute the TAC overlaps with the SAC; Plaintiffs refers multiple times in the TAC to counsel's declarations from their Opposition to the Motion to Dismiss the SAC. Defendant respectfully request that should the Court find jurisdiction under the TAC, that the Court also review and consider the previous filings of Mr. Zhao in support of the Motion to Dismiss the SAC as further arguments of the futility of the TAC, rather than Defendant attempting to restate every brief point from those filings.

disseminate anti-Falun Gong brainwashing training material that emphasizes the need to use torture as a means of 'transforming' practitioners of Falun Gong." TAC at ¶ 5.

Plaintiffs allege Mr. Zhao was in conspiracy with others "who furthered the rights deprivations/persecution and other abuses carried out against practitioners of Falun Gong." *Id.* The acts alleged in the TAC were allegedly carried out as part of a (alleged now for the first time in the TAC) global suppressive campaign of extermination against Falun Gong practitioners in China and the United States. TAC at ¶ 6. In China, the campaign allegedly included prison, labor camp, and re-education center guards and personnel, members of the media and high ranking members of the Communist Party. *Id*. In New York, it allegedly includes vague and conclusory allegations of harassment, intimidation and violence.

Paragraph 26 through Paragraph 118 of the TAC are identical or virtually identical to the allegations in the now-dismissed SAC, claiming completely implausible notions such as that Defendant, a journalist, provided "ideological authorization for a mobilization of security forces . . . and specifically directed Falun Gong adherents be subject to 'transformation'" practices" in China. (TAC at ¶ 43). The allegations again claim that he participated in, or organized the CACA website to post thousands of articles critical of the Falun Gong and warning of its dangers in China.

Paragraphs 119 through 130 are also duplicative recitations of Plaintiff's conclusory theory of how a conspiracy was created in China, with incidental references that vaguely claim that the Party's anti-Falun Gong activities were aimed at the United States. For example: "Promulgating the identical anti-Falun Gong narrative shared by all members of the joint enterprise that was to a large extent created initially by and under

the direction of Zhao, his anti-Falun Gong polemic reached Chinese audiences in the United States," TAC at ¶ 129, and that the aim at the United States had "an explicit, special focus on both China and the United States, where the religion was and is headquartered, where the founder of the practice Mr. Li Hongzhi resides, and where the world's largest concentration of openly practicing adherents reside." TAC at ¶ 130.

Beginning at Paragraph 131, Plaintiffs allege that Defendant – either alone or through the CACA – at some point began to interact with groups in the United States to spread anti-Falun Gong material. Specifically, the TAC alleges that: (1) Mr. Zhao and/or the CACA compiled a library of anti-Falun Gong materials on the Internet; (2) the CACA sent delegations to the United States to organize opposition to the Falun Gong; and (3) the CACA has some amorphous "domestic branch offices and affiliates," which instigate hate rallies and intimidation "often directly quoting from, distributing" and otherwise making use of Falun Gong materials." TAC at ¶ 134. ("They follow his plan, serve under him repeat his words, and attack his 'enemies' in the peaceful Falun Gong religion.") The allegations refer to the same purported statements by defendants and others in China going back as far as 1999 and outlined in the SAC.

Paragraphs 136-152 describe the CACA website, mirroring much of the language of earlier Complaints, and claiming an intent by CACA and Mr. Zhao "to raise an alarm about Falun Gong around the world, especially in the United States," through: vague references to calls for violence, TAC at ¶ 142, libelous or untrue materials (false comparisons and depictions of Falun Gong), TAC at ¶ 141, calling for unspecified violence against the founder of the religion, TAC at ¶ 142, covering up human rights abuses, TAC at ¶ 144, instigating Chinese communities in the United States through its

dehumanizing messages, TAC at ¶ 145, containing dehumanizing images, TAC at ¶¶ 145, 149, 150, and containing misleading or untrue reports. TAC at ¶ 152. The Internet material from China is purportedly downloaded and distributed as paper copies. TAC at ¶¶ 148-150. The TAC strains even to pull phrases out of context to assert a concerted effort to target the United States. For example: "everyone has a social responsibility to 'self-consciously douzheng against the devil,'" TAC at ¶ 137; "the campaign against Falun Gong is designed to raise an emergency alarm to the entire world," TAC at ¶ 138; the CACA website "compiles and builds a hate-filled narrative [using] any and all US commentary" about the Falun Gong, TAC at ¶ 141; the CACA website "presents the violent suppression of Falun Gong as acts of kindness and love" intended solely for Falun Gong adherents, TAC at ¶ 144; and a CACA report states that visitors to the site include people from overseas, TAC at ¶¶ 139, 147. Moreover, the TAC's conclusory language and lack of specificity is readily apparent when describing what Mr. Zhao did to aim the Chinese campaign to the United States, i.e. "Zhao deliberately designed the CACA website to flood Chinese communities in the United States with calls for the violent conversion of believers" (citing use of dehumanizing imagery). TAC at ¶ 145.

Paragraphs 153- 160 allege that CACA delegations – none of which included Mr. Zhao (except one purported 2007 meeting in which he allegedly failed to appear, TAC at ¶ 160), were sent to the American Family Foundation[5] "at various times to solicit the

[5] The American Family Foundation, now known as the International Cultic Studies Association, ("ICSA") is a Florida-based tax-exempt organization that states on its website that it "supports civil liberties and is not affiliated with any religious or commercial organizations," with "a mission to apply research and professional perspectives to help those who have been harmed by psychological manipulation and cultic groups, educate the public, promote and conduct research, and support helping professionals interested in cults, related groups, and psychological manipulation." *See* http://icsahome.com/abouticsa.asp.

group's assistance in vilifying Falun Gong and calling for its suppression," most purportedly concerning the "transformation" or brainwashing of Falun Gong practitioners. *Id.*

Paragraphs 161-166 allege the existence of so-called "CACA Branch offices," suggesting an affiliation between the CACA and two purported U.S.-based entities called the Chinese American Citizen's Anti-Cult Association (CACACA) and the Chinese Anti-Cult World Alliance (CACWA).[6] The TAC alleges that these groups "actively disseminated, distributed and invoked Zhao's materials to mobilize anti-Falun-Gong hate rallies and posses, in all cases seeking to threaten and intimidate local adherents and suppress the religion." TAC at ¶ 165. The degree of speculation and presumption in lieu of proximate cause in the TAC is staggering. Plaintiffs allege simply that the CACA website "characterized" the CACACA as a branch office or affiliate, "with the full support and endorsement, if not direction and control of the CACA," and that the CACACA uses materials from the Chinese CACA website. TAC at ¶ 163.

Paragraph 166 alleges that the physical attacks on Falun Gong adherents in 2008 were "foreseeable results of the distribution of the anti-Falun Gong materials," and that one purported "chief of a local CACA branch office," Li Huahong, was "tried and sentenced guilty" based upon one assault. While Plaintiffs allege violence based upon "information and belief" or upon newspaper reports, they ironically fail to include a 2007 *New York Times* report which describes bitter attacks on Li Hauhong by the Falun Gong's *Epouch Times* newspaper and her response to these very same accusations of her being a

[6] Both of these groups, as well as the ICSA, appear to be necessary parties to answer for these frivolous allegations, but none of them are named in the TAC.

Chinese government agent: http://cityroom.blogs.nytimes.com/2011/03/07/a-battle-for-chinese-hearts-and-minds-in-flushing/.

Paragraphs 167-180 are more of the same speculation and conclusory statements, itemizing the alleged defamatory content of Mr. Zhao's supposed strategy to discredit the Falun Gong, TAC at ¶ 169, the purported "close collaboration" with CCTV's international channel 4 (TAC at ¶ 170), and the purported impact of these broadcasts, going so far as to state at ¶¶ 175 -180 that the availability of these materials have turned the tide of public opinion against the Falun Gong. These allegations essentially conclude that by broadcasting the materials on the CACA website and on CCTV, the materials appear as if they are approved by the CCP and thus they become authoritative and influential on Chinese-American public opinion in the United States, ultimately leading 38 U.S.-based Chinese community associations to sign on to an open letter supporting the CCP's stance on the Falun Gong and urging a wider crackdown. TAC at ¶¶ 179, 190.

Plaintiffs allege that the above-referenced activities target and deprive Falun Gong practitioners of "human and civil rights" through direct confrontation, forums, and publication of materials denigrating Falun Gong in the U.S., TAC at ¶181-183, threats have been made to the Falun Gong's "digital temple," religious gatherings have been disrupted, and there are vague allegations of attacks and intimidation, as well as infliction of emotional distress through exposure to hate speech. TAC at ¶ 184. Plaintiffs claim – without any specifics – that these activities deprive them of their fundamental rights to religious freedom and the freedoms of belief, association, assembly and self-expression. "Because these acts have occurred in a widespread fashion, they rise to the level of persecution as a crime against humanity." *Id.* However, Plaintiffs fail to state whether

they ever made these claims in a separate criminal or civil complaint against the alleged perpetrators.

One example of these so-called "disruptions" was a May 17, 2008 rally in Flushing, NY where a supposed mob of angry community members attacked Falun Gong adherents holding a rally of condolence for victims of the Sichuan, China earthquake. TAC at ¶ 187. Incorporation of this isolated event into the TAC and claiming it to be a violation of international law is bad enough, but Plaintiffs fail to report that the Falun Gong's own activities appear to have instigated community antagonism by hanging a banner that read "天滅中共" (Heaven is destroying the CCP), in reference to a belief that the "God" punished the Chinese Communist Party by killing tens of thousands of people in the Sichuan earthquake: basically that the CPP and its followers got what they deserved, a notion that, according to at least one report, engendered an immediate visceral reaction by many community members. *See* http://blog.foolsmountain.com/2008/05/22/some-rabid-falun-gong-followers-show-their-ugly-side-in-flushing-ny/. Nevertheless, Plaintiffs claim that those who would seek group worship "live with a constant experience of hate-based discrimination, ostracism, harassment, and the threat of violence, TAC at ¶ 189, where they must experience "dehumanizing invective." TAC at ¶¶ 190 – 202.

