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UNITED STATES DISTRICT COURT
FOR THE DISTRICT COURT OF CONNECTICUT

CHEN GANG, DOES 1-3, ZOU WENBO, AND OTHERS SIMILARLY SITUATED,

Plaintiffs,

vs.

ZHAO ZHIZHEN & DOES, 1-5 INCLUSIVE,

Defendants.

Case No. 3:04cv01146(RNC)

Assigned to the Honorable Robert N. Chatigny, U.S.D.J.

PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR LEAVE TO FILE A THIRD AMENDED COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

[[Proposed] Third Amended Complaint filed concurrently herewith as Exhibit A]

Action Filed: July 13, 2004
FAC Filed: Sept. 2, 2004
SAC Filed: August 16, 2011

On the Brief
HRLF International Law Fellows
Jordan S. Berman, Esq.
Ryan J. Mitchell, Esq.

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD HEREIN:

PLEASE TAKE NOTICE that Plaintiffs CHEN GANG, DOES 1-3, ZOU WENBO, AND OTHERS SIMILARLY SITUATED, hereby move this Court for the following:

(1) An order granting Plaintiffs leave to amend the Second Amended Complaint to add four new plaintiffs: Ning Yan, Doe 4, Erh Boon Tiong, Charles Lee.

(2) An order granting Plaintiff leave to amend the Second Amended Complaint to add newly-ascertained facts directly relating to the new state of the law as reflected in the recent Supreme Court ruling in *Kiobel v. Royal Dutch Petroleum Co.,* 569 U.S. ____ (slip op.), 133 S.Ct. 1659 (2013);

(3) An order accepting the [Proposed] Third Amended Complaint ("TAC") as lodged currently herein as Exhibit A, which reflects the addition of newly ascertained facts and Ning Yan, Doe 4, Erh Boon Tiong, Charles Lee as plaintiffs against Defendants ZHAO ZHIZHEN & DOES, 1-5 INCLUSIVE; and

(4) An order that the attached [Proposed] TAC be deemed the amended pleading, and that it be deemed filed and served as of the date the motion is granted.

This motion is made pursuant to the schedule ordered by the court in a minute entry on September 11, 2013.

The motion will be based upon this Notice, the attached Memorandum in support, the files and records in this action, and any further evidence and argument that the Court may receive at or before a hearing.

Respectfully submitted on this October 11, 2013 by

PLAINTIFFS

by:

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

RULES

TREATISES

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs Chen Gang, Zou Wenbo, Does 1-3 (collectively, "Plaintiffs") bring this Motion for Leave to File a Second Amended Complaint ("Motion to Amend") to add newly-discovered facts, three named plaintiffs, Ning Yan, Charles Lee, and Erh Boon Tiong and one anonymous plaintiff [1](all new plaintiffs, the "Proposed Plaintiffs"), to this action against Zhao Zhizhen & Does 1-5 Inclusive, pursuant to Fed. R. Civ. P. Rule 15.

In July 13, 2004, Plaintiffs filed this case as a putative class action on behalf of tens of thousands of adherents of Falun Gong, a peaceful religious practice based upon the tenets of "Zhen", "Shan," and "Ren" (Truthfulness, Compassion, and Tolerance). Defendant, through his anti-Falun Gong propaganda and related anti-Falun Gong activities lending legitimacy to and instigating the suppression of Falun Gong believers in China and in the United States, aided and abetted, directed, organized, guided and collaborated with Chinese Communist Party-controlled individuals and entities in China and the United States by providing substantial assistance to them, knowing and intending that they would provide such assistance in the commission of human rights abuses against Falun Gong, including but not limited to torture and persecution[2] (as a crime against humanity).