The TAC repeatedly describes these allegations as "specific," almost like a mantra, but a closer reading shows that these allegations are nothing if not ridiculously vague (underlined emphasis added):

- CACA domestic branch offices and affiliates, which carry out CACA domestic branch on a regular basis (providing "boots on the ground" for anti-Falun Gong activities and instigation of hate rallies, violent assaults

threats and intimidation) often using materials they claim was drafted or directed by Mr. Zhao. TAC at ¶ 134.

- A "digital temple" has been "subjected" to "suppressive campaign," religious gatherings have been "disrupted by violent threatening mobs," "lives and physical safety has been routinely threatened and jeopardized," adherents are publicly humiliated and targeted by anti-Falun Gong materials, "adherents have "been terrorized and are in a state of constant alarm." TAC at ¶ 184. There were "dozens of incidents." TAC at ¶ 189
- "[W]idespread acts of physical violence," are the directly foreseeable result of Mr. Zhao's speech, which are supposedly carried out by CACA and its related branches. TAC at ¶¶ 185, 186, 191, 221.
- Assailants at the May 17, 2008 rally "showed signs of working in unison, involving hate speech and physical blows to adherents." ¶ 187. Other violent assaults were made by CACWA volunteers and those with ties to the CACA which were instigated by Defendant's anti-Falun Gong materials. TAC at ¶ 188
- There were other actions against Falun Gong adherents in other cities, especially San Francisco. TAC at ¶ 191.

In order to allege aiding and abetting, Plaintiffs claim that Mr. Zhao intended that his Internet message "be carried out in the United States," TAC at ¶ 205, - that he has called Falun Gong an "ulcer on society" and a terrorist group, and called for "extermination of its founder and criticized U.S. Politicians who support Falun Gong. TAC at ¶ 207. Plaintiffs further allege he provided "substantial assistance" through materials provided on the CACA website, "providing those who committed the abuses with their motivation, cover-up/justification, and a library of materials to use in building support within the Chinese community and motivating others to help them attack Falun Gong adherents. TAC at ¶¶ 214-217.

Paragraph 217 is emblematic of the defects of the pleading, which makes it clear that the TAC seeks damages for the effects of alleged hate speech in the United States that does not come close to meeting *Brandenburg's* standards (emphasis added):

> Zhao's anti-Falun Gong propaganda, including specific acts of slander/libel falsely attributing crimes of moral turpitude to Falun Gong

> adherents, his extensive dehumanizing rhetoric and instigation of acts of violence [which are only alleged as result of the transmission of inciting materials], as well as the CACA activities of organizing anti-Falun Gong demonstrations and violent assaults/confrontations, were (and continue to be) essential to the injuries suffered by Falun Gong members believers on U.S. soil including their deprivation of rights within Chinese communities. Zhao's materials successfully instigate anti-Falun Gong animus, his organization (CACA) coordinates that animus into specific incidents of violence and intimidation, and promulgates his materials throughout Chinese Communities.

Thus, Plaintiffs claim a conspiracy with numerous individuals and organizations based in China, such as major Chinese Communist Party leaders, CACA Standing Committee members and others "to flood U.S. Chinese Communities with anti-Falun Gong invective that would integrate persecution and violence, was carried out through the collaborative efforts of Zhao, the CACA and Party propaganda apparatus . . . The entire library of anti-Falun Gong rhetoric aired in China that was also simulcast in the US presented a well-coordinated narrative that depicts all Falun Gong as violent and dangerous criminals and murderers who must be eradicated." TAC at ¶ 218.

On September 20, 2013, this Court issued a written opinion and Order dismissing this matter for lack of subject matter jurisdiction. *Chen Gang v. Zhao Zhizhen*, 3:04CV1146 RNC, 2013 WL 5313411 (D. Conn. Sept. 20, 2013). As the following argument will show, there are multiple reasons, in addition to those stated in its decision, why this Court should deny the motion for leave to file the TAC, with prejudice.

ARGUMENT

THE MOTION FOR LEAVE TO FILE THE TAC SHOULD BE DENIED AS FUTILE AND PREJUDICIAL

Plaintiffs' motion to amend their 2004 Complaint for the third time to add four new plaintiffs, new facts and new claims eight years after the initial filing should not be

countenanced by this Court. The amendments are therefore prejudicial and the proposed TAC is futile.

In the alternative, should this Court permit Plaintiffs to file a TAC, the new Plaintiffs' claims should not be permitted to "relate back" to the initial 2004 Amended Complaint for purposes of preserving the statute of limitations, as Plaintiffs have not satisfied the applicable relation back test applied by courts in this jurisdiction.

Federal Rule of Civil Procedure ("Fed R. Civ. Pro") 15(a) addresses amendments to pleadings before trial, the applicable subsection stating that "a party may amend its pleading only with the opposing party's written consent or the court's leave." Leave to amend a complaint "shall be freely given when justice so requires." *Id.*

However, such leave should only be granted where "(1) the party seeking the amendment has not unduly delayed, (2) that party is not acting in bad faith or with a dilatory motive, (3) the opposing party will not be unduly prejudiced by the amendment, and (4) the amendment is not futile." *Kirk v. Heppt*, 423 F. Supp. 2d 147, 149 (S.D.N.Y. 2006) (*citing Foman v. Davis*, 371 U.S. 178, 182 (1962)); *Mackensworth v. S.S. Am. Merchant*, 28 F.3d 246, 251 (2d Cir.1994). "A district court has broad discretion in determining whether to grant leave to amend." *Gurary v. Winehouse*, 235 F.3d 792, 801 (2d Cir. 2000); *see also Allen v. City of Beverly Hills*, 911 F.2d 367, 373 (9th Cir. 1990) ("The district court's discretion to deny leave to amend is particularly broad where plaintiff has previously amended the complaint") (*quoting Fid. Fin. Corp. v. Fed. Home Loan Bank of San Francisco*, 792 F.2d 1432, 1438 (9th Cir. 1986)) (internal quotation marks omitted).

As illustrated in further detail below, all four bases for denial of leave to amend identified by the Supreme Court in *Foman* are present here: (1) undue delay, (2) repeated failure to cure pleading deficiencies, (3) undue prejudice to Defendant Zhao, and (4) futility in allowing Plaintiffs to amend their Complaint for the third time. Taken together, they provide ample justification for denying Plaintiffs' Motion to File a TAC.

I. LEAVE TO FILE A TAC SHOULD NOT BE GRANTED BECAUSE THE TAC IS FUTILE

"It is well established that leave to amend a complaint need not be granted when amendment would be futile." *Ellis v. Chao*, 336 F.3d 114, 126 (2d Cir.2003) (*citing Foman*, 371 U.S. at 182). An amendment is futile where the proposed new pleading fails to state a claim. *Anderson News, L.L.C. v. Am. Media, Inc.*, 680 F.3d 162, 185 (2d Cir. 2012) *cert. denied*, 133 S. Ct. 846 (2013); *Horvath v. Daniel*, 423 F. Supp. 2d 421, 423 (S.D.N.Y. 2006) ("[A]n amendment is considered futile if the amended pleading fails to state a claim, or would be subject to a motion to dismiss on some other basis"). "Case law within the Second Circuit is clear that if, upon amendment, a Rule 12(b) motion would have to be granted, the proposed amendment should be deemed futile." *Griffith v. Sadri*, CV07-4824BMC(LB), 2009 WL 2524961 (E.D.N.Y. Aug. 14, 2009)).

In determining whether an amendment would be futile, a court accepts all well-pleaded allegations as true and draws all inferences in favor of the pleader. *Id.* As always, in order for the proposed amended pleading to state a claim (i.e., in order not to be futile), it "must provide 'more than an unadorned, the-defendant-unlawfully-harmed-me accusation.'" *Pension Ben. Guar. Corp. ex rel. St. Vincent Catholic Med. Centers Ret. Plan v. Morgan Stanley Inv. Mgmt. Inc.*, 712 F.3d 705, 717-18 (2d Cir. 2013) (*quoting*

Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)). A court "'[is] not bound to accept as true a legal conclusion couched as a factual allegation.'" *Id.*

Application of futility analysis is illustrated by *Kirk* and *In re Alcon S'holder Litig.*, 719 F. Supp. 2d 280 (S.D.N.Y. 2010). In *Kirk*, the District Court denied leave to amend plaintiffs' complaint to add a RICO claim. The court found the amendment to be futile because the allegations, even if accepted as true, did not establish the proximate cause element of the RICO claim. In *Alcon S'holder Litig.*, the court similarly denied leave to amend on futility grounds. The court had previously dismissed plaintiffs' class action complaint on the grounds of forum non conveniens. The court found that the proposed amended complaint's added claims were substantially identical to those previously dismissed. In denying leave to amend, the court explained, "even if Plaintiffs were granted leave to file their proposed amended complaint, the Court's forum non conveniens analysis would not change, and leave to amend would thus be futile." *Alcon S'holder Litig.*, 719 F. Supp. 2d at 283.

Here, plaintiffs' proposed amendment is futile for several reasons. First, like the SAC, the proposed TAC fails to establish jurisdiction under the Alien Tort Statute: it fails to meet proper pleading standards and the proposed additional allegations should not alter the analysis of the Court in dismissing the SAC. Second, the proposed TAC is barred by the First Amendment. Third, the proposed additional claims do not relate back to plaintiffs' previously filed pleadings and are therefore time-barred and/or not within the personal jurisdiction this court has obtained over defendant Zhao. Fourth, the proposed TAC is factually insufficient under *Twombly* and *Iqbal*. Fifth, defendant Zhao is entitled to common law immunity as a foreign official. Sixth, this court should decline

jurisdiction on the grounds of the act of state, political question, comity, and *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) case-specific deference doctrines. *See* moving and reply briefs seeking to dismiss the SAC.

A. THIS COURT HAS NO JURISDICTION TO CONSIDER THE TAC UNDER THE ALIEN TORT STATUTE

The Alien Tort Statute (ATS) provides that "the district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. *Sosa v. Alvarez-Machain, supra*, makes clear that the ATS is a jurisdictional statute only, furnishing jurisdiction for "a narrow set of common law actions derived from the law of nations." *Id.* at 721. To be actionable under the ATS, the norm of international law must be "'specific, universal, and obligatory.'" *Id.* at 732 (*quoting In re Estate of Marcos Human Rights Litigation*, 25 F.3d 1467, 1475 (9th Cir. 1994)). "[C]ourts should require any [ATS] claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with specificity comparable to the features of the 18th-century paradigms we have recognized." *Id.* at 725.

1. Plaintiffs' Claims Are Barred by *Kiobel*

The Supreme Court has "expressly held that claims under the ATS cannot be brought for violations of the law of nations occurring within the territory of a sovereign other than the United States." *Balintulo v. Daimler AG*, 727 F.3d 174, 189 (2d Cir. 2013) (*citing Kiobel, supra*. "Accordingly, if all the relevant conduct occurred abroad, that is simply the end of the matter under *Kiobel*." *Balintulo*, 727 F.3d at 190.

Indeed, as the electronics giant Cisco Systems recently pointed out in its motion to dismiss *Doe I v. Cisco Systems*, (N.D. CA 11-cv-02449, Doc. 117, pg 24), a case with

similar issues brought by the same counsel as Plaintiffs here, in the seven months since *Kiobel* was decided, at least thirteen court decisions have dismissed or undercut ATS claims on grounds of extraterritoriality—a rate of almost one dismissal every two weeks.[7]

This Court previously dismissed Plaintiffs' Second Amended Complaint, noting "Even assuming the presumption against extraterritorial application could be displaced by 'specifically directing' tortious conduct toward the United States, as plaintiffs argue, the SAC does not support displacement under such a theory. The tortious conduct relevant to the plaintiffs' ATS claims occurred in China and was directed toward people there." *Chen Gang v. Zhao Zhizhen*, *supra*. However, now, Plaintiffs seek to revive their claims and establish jurisdiction under the ATS by adding allegations of conduct within the United States. However, Plaintiffs' attempt to shoehorn their claims within the jurisdiction

[7] *See, e.g., Tymoshenko v. Firtash*, No. 11-cv-2794, 2013 WL 4564646, at *4 (S.D.N.Y. Aug. 28, 2013) (dismissing ATS claims where "Plaintiffs [were] citizens of a foreign country, [defendant was] a foreign corporation, and the tortious conduct at issue—arbitrary arrest and detention—took place on foreign soil," notwithstanding defendant's "use of New York bank accounts"); *Adhikari v. Daoud & Partners*, No. 09-cv-1237, 2013 WL 4511354, at *7 (S.D. Tex. Aug. 23, 2013) (dismissing ATS claims because "the conduct underlying [the] claim is entirely foreign," even though defendant corporation was "a U.S. national"); *Kaplan v. Cent. Bank of Islamic Republic ofIran*, No. 10-cv-483, 2013 WL 4427943, at *16 (D.D.C. Aug. 20, 2013) (dismissing ATS claims based on "attacks … allegedly funded by Iran, launched from Lebanon, and [that] targeted Israel" even though "some of the individuals affected by the attacks [were] American"); *Ahmed-Al-Khalifa v. Minister of Interior, Fed. Republic of Nigeria*, No. 13-cv-172, 2013 WL 3991961, at *2 (N.D. Fla. Aug. 2, 2013) (dismissing ATS claims "because the violations at issue occurred outside the United States"); *Ahmed-Al-Khalifa v. Trayers*, No. 13-cv-869, 2013 WL 3326212, at *2 (D. Conn. July 1, 2013) (no ATS jurisdiction "over conduct committed outside of the United States"); *Mohammadi v. Islamic Republic of Iran*, No. 09-cv-1289, 2013 WL 2370594, at *15 (D.D.C. May 31, 2013) (dismissing ATS claims for "conduct that occurred entirely within the sovereign territory of Iran"); *Giraldo v. Drummond Co.*, No. 09-cv-1041, 2013 WL 3873960, at *8 (N.D. Ala. July 25, 2013) (no ATS jurisdiction because "where a complaint alleges activity in both foreign and domestic spheres, an extraterritorial application of a statute arises *only* if the event on which the statute *focuses* did not occur abroad. Of course, the ATS *focuses* on the torts of extrajudicial killings and war crimes . . . [and] the tort at issue occurred abroad . . . ") (emphasis in original, internal citations omitted).

conferred by the ATS must fail. The proposed TAC, although it contains new allegations of conduct within the United States, nevertheless fails to allege *violations of the law of nations* that occurred within the United States. *Kiobel, supra*, 133 S. Ct. at 1670 (Alito, J. concurring) (noting that a claim under the ATS is barred "unless the domestic conduct is sufficient to violate an international law norm").

Indeed, *Kiobel* relied heavily on *Morrison v. Nat'l Australia Bank Ltd.*, 130 S. Ct. 2869 (2010), which, opining on application of the Securities Exchange Act of 1934, made clear the question was not whether *any* conduct took place in the United States, but rather, whether the conduct that was the "*focus of congressional concern*," in drafting the relevant statute took place in the United States. *Id.* at 2884.[8] ("It is a rare case of prohibited extraterritorial application that lacks *all* contact with the territory of the United States.") *See also, Norex Petroleum Ltd. v. Access Indus., Inc.*, 631 F.3d 29, 33 (2d Cir. 2010) ("slim contacts with the United States . . .are insufficient" to apply RICO to limited domestic conduct); *Cedeño v. Castillo*, 457 F. App'x 35, 37-38 (2d Cir 2012) (inadequate conduct in U.S. to state a domestic RICO claim); *Balintulo*, 727 F.3d 174 (no jurisdiction under ATS where United States corporations engaged in relevant conduct in the United States but no such conduct gave rise to a violation of customary international law); *Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 744 (9th Cir. 2011), *vacated sub nom, Rio Tinto PLC v. Sarei*, 133 S. Ct. 1995 (2013), *aff'd on remand, Sarei v. Rio Tinto, PLC*, 722 F.3d 1109 (9th Cir. 2013) (denying jurisdiction under ATS and noting that defendant had "substantial operations" in the United States but "the torts alleged all occurred outside of the United States"); *Tymoshenko v. Firtash, supra* (no jurisdiction under ATS where

[8] Plaintiffs' citations to numerous pre-*Kiobel* cases to refute this point, indeed many of them ancient, are inapplicable and unavailing.

defendant's only connection to United States was maintaining bank accounts in New York); *Adhikari v. Daoud & Partners, supra,* (no jurisdiction under ATS where foreign plaintiff sued a United States corporation with substantial domestic operations for its alleged foreign conduct). *Giraldo v. Drummond Co., Inc., supra*; at *8**.** "[W]here a complaint alleges activity in both foreign and domestic spheres, an extraterritorial application of a statute arises *only* if the event on which the statute *focuses* did not occur abroad."

Because Plaintiffs' new allegations of conduct within the United States fail to allege any such conduct that would by itself constitute a violation of international law norms, or that this conduct is not the focus of the claims, the proposed TAC fails to state a claim under the ATS and leave to amend must be denied as futile.

B. THE PROPOSED TAC IS INSUFFICIENT UNDER FEDERAL PLEADING STANDARDS

1. A Higher Pleading Standard Applies to Plaintiffs' ATS Claims and First Amendment Claims

Because this case has been brought under the ATS, searching scrutiny must be made of the *particular claim* that is being brought. *See Sosa, supra,* (rejecting claim for "arbitrary arrest" as actionable on the particular facts pleaded); *Kadic v. Karadzic*, 70 F.3d 232, 241, 238 (2d Cir. 1995) ("In order to determine whether the offenses alleged by the [plaintiffs] in this litigation are violations of the law of nations that may be the subject of Alien Tort Act claims against a private individual, we must make a *particularized examination* of these offenses"; "this statute requires a *more searching review* of the merits to establish jurisdiction than is required under the more flexible 'arising under' formula of [28 U.S.C.] section 1331") (emphasis added). The complaint must identify

facts showing defendant violated a specifically defined, universal norm of international law. *Sinaltrainal v. Coca-Cola Co.*, 256 F. Supp.2d 1345, 1352 (S.D. Fla. 2003). And most importantly in this instance, *international norms that exist only "at a high level of generality" and that are not sufficiently specific to constitute binding norms of customary international law are not cognizable under the ATS*. *See Sosa*, *supra*, 542 U.S. at 737 n.27. Thus, this Court must thoroughly examine the merits of the Plaintiffs' complaint to determine whether it has jurisdiction. *Jogi v. Piland*, 131 F. Supp. 2d 1024, 1026 (C.D. Ill. 2001). Like the previous complaint, the TAC does not come close to meeting the pleading standard set forth in *Sosa*.