Plaintiffs' action seeking justice for the horrific crimes they have endured and in many cases continue to endure came to an abrupt halt when the Supreme Court granted certiorari on two cases bearing directly on a number of grounds on which Defendants were moving to dismiss the action, *Kiobel v. Royal Dutch Petroleum Co.,* 621 F.3d 111 (2nd Cir. 2010), *cert. granted,* 79 U.S.L.W. 3728 (U.S. Oct. 17, 2011) (No. 10-1491) ("*Kiobel")*, and *Mohamad v. Rajoub,* 634 F.3d 604 (D.C. Cir. 2011), *cert. granted,* 80 U.S.L.W. 3059 (U.S. Oct. 17, 2011) (No. 11-88) ("*Mohamad"*). As a result, Plaintiffs' case has effectively been in a holding pattern for the last two years pending the Supreme Court decisions.

[1] Plaintiffs rely on the limited grant of anonymity from the Court's Order on the Anonymity Motions to add Proposed Plaintiff Doe 4 in the Proposed TAC. Plaintiffs understand that if the Court grants leave to file the [Proposed] TAC,
[2] Unless otherwise noted, "persecution" is used here to describe abuses meeting the legal definition of "persecution" as a crime against humanity under international law.

Plaintiffs and Proposed Plaintiffs have waited patiently for nearly two years for the Supreme Court to issue its opinions in *Kiobel* and *Mohamad* so that this case could proceed and now believe it appropriate and timely for Proposed Plaintiffs to request that this Court permit their joinder to the action. The Proposed Plaintiffs, like the current Plaintiffs in this action, are adherents of Falun Gong who have been subjected to horrific and unspeakable violations of rights at the hands of the Chinese Communist Party whose perpetration of crimes were facilitated by the Defendant to this action. Plaintiffs also believe it appropriate to incorporate allegations based on newly ascertained facts that bear directly on the newly decided law in *Kiobel* into their complaint.

Accordingly, Plaintiffs respectfully request the Court grant leave to file the attached [Proposed] Third Amended Complaint ("[Proposed] TAC") which adds relevant newly-discovered facts that support the current state of the law as articulated by the Supreme Court in *Kiobel,* and add Proposed Plaintiffs Ning Yan, Doe 4, Ehr Boon Tiong and Charles Lee who bring valid claims against Defendants arising out of similar facts and circumstances.

II. FACTUAL BACKGROUND

Plaintiffs are practitioners of Falun Gong, several of whom are now U.S. residents and/or asylees/refugees. Defendant Zhao Zhizhen took part in and played a lead role in a common plan, with other high-profile figures associated with the Chinese Communist Party, to violently suppress and deprive of rights Falun Gong practitioners worldwide, and especially in China and the United States.

In addition to his anti-Falun Gong activities in China, Zhao and his colleagues/subordinates in the CACA, its Website, the Party propaganda apparatus, and others involved in the common plan additionally instigated, carried out, and furthered the suppression and denial of rights of Falun Gong believers residing in the U.S. as citizens, refugees, visitors and residents. As a result, Falun Gong believers including Plaintiffs were victimized by hate-based violence, group intimidation, threats, and verbal harassment and demonization causing fear, distress, physical pain and suffering, and an inability to enjoy basic international and domestic rights. Plaintiffs were beaten, insulted, and subjected to effective death threats on various occasions by gangs of anti-Falun Gong individuals associated with Zhao and his CACA

organization. These individuals expressly affiliated themselves with his plan to violently suppress and deny rights to Falun Gong believers.

The human rights abuses carried out by Chinese Communist Party and Public Security officers in China through and as a result of the Defendant's conduct comprise ultra vires acts that not only violate Chinese law, but also do not implicate the Government of China.

As the Third Amended Complaint further establishes, Zhao substantially assisted in the perpetration of the alleged crimes through conduct that was essential to and specifically directed towards the use of violence and intimidation against Falun Gong practitioners in the U.S, in order to deprive them of their fundamental rights under U.S. and international law. *See infra* at §III.A.