The public policy behind the First Amendment also requires that when a complaint seeks to attach liability to speech, it must include allegations far more specific than would be necessary in the ordinary civil case. *See Franchise Realty Interstate Corp. v. San Francisco Local Joint Exec. Bd. of Culinary Workers*, 542 F.2d 1076, 1082–83 (9th Cir. 1976) (holding that "in any case . . . where a plaintiff seeks damages or injunctive relief, or both, for conduct which is *prima facie* protected by the First Amendment, the danger that the mere pendency of the action will chill the exercise of First Amendment rights requires more specific allegations than would otherwise be required"); *accord*, *Hydro-Tech Corp. v. Sundstrand Corp.*, 673 F.2d 1171, 1177 n.8 (10th Cir. 1982). Thus, the content, manner, and setting of the offending speech must be pled with specificity in order to allow a court to determine whether the alleged speech is protected under the First Amendment.

2. The Complaint's Allegations Are Insufficient under *Twombly* and *Iqbal*.

As noted below and in Mr. Zhao's previous filings, we showed that the actual specific conduct alleged to have been undertaken by Mr. Zhao – the publication or broadcast of certain speech – is not actionable based on speech that does not incite imminent lawless action, and adjudication in a U.S. court would be barred by the First Amendment. Putting that same speech under the more general, abstract rubric of "aiding and abetting" obviously cannot make these fatal defects in the TAC go away. Plaintiffs' claims that the speech constitutes "aiding and abetting" only introduces additional defects. The TAC's highly conclusory allegations do not meet general federal pleadings requirements or the heightened requirements for specifically pleading claims under the ATS.

In 2007, in *Twombly*, *supra*, the Supreme Court set out "two working principles" for assessing the viability of pleadings. 550 U.S. at 555. One was (as was further explained and elaborated in *Iqbal* two years later) that "threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice" to meet the requirement in the Federal Rules of Civil Procedure of "a short and plain statement of the claim." *Id.; Iqbal, supra* 556 U.S. at 664. A complaint will not "suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement,'" and a lower court is "'not bound to accept as true a legal conclusion couched as a factual allegation.'" *Id*. at 678.

The second working principle from *Twombly* and *Iqbal* is that a complaint must state "a plausible claim for relief." That is, a "complaint must plead 'enough facts to state a claim to relief that is plausible on its face.'" *Smith v. NYCHA*, 410 F. App'x 404,

405 (2d Cir. 2011) (*quoting Twombly*, 550 U.S. at 570). To survive a motion to dismiss, a complaint must allege a plausible set of facts sufficient "to raise a right to relief above the speculative level." *Twombly*, *supra*, 550 U.S. at 555.

"A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. Where a plaintiff has not "nudged his claims across the line from conceivable to plausible, [the] complaint must be dismissed." *Twombly*, *supra*, 550 U.S. at 570. "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Iqbal*, *supra*, 556 U.S. at 678 (*quoting Twombly*, *supra*, 550 U.S. at 570).

"Determining whether a plausible claim has been pled is 'a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.'" *Lundy v. Catholic Health Sys. of Long Island Inc.*, 711 F.3d 106, 114 (2d Cir. 2013) (*quoting Iqbal*, *supra*, 556 U.S. at 884). "A court 'can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth.'" *Ruston v. Town Bd. for Town of Skaneateles*, 610 F.3d 55, 59 (2d Cir. 2010) (*quoting Iqbal*, *supra*, 556 U.S. at 679).

Here, this Court has provided these Plaintiffs six years to come up with enough specifics to cross that line. It determined that the original Amended Complaint failed to meet this pleading standard, but permitted amendment because the Amended Complaint had been filed well before the *Twombly* and *Iqbal* decisions were issued. This Court did

not decide whether the SAC could withstand the federal pleading standard because it dismissed the case on jurisdictional grounds. Nevertheless, Plaintiffs' proposed TAC consists of the same – and even more – implausibilities and conclusory claims. Such a bare pleading cannot not withstand the scrutiny required generally by *Twombly* and *Iqbal* and must certainly fail in light of the heightened pleading standards applicable to this context.

In light of *Kiobel*, Plaintiffs allege for the first time in the proposed TAC that Defendant Zhao engaged in conduct within the United States or directed toward Plaintiffs located in the United Sates. However, Plaintiffs fail to allege with any specificity what conduct by Defendant Zhao constituted violations of international law. The TAC likewise fails to allege the injuries sustained by the Plaintiffs or how such injuries were caused in any way by conduct of Defendant Zhao.

For example, the TAC alleges that "In the United States, Defendant similarly promoted, aided and collaborated with those who furthered the rights deprivations/persecution and other abuses carried out against practitioners of Falun Gong." TAC at ¶ 5. Plaintiffs add that Defendant Zhao authored material that was broadcast in the United States, *see* TAC at ¶¶ 167-180, and that delegations affiliated with Defendant Zhao or the CACA traveled to the United States, *see* TAC at ¶¶ 153-160, though Plaintiffs conspicuously note that Defendant Zhao was not among these delegations. However, Plaintiffs do not even allege any acts taken by Defendant Zhao within the United States that caused a violation of international law other than that Zhao's opinions and positions were made known in the United States.

As noted above, Plaintiffs fail to allege with specificity any violations of international law that occurred in the United States. Plaintiffs conclusorily contend that "[t]he actions taken by Zhao and his cohorts in the common plan to violently suppress Falun Gong in China also targeted and gave rise to different, but related, forms of such violent suppression in the United States," TAC at ¶ 181, that "[t]he assistance Zhao provided was specifically directed towards the widespread deprivation of rights of Falun Gong adherents in the US," TAC at ¶ 214, and that United States Falun Gong adherents have been subjected to "humiliating and degrading treatment, . . . acts of violence against them and … a hostile fear-based environment." TAC at ¶ 148. Plaintiffs also vaguely describe creation of "social animus," TAC at ¶ 150 and disruption of a Falun Gong demonstration in Flushing, New York in 2008. TAC at ¶ 187.

Indeed, in describing the injuries sustained by the named Plaintiffs, *see* TAC at ¶¶ 26-36, the proposed TAC alleges only one injury sustained in the United States: a battery in Flushing, New York committed by unknown assailants. TAC at ¶ 36. Plaintiffs' attempt to legitimize a claim comprising exclusively foreign conduct (as is explicitly prohibited by *Kiobel*) by making passing references to events within the United States. However, none of the alleged injuries sustained by Falun Gong adherents constitutes a violation of international law. The United States conduct alleged by Plaintiffs, though perhaps giving rise to individual tort claims against individual assailants, are patently not actionable under the ATS.

Last, Plaintiffs nowhere allege that any conduct of Defendant Zhao proximately caused any of the injuries allegedly sustained by Plaintiffs. Plaintiffs' tenuous causation argument consists instead of conclusory statements such as "Zhao's actions and those of

his cohorts exerted influence over local communities of Chinese in the United States, instigating members of such communities to target and deprive of human and civil rights any Falun Gong adherents they could find, causing deprivation of rights and sometimes also acts of violent suppression." TAC at ¶ 182. Plaintiffs rely on assertions that "[a]s the result of the common plan Zhao directed, engineered and helped implement," Falun Gong adherents have endured violations of various rights. *See* e.*g.*, TAC at ¶¶ 184, 202. Such statements are inadequate and cannot support the proposed TAC. *See Bigio v. Coca-Cola Co.*, 675 F.3d 163, 173-74 (2d Cir. 2012) *cert. denied*, 133 S. Ct. 952 (2013) (noting that allegations that "Defendants conspired with and aided and abetted their subsidiaries and affiliates" and that "Defendants knowingly and substantially assisted the principal violations committed by their subsidiaries, affiliates, and co-conspirators" were "just the sort of '[t]hreadbare recitals of the elements of a cause of action' and 'conclusory statements,' that do not suffice to state a claim") (internal citations omitted).

Under *Twombly* and *Iqbal*, the conclusory statements and factually implausible allegations contained in the proposed TAC are not entitled to a presumption of veracity. After these inadequately plead allegations are stripped away, what remains are allegations of exclusively foreign conduct. The claims contained within the proposed TAC are exactly those held to be impermissible by the Supreme Court in *Kiobel*. Plaintiffs must not be allowed to improperly obtain jurisdiction under the ATS (in violation of *Kiobel*) by building their pleadings on implausible and conclusory statements (in violation of *Twombly* and *Iqbal*).

For the foregoing reasons, Plaintiffs' proposed TAC fails to plead sufficient facts to state a claim for violation of the ATS under *Twombly* and *Iqbal*. The motion for leave to file a TAC should therefore be denied.

3. Aiding and Abetting Is Not Adequately Pleaded.

"Aiding and abetting" under the ATS requires that the defendant "(1) provides practical assistance to the principal which has a substantial effect on the perpetration of the crime, and (2) does so with the purpose of facilitating the commission of that crime." *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 259 (2d Cir. 2009). Neither prong is satisfied by the allegations in the TAC.

The first prong requires that the defendant provide "practical assistance" that has a "substantial effect on the perpetration of the crime." Speech is not practical assistance to the perpetration of the torture alleged. According to Plaintiffs, Mr. Zhao organized and contributed to a propaganda campaign, and this contributed to a hostile attitude towards Falun Gong practitioners and to a decline in public approval of the Falun Gong in the United States among Chinese-Americans. This is not practical assistance. For this reason alone, no claim for aiding and abetting is stated against Mr. Zhao.

Liu Bo Shan v. China Construction Bank Corp., 421 Fed. Appx. 89, 2011 U.S. App. LEXIS 9397 (2d Cir. May 5, 2011) presents similarly inadequate pleadings of practical substantial assistance. The plaintiffs there alleged that "the [defendant] Bank contacted the police and provided false evidence to induce Liu's arrest." 421 Fed. Appx. at 94. The plaintiff Liu further claimed that "the false evidence provided by the Bank 'created a veneer of legitimacy to justify the police's arrest and detention of Liu' and that the Bank's purported communication with the police about the audit constituted

'encouragement and support for the violent acts that otherwise would never have occurred.'" *Id.* The Second Circuit found the pleadings inadequate, stating that these "do not constitute 'substantial assistance' to the police in perpetrating the alleged torture, cruel treatment, or prolonged arbitrary detention" (the alleged violations of the law of nations). *Id.* If providing false evidence to the police to cause the police to take the plaintiff into custody is not substantial practical assistance, *a fortiori*, speech criticizing Falun Gong cannot constitute substantial practice assistance satisfying the ATS pleadings requirements.

The second prong of *Talisman* requires that the defendant have acted with the purpose of facilitating the commission of the crimes in question. "'Aiding and abetting' liability does not lie under the ATS unless the conduct is done with the positive *intention* of bringing about a violation of the Law of Nations." *Kiobel, supra,* (citing *Talisman, supra,* 582 F.3d at 258.) In *Mastafa v. Chevron Corp.*, where plaintiffs set forth mere conclusory allegations that defendants "knowingly" aided and abetted in the commission of human rights violations, the court found plaintiffs failed to adequately plead that defendants acted with the purpose of facilitating human rights violations. 759 F.Supp.2d 297 (S.D.N.Y. 2010). The court found that although the complaint repeatedly stated that the defendants "knowingly" aided and abetted in the commission of human rights abuses, the allegations were "nothing more than formulaic recitation[s] of the requirement" and are thus "not sufficient to make the claims for relief 'plausible.'" *Id.* (citing *Mastafa v. Australian Wheat Bd. Ltd.*, 2008 U.S. Dist. LEXIS 73305 *18 (S.D.N.Y. Sept. 25, 2008) (quoting *Twombly*, 550 U.S. at 555)).

There are no specific factual allegations – only conclusory statements – alleging that Mr. Zhao acted with the purpose of facilitating the commission of the crimes in question. The crimes in question are alleged violations of international law: torture, arbitrary arrest and detention, crimes against humanity. According to the allegations of the TAC, Mr. Zhao's intention (purpose) to *aid and abet the commission of violations of the law of nations* is demonstrated by his use of "Cultural Revolution-style operative language, *see* TAC at ¶ title to ¶ 52, ¶¶ 52-59, has alleged "Cultural Revolution-style tactics of blatant dehumanization and incitement to violence, in his own speech and in that under his direction," *see* TAC at ¶ title to ¶ 60, ¶¶ 60-69, and by his use of "constant use of Cultural Revolution-style invective, *see* TAC at ¶ title to ¶ 70, ¶¶ 70-90.

While the speech in question may be sarcastic and may engage in intellectual combat with what are regarded as the theological and anti-scientific ideas of Li Hongzhi, the speech does not incite to physical violence. Moreover, the speech is not Mr. Zhao's, but Plaintiffs have chosen to try to attribute it to him personally. The language of some of these attacks may be unpleasant and harsh, but nowhere do they manifest an intent to torture or to induce or advocate the commission of torture, arbitrary arrest and detention, or crimes against humanity.

Thus, Plaintiffs have done nothing more than set forth conclusory allegations that Defendant acted with the purpose to aid and abet violations of international law. In fact, nothing in the speech identified by Plaintiffs calls for torture, genocide or crimes against humanity or against Plaintiffs themselves to be committed. Only the term "douzheng" which Plaintiffs allege to mean far more than it actually means. The only purpose revealed in the speech identified by Plaintiffs is to expose the falsity of factual claims and

teachings made by Li Hongzhi, to describe harms caused by those claims and teachings, and to provide argumentation that can be used to rebut claims made by Falun Gong adherents. *Compare Liu Bo Shan, supra*, 421 Fed. Appx. at 94 ("the amended complaint fails plausibly to allege that the Bank acted with the purpose that Liu be subjected to torture, cruel treatment, or prolonged arbitrary detention by the police. At most, the amended complaint alleges that the Bank falsified evidence and induced the police to arrest Liu in retaliation for his release of the audit, knowing that the police would subject him to mistreatment").[9]

C. PLAINTIFFS' CLAIMS ARE BARRED BY THE FIRST AMENDMENT

The speech on which Plaintiffs' claims are based is not speech that is actionable under *Brandenburg*; consequently, the claims are barred by the First Amendment to the

[9] To the extent the TAC, like the SAC, suggests that Mr. Zhao should be held liable for the alleged actions of the Chinese police and security officials on the basis of "command or superior responsibility," no factual allegations support this manifestly conclusory claim.

"The central readily identifiable distinction between command responsibility and aiding and abetting liability is that command responsibility requires a finding of formal or actual control; that is, an agency (or similar) relationship between the primary wrongdoer and the defendant." *Doe v. Nestle*, 748 F. Supp. 2d 1057, 1104 (C.D. Cal. 2010). As the TAC discloses, Mr. Zhao was not, however, in a position of "command or superior responsibility" with respect to the Chinese state security and prison officials alleged to have committed the harms for which Plaintiffs are suing. His positions in a television bureau or as a member of the standing committee of the Chinese Anti-Cult Association do not put him in a position of "command or superior responsibility" with respect to prison or police officials; they are obviously not in a chain of command making them answerable to him. The TAC does not allege that Mr. Zhao occupies a position in the state security or prison hierarchy, and in fact avers that he is not a government official. Thus, the claim that Mr. Zhao has a command position is entirely conclusory, completely unsupported by any factual allegation that, if true, would place him in such a position with respect to the officials who allegedly inflicted harms on the Plaintiffs. Even if (counter to Plaintiffs' own allegations) Mr. Zhao had been in a position to have "command responsibility," no colorable claim could be stated against him under the ATS or TVPA. The doctrine of command responsibility is sufficiently specific to be recognized as cognizable under the ATS *only with respect to acts or omissions occurring in wartime*: the doctrine "appears to be well accepted in U.S. and international law in connection with acts committed *in wartime*." *Hilao v. Estate of Ferdinand Marcos*, 103 F.3d 767, 777 (9th Cir. 1996) (emphasis added).

U.S. Constitution, as shown in this section.[10] The First Amendment has a direct bearing on the question of jurisdiction. As we argued in regard to the SAC – and it is even more relevant here with regard to actions that occur in the United States – the speech set forth in the TAC is not actionable directly under the §1985 claim or indirectly in the ATS claim. In the ATS claim there is a *jurisdictional consequence* because the speech is not actionable under *Brandenburg*: the claims cannot constitute claims of violations of *universal* norms of international law, an absolute prerequisite to jurisdiction under the ATS.

As they did in the first three complaints, Plaintiffs ignore the strong protection that is accorded to speech and expression in all but the narrowest of circumstances under the First Amendment to the U.S. Constitution.[11] In essence, Plaintiffs complain of speech that assails the claims to supernatural powers of the founder of Falun Gong and that articulates harms caused by Falun Gong, and that in some instances is scornful, harsh, shrill and derogatory.

For example, Plaintiffs again allege that Mr. Zhao used ideological criticism to discredit Falun Gong as politically undesirable, ideologically malevolent, subjecting Plaintiffs to the hostility of the Chinese state and Chinese society; used animal imagery or

[10] It does not matter whether the speech was uttered in the United States or elsewhere, but the new claims specifically identify speech that indisputably originates in China as allegedly inciting actions in the United States. U.S. courts must give effect to the public policies behind the First Amendment even when the speech in question occurred outside the United States. *See, e.g.*, *Matusevitch v. Telnikoff*, 877 F. Supp. 1 (D.D.C. 1995) (refusing to enforce English libel judgment); *Abdullah v. Sheridan Square Press, Inc.*, 154 F.R.D. 591 (S.D.N.Y. 1994); *DeRoburt v. Gannett Co. Inc*., 83 F.R.D. 574,579–80 (D. Hawaii 1979); *Bachchan v. India Abroad Publn's Inc.*, 154 Misc. 2d 228, 585 N.Y.S.2d 661 (N.Y. Sup. Ct. 1992).

[11] Incitement is part of a narrow category of unprotected speech that includes "fighting words," speech that incites others to imminent lawless action, obscenity, certain types of defamatory speech, and "true threats." *See* *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (fighting words); *Miller v. California*, 413 U.S. 15 (1973) (obscenity); *New York Times v. Sullivan*, 376 U.S. 254 (1964) (defamatory speech); *Watts v. United States* 394 U.S. 705 (1969) ("true threats").

disease imagery to dehumanize Falun Gong; referred to Falun Gong as "an extreme psychological epidemic", requiring "thought 'transformational work'", or as a "foul-smelling thing" and an "ulcer," referred to Li Hongzhi as "the evil cult's demon leader", and predicted other countries that allow Falun Gong and "who take China's ulcer as a treasure, will only bring disaster to themselves." The TAC alleges that these groups "actively disseminated, distributed and invoked Zhao's materials to mobilize anti-Falun-Gong hate rallies and posses, in all cases seeking to threaten and intimidate local adherents and suppress the religion. TAC at ¶ 165. No details of these purported threats are actually provided, other than a vague reference to a claimed May 2008 physical attack on Falun Gong adherents, which the TAC claims were "foreseeable results of the distribution of the anti-Falun Gong materials." Paragraphs 167-180 of the TAC itemize the alleged defamatory content of Mr. Zhao's supposed strategy to discredit the Falun Gong, as well as the purported "close collaboration" with CCTV's international channel 4, TAC at ¶ 170, and the purported impact of these broadcasts, going so far as to state at ¶¶ 175 -180 that the availability of these materials have turned the tide of public opinion against the Falun Gong. These allegations essentially conclude that by broadcasting the materials on the CACA website and on CCTV, the materials appear as if they are approved by the CCP and thus they become authoritative and influential on Chinese-American public opinion in the United States, ultimately leading 38 U.S. based Chinese community associations to sign on to an open letter supporting the CCP's stance on the Falun Gong and urging a wider crackdown. TAC at ¶¶ 179, 190.

Even if Plaintiffs were correct that this alleged speech was a part of a propaganda campaign contributing to an atmosphere of hostility against Falun Gong allegedly

affecting the behavior of not only police and security officials in China but ordinary Chinese-Americans in New York City, those characterizations still would be insufficient to make that speech actionable under U.S. law. "Speech does not lose its protected character … simply because it may embarrass others or coerces them into action." *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886, 910 (1982). Moreover, as noted above, forbidding or proscribing advocacy of the use of force or of a violation of law cannot be prohibited except where such advocacy is "directed to inciting or producing *imminent lawless action* and is likely to incite or produce such action." *Brandenburg*, *supra*. 295 U.S. at 447 (emphasis added). The Supreme Court provided further clarity to the *Brandenburg* standard four years later in *Hess v. Indiana*, 414 U.S. 105 (1973), finding that speech consisting of "advocacy of illegal action at some indefinite future time" was constitutional and could not be punished. *Id*. at 109. "The mere abstract teaching of the moral propriety or even moral necessity for the resort to force and violence is not the same a preparing a group for violent action and steeling it to such action." *Id.* at 447–48 (citations omitted); *see also McCollum v. Columbia Broad. Sys., Inc*., 202 Cal.App.3d 989, 1002 (1988) (words contained in defendant's broadcasts and writing were not "literal commands or directives to immediate action").

Examination of the speech at issue in this case cannot lead to the conclusion that it was directed or intended to produce imminent lawless conduct, whether lawless conduct on the part of Chinese law enforcement officials or that of unnamed Chinese-Americans living in New York. To the extent that the speech allegedly advocates deprogramming (even if it is characterized as brainwashing) of Falun Gong adherents "at some indefinite future time," that likewise cannot be actionable. "[T]he mere abstract

teaching of Communist theory, including the teaching of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action. There must be some substantial direct or circumstantial evidence of a call to violence now or in the future which is both sufficiently strong and sufficiently pervasive to lend color to the otherwise ambiguous theoretical material. . . ." *Noto v. United States*, 367 U.S. 290, 297-98 (1961).

U.S. courts have repeatedly refused to entertain claims even against speech saturated with images of violence and apparently event that advocating illegal conduct. For example, in *Melzer v. Bd. of Educ. of the City Sch. Dist. of the City of N.Y.*, 336 F.3d 185, 198 (2d Cir. 2003), the Second Circuit refused to find incitement in a fired teacher's active involvement with an organization that, among other things, published a newsletter that was allegedly "an instruction manual for illegally molesting children."

> Under our system an individual cannot be punished for associating with an organization or engaging in advocacy, absent a clear showing that the organization is actively engaged in illegal activity or the advocacy is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action." . . . Even were it shown on this record—and it is not—that some of [the organization's members] members engage in illegality, or that the organization's aims are in fact illegal, Melzer himself could not be punished absent clear proof—also not present here—that he knew of such illegal aims and specifically intended to accomplish them.

336 F.3d at 198.

In *Wilson v. Midway Games, Inc.*, 198 F. Supp. 2d 167, 182 (D. Conn. 2002), a court dismissed a suit against a video game maker by the family of a 13 year old boy stabbed in the chest with a kitchen knife by his friend, stating the manufacturer's interactive video story depiction in game form "was not alleged to be 'directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action,' and

at amounted to nothing more than advocacy of illegal action at some indefinite future time, which is not sufficient." *Id.* at 182. Similarly, in *James v. Meow Media, Inc.*, 300 F.3d 683 (6th Cir. 2002) the Court dismissed a case brought against video game, movie production and internet content provider firms by the parents of the victims of a school shooting brought suit. While finding no incitement to imminent lawless action, the court also rejected plaintiffs' theory of causation that persistent exposure to the defendants' media gradually undermined [the shooter's] moral discomfort with violence to the point that he solved his social disputes with a gun. "This glacial process of personality development is far from the temporal imminence that we have required to satisfy the *Brandenburg* test."[12] *Id*. at 698.

The outer limits of First Amendment protection are described by the Fourth Circuit in *Rice v. The Paladin Enterprises, Inc.*, 128 F.3d 233 (4th Cir. 1997), where the court reversed summary judgment in favor of a publishing company that published the book *Hit Man: A Technical Manual for Independent Contractors,* in a suit brought by victims of a real life assassin. The court explained that the book, which contained detailed instructions and explained ways in which the hired hit man had used the techniques set forth in the book. The court also noted that the author had admitted in the book that he intended the material to help criminals commit crimes. The Court found that *Hit Man* provided "detailed, focused instructional assistance to those contemplating or in

[12] Other cases refusing to find incitement for discussions or images of violence or violent behavior include *Davidson v. Time Warner, Inc*., 25 Media L. Rep. 1705, 1997 U.S. Dist. LEXIS 21559 (S.D. Tex. March 31, 1997) (unpublished mem. order), *Waller v. Osbourne,* 763 F. Supp. 1144 (M.D. Ga. 1991), *aff'd,* 958 F.2d 1084 (11th Cir. 1991); *Zamora v. Columbia Broad. Sys.*, 480 F. Supp. 199 (S.D. Fla. 1979); *Yakubowicz v. Paramount Pictures Corp.*, 536 N.E.2d 1067 (Mass. 1989); *DeFilippo v. Nat'l. Broad. Co., Inc.*, 446 A.2d 1036 (R.I. 1982); *Bill v. Superior Court*, 137 Cal.App.3d 1002 (1982); *Olivia N. v. Nat'l Broad. Co., Inc*., 126 Cal.App.3d 488 (1981), *cert. denied*, 458 U.S. 1108 (1982).

the throes of planning murder is the antithesis of speech protected under *Brandenburg*. It is the teaching of the 'techniques' of violence, . . . the 'advocacy and teaching of concrete action,' . . . the 'preparation . . . for violent action and [the] steeling. . . to such action[.]'" *Id.* at 249. If the Defendant here were accused of providing instruction on how to water-board Falun Gong adherents, or how to apply other forms of torture, that could be beyond the bounds of First Amendment protection; but no such allegations are – or could be – made of Mr. Zhao's speech.

Rice has never been applied to speech on matters of public concern, which the discussion of the Falun Gong is whether in China or the United States. However, see *United States v. Turner*, 720 F.3d 411 (2d Cir. 2013), in which a talk show host essentially exhorted his listeners to kill certain federal judges or at minimum intimidate them by posting photographs, work addresses and room numbers for each of the judges, along with a map and photograph of the courthouse, while referencing their colleague who had had been assassinated. *Id.*, 720 F3d. at 423. The centerpiece of Plaintiffs' position is *Sexual Minorities Uganda v. Lively*, 2013 WL 4130756 (D. Mass. Aug. 14, 2013), an unpublished decision from Massachusetts district court which involves a Massachusetts man whose activities were designed to pass laws to repress LGBTI individuals in Uganda, first at a conference in Uganda in 2002 and then for the next seven years from the United States "to carry out specific actions to deny fundamental rights of the LGBTI community in Uganda." *Id*. at *3. The alleged activities include exposing individuals who advocate for LGBTI rights to the same kind of direct death threats that Turner advocated.

This Court has already differentiated *Sexual Minorities* insofar as the *Kiobel* restrictions on extraterritorial application of the ATS because the defendant was a citizen of the United States and the alleged conduct occurred in substantial part within the U.S. Slip op. at 8. *See also, Sexual Minorities* at *14 ("This is not a case where a foreign national is being hailed into an unfamiliar court to defend himself. Defendant is an American citizen located in the same city as this court.").

However, the First Amendment determinations in *Sexual Minorities* are not only based on far more specific allegations of illegal conduct, rather than speech, they are based on the "plausible claims," of Plaintiff, *id*. at *22, in contrast to the TAC's conclusory, vague and speculative allegations of aiding and abetting conduct of Mr. Zhao, that are not only in question because of *Kiobel* but which are subject to case-specific deference by this Court (*See* Motion to Dismiss SAC). *Sexual Minorities* also assumes a potential for discovery with which to make an eventual determination between illegal solicitation and legal advocacy. By contrast, as Mr. Zhao has said repeatedly over the years, such discovery is problematic, indeed impossible, in a country that does not recognize the jurisdiction of this Court in its affairs, and where no one expects the putative plaintiffs and their so-called experts are available to testify. *Sexual Minorities* is neither binding on this court nor persuasive authority, it does not provide proper deference for the First Amendment concerns. Moreover, as explained throughout this brief, the activities of Mr. Zhao in the United States alleged in the TAC do not constitute illegal activities in violation of international law and do not provide the basis for aiding and abetting liability that could meet the heightened pleading standard for First Amendment cases or under *Twombly*, *supra*, and *Iqbal*, *supra.* "[A] common law cause

of action brought under the ATS cannot have extraterritorial reach simply because some judges, in some cases, conclude that it should." *Balintulo, supra*, 757 F. 3d. at 192.

It is true, as Plaintiffs admit, that terms such as *douzheng* have been used in Chinese Communist parlance for decades. Although persons in the United States may dislike the Chinese Communist Party and Communist ideas such as "class struggle" and "contradictions" in society, that of course does not make such discourse actionable.

The speech in question does not advocate lawless action, much less torture as Plaintiffs allege (of which there is not a word in the speech identified by Plaintiffs), but even if for the sake of argument it were conceded that the speech did advocate lawless action, that speech would *still* not be actionable under U.S. law because *imminent action* is not advocated. At worst, Plaintiffs effectively accuse the speech in question of contributing to an atmosphere of hostility against a cult that is prohibited by law in China. That is insufficient to survive the bar of the First Amendment.

D. PLAINTIFFS FAIL TO STATE A CLAIM UNDER 42 U.S.C. 1985(3) OR THE TORTURE VICTIMS PROTECTIION ACT("TVPA")

Plaintiffs' Twelfth Cause of Action (for alleged violation of 42 U.S.C. 1985(3), the "Klu Klux Klan Act") fails to state a claim upon which relief may be granted. In order to prevail on a claim for violation of Section 1985(3), a plaintiff must establish "(1) the existence of a conspiracy; (2) for the purpose of depriving him, either directly or indirectly, of equal protection of the laws, or of equal privileges and immunities under the laws; (3) an act in furtherance of the conspiracy; and (4) injury in his person or property or deprivation of any right of a citizen of the United States." *Knight v. City of New York*, 303 F. Supp. 2d 485, 501-02 (S.D.N.Y. 2004) *aff'd*, 147 F. App'x 221 (2d Cir. 2005)

(citing *Mian v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 7 F.3d 1085, 1087 (2d Cir. 1993)).

Additionally, in order to recover on a Section 1985(3) claim where the alleged conspiracy does not involve state action, "a plaintiff must show, *inter alia*, (1) that 'some racial, or perhaps otherwise class-based, invidiously discriminatory animus [lay] behind the conspirators' action,' and (2) that the conspiracy 'aimed at interfering with rights' that are 'protected against private, as well as official, encroachment,'" *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 267-68 (1993) (citations omitted). Currently, "the Supreme Court has recognized only two rights protected against private as well as official encroachment under the deprivation clause: the right to be free from involuntary servitude and the right of interstate travel." *Jenkins v. Miller*, 2:12-CV-184, 2013 WL 5770387 (D. Vt. Oct. 24, 2013) (citing *Bray*, 506 U.S. at 278).

Section 1985(3) "does not apply . . . to private conspiracies that are 'aimed at a right that is by definition a right only against state interference,' but applies only to such conspiracies as are 'aimed at interfering with rights ... protected against private, as well as official, encroachment.' *Bray*, 506 U.S. at 278 (citing *United Bhd. of Carpenters & Joiners of Am., Local 610, AFL-CIO v. Scott*, 463 U.S. 825, 832 (1983)). In *Bray*, the Supreme Court noted that *Carpenters* "rejected a claim that an alleged private conspiracy to infringe First Amendment rights violated § 1985(3)" and added that the Fourteenth Amendment, similarly, is "obviously *not* protected against private infringement." *Id.*

Here, as in *Bray*, plaintiffs have "identified no right protected against private action that has been the object of the alleged conspiracy." Accordingly, the Twelfth Count of the TAC fails to state a claim upon which relief can be granted.

Again, the Thirteenth and final Count of the TAC is the TVPA, which creates a private right of action for torture, not speech. For the reasons stated in Mr. Zhao's previous Motion to Dismiss and as set forth by the Court in its decision and Order, the TVPA Count should be dismissed along with the other federal causes of action.

II. ALLOWING FILING OF A TAC WOULD BE PREJUDICIAL TO DEFENDANT ZHAO

"[C]onsiderations of undue delay ... and prejudice to the opposing party [are] touchstones of a district court's discretionary authority to deny leave to amend." *O'Hara v. Weeks Marine, Inc.*, 294 F.3d 55, 70 (2d Cir. 2002) (quoting *Barrows v. Forest Labs., Inc.*, 742 F.2d 54, 58 (2d Cir.1984)). Indeed, "[u]ndue prejudice to the opposing party is typically the most important consideration in evaluating a motion to amend a pleading." *Lacher v. C.I.R.*, 32 F. App'x 600, 603 (2d Cir. 2002). "In gauging prejudice, [a court] consider[s], among other factors, whether an amendment would 'require the opponent to expend significant additional resources to conduct discovery and prepare for trial' or 'significantly delay the resolution of the dispute.' *Ruotolo v. City of New York*, 514 F.3d 184, 192 (2d Cir. 2008) (quoting *Block v. First Blood Assocs.*, 988 F.2d 344, 350 (2d Cir.1993)).

"Courts also consider whether the opponent was otherwise on notice of the new claim, and whether the claim derives from the same facts set forth in the original pleading." *Lacher*, 32 F. App'x at 603. In *Lacher*, the United States Court of Appeals for the Second Circuit affirmed the Tax Court's decision to deny leave to amend after eleven years where the proposed amendment would have compromised the ability of the Internal Revenue Service to investigate and defend petitioner's new claims "not foreshadowed in

any way by his original or first amended petitions." *See also Ansam Associates, Inc. v. Cola Petroleum, Ltd.*, 760 F.2d 442, 446 (2d Cir. 1985) (affirming denial of leave to amend complaint where proposed additional claims arose form "an entirely new set of operative facts of which it cannot be said that the original complaint provided fair notice").

Ordinarily, "delay alone, unaccompanied by an additional 'declared reason' such as prejudice to the opposing party, … does not warrant denial of leave to amend." *State Farm Ins. Companies v. Kop-Coat, Inc.*, 183 F. App'x 36, 38 (2d Cir. 2006) (citing *Rachman Bag Co. v. Liberty Mut. Ins. Co.*, 46 F.3d 230, 234–35 (2d Cir.1995)). However, "the longer the period of an unexplained delay, the less will be required of the nonmoving party in terms of a showing of prejudice." *Block v. First Blood Associates*, 988 F.2d 344, 350 (2d Cir. 1993) (quoting *Evans v. Syracuse City Sch. Dist.*, 704 F.2d 44, 47 (2d Cir.1983)).

Here, the grant of Plaintiffs' request for leave to file a TAC would result in severe undue prejudice to Mr. Zhao. Although Plaintiffs argue that they had no notice of the extraterritorial requirement of *Kiobel* when they filed the SAC, it is a red herring. If Plaintiffs knew of these activities in 2011, they had every opportunity to add them to the complaint. Notwithstanding the Court's own delay, permitting Plaintiffs in 2013 to add four new plaintiffs to what is essentially a 2004 lawsuit filing would extend this litigation beyond the pale, lengthening this already tortured eight-year-long set of allegations that would add new plaintiffs, create entirely new claims, circumvent statute of limitations that has long expired, and require extensive discovery for a Chinese defendant in the United States. It bears repeating that it would be impossible for Mr. Zhao to investigate

and take discovery into claims inside and outside of China due: (1) to the sheer length of time since those events occurred (fourteen years since the oldest event and five years since the most recent event); and also (2) to the fact that all of the supposed events except for one took place on foreign soil in China and involving the Chinese Communist Party and government. A defendant is entitled to finality and closure to legal actions brought against him and not to have meritless claims forever resurrected year after year using different wording and trying out different plaintiffs in the hopes that the claims will eventually stick. Granting Plaintiffs' motion to file a TAC eight years into this litigation and requiring Defendant Zhao to expend further time and resources to defend against these still meritless, decade-old claims would grossly prejudice him.

For the above reasons, Plaintiffs' Motion for Leave to file a TAC should be denied in its entirety with prejudice.

A. Even Should the Court Grant Plaintiffs Leave to Add New Plaintiffs, Plaintiffs Have Not Satisfied the Test to Allow the New Plaintiffs' Claims to Relate Back to the Original Complaint.

As a threshold matter, Plaintiffs have not filed a motion for relation back of their new proposed plaintiffs' claims to the original complaint and thus these claims should not be held to relate back as a matter of course. Defendant Zhao nonetheless addresses the doctrine of relation back as it is clear from the nature of Plaintiffs' motion that their intention *is* to have their new proposed plaintiffs' claims be heard with the original Plaintiffs' claims and for them to relate back to the original action. Fed R. Civ. Pro 15(c)

addresses relation back of pleading amendments.[13] Fed R. Civ. Pro 15(c)(1) states that an amendment to a pleading "relates back" to the date of the original pleading when:

> (A) the law that provides the applicable statute of limitations allows relation back;
>
> (B) the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading; or
>
> (C) the amendment changes the party or the naming of the party against whom a claim is asserted . . . .

Fed R. Civ. Pro 15(c)(1)(A)-(C). Here, neither subsections A or C apply to Plaintiffs' motion to amend. With respect to subsection A, Connecticut state law governs the applicable statutes of limitations in this action and does not independently allow relation back in this case, as its relation back doctrine is akin to FRCP 15. *See Cabrera v. Lawlor*, 252 F.R.D. 120, *4 (D.Conn. 2008) (*quoting Gurliacci v. Mayer*, 218 Conn. 531, 547 (1991) ("We have previously recognized that our relation back doctrine is akin to rule 15(c) of the Federal Rules of Civil Procedure . . .") (internal quotations omitted)). In addition, subsection C is wholly inapplicable because Plaintiffs do not seek to amend the names of any existing defendants but instead to add new plaintiffs.

Consequently, for the addition of the new plaintiffs' claims in the proposed TAC to relate back to the original Complaint and/or SAC, Plaintiffs must satisfy Fed R. Civ. Pro 15(c)(1)(B)'s requirement that the new plaintiffs' claims arose out of the "conduct, transaction or occurrence" set out in the original Complaint in order for the new Plaintiffs' claims to "relate back" to the original 2004 Complaint for purposes of the

[13] "The Federal Rules of Civil Procedure do not expressly provide for relation back of an amendment that adds new plaintiffs, but the Advisory Committee Notes state that 'the attitude taken in ... Rule 15(c) toward change of defendants extends by analogy to amendments changing plaintiffs.'" *Perkins v. Southern New England Telephone Company*, 2009 WL 3754097 *2 (D.Conn. 2009) (*quoting* FRCP 15 Advisory Committee's Notes).

statute of limitations. In order to make this determination, the United States District Court for the District of Connecticut applies the following test, which is generally followed in most jurisdictions in this country:

> In general, courts find relation back to be proper **where the adverse party "viewed as a reasonably prudent person, ought to have been able to anticipate or should have expected that the character of the originally pleaded claim might be altered or that other aspects of the conduct, transaction, or occurrence set forth in the original pleading might be called into question."** 6A Wright & Miller, Federal Practice & Procedure, § 1497. Relation back to add plaintiffs is appropriate **where "the status of the original plaintiff and a liberal reading of the complaint apprise defendant of the existence of the additional plaintiff's existence and claims, or ... if the defendant has had actual notice that additional parties might assert claims arising out of the transaction or occurrence at issue."** *See Andujar v. Rogowski*, 113 F.R.D. 151, 154 (S.D.N.Y.1986); *see also Sokolski v. Trans Union Corp.*, 178 F.R.D. 393, 398 (E.D.N.Y.1998).

Perkins v. Southern New England Telephone Company, *supra* (emphasis added).

The purpose of this test is to determine whether a defendant had adequate notice of and/or should have anticipated the new plaintiff's claims, such that the defendant would not be prejudiced by allowing the new plaintiff's claims to relate back to the original claims. *See id.* Accordingly, an amendment does not relate back simply because it alleges additional facts that are contemporaneous with those underlying the previous pleading. Indeed, "the test is not contemporaneity but rather adequacy of notice." *Rosenberg v. Martin*, 478 F.2d 520, 526 (2d Cir. 1973). "[T]he inquiry in a determination of whether a claim should relate back will focus on the notice given by the general fact situation set forth in the original pleading." *Id.* (quoting *Snoqualmie Tribe v. United States*, 372 F.2d 951, 960 (Ct. Cl. 1967). In *Rosenberg*, the Court of Appeals for the Second Circuit referred to the case of *Griggs v. Farmer*, 314 F.Supp. 1185 (E.D.Va. 1969), *aff'd*, 430 F.2d 638 (4th Cir. 1970) as an illustrative example. There, the court

"refused to permit a 'relating back' amendment of a complaint alleging breach of promise to marry to include a claim for assault at the time of the breach." *Id.*at 526-527.

Indeed, the Second Circuit has explained: "The pertinent inquiry, in this respect, is whether the original complaint gave the defendant fair notice of the newly alleged claims." *Wilson v. Fairchild Republic Co.*, 143 F.3d 733, 738 (2d Cir.1998); *see also* 6A Wright & Miller, Federal Practice & Procedure § 1501 ("As long as defendant is fully apprised of a claim arising from specified conduct and has prepared to defend the action, his ability to protect himself will not be prejudicially affected if a new plaintiff is added, and he should not be permitted to invoke a statute of limitations defense.").

Here, the new Plaintiffs' claims fail to satisfy this test. The four new proposed plaintiffs are completely unrelated to each other or to the original Plaintiffs and each bring their own set of independent circumstances and situations. Plaintiff Lee alleges torture and other mistreatment at Nanjing Prison in China between the years of 2003 and 2006. *See* TAC at ¶ 33. Plaintiff Yan alleges torture and other mistreatment in 1999 at the Beijing Dongcheng police station in China; and in 2001-03 and 2007-08 at the Tianjin Female Labor Camp in China. *See* TAC at ¶ 34. Plaintiff Doe 4 alleges torture and other mistreatment in 2000 at Tiananmen Square in China; in 2001 at the Guangdong Sanshui Female Labor Camp in China; and in 2004 at the Beijing Haidian Detention Center and at the Wuhan Female Labor Camp in China. *See* TAC at ¶ 35. Even more distinct from the rest, Plaintiff Tiong alleges he was beaten up and verbally abused in 2009 at a Falun Gong religious celebration and peaceful protest in Flushing, New York. *See* TAC at ¶ 36.

A review of the factual statements in the proposed TAC relating to the original Plaintiffs illustrates that all of the alleged acts committed against them were conducted by

different individuals, at different locations and during different time periods than that of the four new proposed plaintiffs. *See* TAC at ¶¶ 26-32. Even more critically, many of the subject events with respect to the four new plaintiffs occurred years after this litigation was originally filed in 2004. Furthermore, the events involving Plaintiff Tiong are alleged to have taken place in New York several years after the original actions were filed, while all of the alleged events of the original Plaintiffs occurred in China. Finally, a review of the claims being asserted in the TAC on behalf of the new plaintiffs illustrates that they are completely standalone claims not even remotely related to the claims brought by the original Plaintiffs. Specifically, Count VII of the TAC asserts state law claims of wrongful imprisonment/assault/wrongful death and Count XII of the TAC asserts federal 1985 civil rights claims against Mr. Zhao. *See* TAC generally. It would be unreasonable to conclude that Mr. Zhao could possibly have had specific or "fair notice" of the four new plaintiffs' claims – including state law and civil rights claims – many of which did not even arise until years after the 2004 original lawsuit filing and which occurred in New York.

Moreover, none of the four new plaintiffs have any relation to each other or to the original plaintiffs except for the fact that they are members of Falun Gong. The fact that a common tie between the original and new plaintiffs' claims exists in Defendant Zhao's supposed anti-Falun Gong activities is insufficient to conclude that the new plaintiffs' claims actually arise out of the same "conduct, transaction or occurrence" as that of the original plaintiffs, due to the fact that Mr. Zhao must defend each claim independently since each arises from its own set of facts and circumstances.

Indeed, a look at the case law in this jurisdiction where new plaintiffs' claims *were* held to relate back to the original plaintiffs' claims illustrate that in those cases, the new plaintiffs' claims arose out of the same exact conduct or transaction as the original plaintiffs and are highly distinguishable from this case. Relation back is most often permitted in order to allow assertion of claims related to the same incident, or accident or tort, involving the plaintiff's injuries or damages. *See, e.g., Drakatos v. R.B. Denison, Inc.*, 493 F.Supp. 942 (D. Conn. 1980); *Perkins v. Southern New England Telephone Company*, *supra* at **5-6. However, this matter involves many different incidents and events occurring many years and different countries apart, certainly not a common incident or accident; each plaintiff is entirely unique and unrelated – except for being current or former Falun Gong practitioners – and the events giving rise to their claims are all different, occurring in different places and at different times in China or in New York. Defendant Zhao would have to investigate each claim separately and may need to raise separate defenses for each plaintiff's claim.

The above examples illustrate just how different a true "relation back" case is from the matter at bar. In contrast, district courts in this circuit and elsewhere that have looked at relation back cases with similar facts as in this case have concluded that relation back is not appropriate. For example, in *106 Mile Transport Assoc. v. Koch*, 656 F.Supp. 1474, 1487 (S.D.N.Y. 1987), a claim was made that a city's award of a contract was violative of the Jones Act, and later two shippers that bid for the contract looked to join the action bringing New York state competitive bidding law claims. *See id.* The Court held that the two new plaintiffs' claims did not relate back to the original complaint filing because the city was not put on notice that Jones Act litigation would ultimately

lead to state competitive bidding claims – and thus the claims were different. *See id.* Additionally, in *Johnson v. Koppers Co., Inc.*, 524 F.Supp. 1182 (N.D. Ohio 1981), the Court held that an amended complaint adding a new plaintiff to a wrongful death and survival action would not relate back to the original date of the filing, as the action by the "new" plaintiff arose out of working conditions during a time period different from the claims of the three original plaintiffs and so did not arise out of the same conduct, transaction or occurrence as the original plaintiffs' claims. *See id.*

Both of the above cases are factually on point with this matter, in that the new plaintiffs' claims arose at a different time period than the original plaintiffs and that the claims being brought – state law wrongful imprisonment/assault/wrongful death and 1985 civil rights claims – are entirely separate and unrelated to the original plaintiffs' claims. Here too, this Court should determine that relation back is inappropriate based upon the separate time periods and separate claims of the new plaintiffs.

For the above reasons, should this Court permit Plaintiffs to file a TAC, this Court should not allow relation back of the four new plaintiffs' claims to the original Plaintiffs' prior pleadings.

III. NO JURISDICTION EXISTS OVER THE PENDENT STATE-LAW CLAIMS (COUNTS 7-11).

The TAC includes state-law-based claims for wrongful imprisonment, assault and battery, wrongful death, intentional infliction of emotional distress and negligent infliction of emotional distress. These are not international law claims cognizable under the ATS or TVPA. Moreover, venue is improper as the alleged conduct underlying these state-law claims occurred in New York. Without at least one of the ATS, TVPA or Civil Rights claims, there is no jurisdiction in this Court for these claims. *See Carnegie-*

Mellon Univ. v. Cohill, 484 U.S. 343, 350-51 n.7 (1988) ("when the federal-law claims have dropped out of the lawsuit in its early stages and only state-law claims remain, the federal court should decline the exercise of jurisdiction by dismissing the case without prejudice").

CONCLUSION

For the reasons stated above and in Mr. Zhao's Motion to Dismiss the Second Amended Complaint, this Court should deny Plaintiffs' motion to file a Third Amended Complaint with prejudice.

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