Zhao personally directed and controlled the CACA, of which he was a Standing Committee member, as well as its Website, which he personally founded and supervised. Zhao made statements calling for the extension of anti-Falun Gong violent suppression and deprivation of rights to the United States, and he actively participated in and maintained control over, and constant knowledge of, the specific means by which this extension was carried out: Zhao participated in and oversaw the CACA's multi-year program of sending delegations to promote anti-Falun Gong animus in the U.S., and the CACA's founding of and/or affiliation and collaboration with branch offices and/or affiliates in the U.S. These branches and/or affiliates conducted mass rallies against Falun Gong, violence and intimidation against individual Falun Gong adherents, and ostracism and demonization of Falun Gong. As a result, Falun Gong adherents in the U.S. were deprived of their rights to religious freedom, self-expression, participation in civic life, and to physical security. During the commission of all of these acts, Zhao continued to publicly call for their intensification.

III. RELEVANT PROCEDURAL BACKGROUND

On July 13, 2004, Plaintiffs filed suit in the United States District Court for the District of Connecticut against Zhao Zhizhen and Does 1-5 Inclusive. *See* Docket Entry ("DE") 1. Plaintiffs filed an Amended Complaint on September 2, 2004. *See* DE 18. On December 30, 2004, Defendants filed a Motion to Dismiss Plaintiffs' Amended Complaint. *See* DE 41. The Court held a motion hearing on the Motion to Dismiss on September 22, 2005, *see* DE 71, and on July

29, 2011, *see* DE 79. The Court then issued a scheduling order for a Second Amended Complaint on August 5, 2011, *see* DE 83, and Plaintiffs filed the Second Amended Complaint on August 16, 2011, *see* DE 85. Defendant filed a Motion to Dismiss the Second Amended Complaint on November 11, 2011, *see* DE 91. The Court held a motion hearing on March 15, 2012, *see* DE 110, and took the motion under advisement.

On October 17, 2011, after Plaintiffs had filed their Second Amended Complaint, the Supreme Court granted certiorari on the case *Kiobel v. Royal Dutch Petroleum Co.,* 621 F.3d 111 (2nd Cir. 2010), *cert. granted,* 79 U.S.L.W. 3728 (U.S. Oct. 17, 2011) (No. 10-1491). The issues considered by the Supreme Court in *Kiobel* included "whether and under what circumstances courts may recognize a cause of action under the Alien Tort Statute (28 U.S.C. § 1350) ("ATS"), for violations of the law of nations occurring within the territory of a sovereign other than the United States." *Kiobel,* 569 U.S. ____ , at 1. The Supreme Court issued its decision in *Kiobel* on April 17, 2013. This Court held proceedings on May 3, 2013, *see* DE 114, and requested briefs to discuss the effect of *Kiobel* on the Second Amended Complaint. On September 20, 2012, this Court dismissed the Second Amended Complaint, *see* DE 123, while directing Plaintiffs to file the present motion to request leave to submit a new complaint, *see* DE 121. No discovery has been taken by the Parties.

ARGUMENT

A. Amendment is Freely Granted and is Warranted Here

Pursuant to Fed. R. Civ. Proc. Rule 15(a)(2), a party may amend its pleading with leave of the Court. Rule 15(a)(2) provides that leave to amend a pleading shall be freely given when justice so requires. This is a "mandate . . . to be heeded." *Foman v. Davis,* 371 U.S. 178 (1962). "The rule in this Circuit has been to allow a party to amend its pleadings in the absence of a *showing by the nonmovant* of prejudice or bad faith." *Block v. First Blood Assocs.,* 988 F.2d 344, 350 (2nd Cir.1993) (emphasis added). Leave to amend should be granted unless amendment: (1) would cause prejudice to the opposing party, (2) is sought in bad faith, (3) creates undue delay, (4) or is futile. *Ruotolo v. City of New York,* 514 F.3d 184, 191 (2nd Cir. 2008) (citing *Foman,* 371 U.S. at 182). The Second Circuit has instructed that the court's discretion in determining

whether to grant leave must be exercised in a manner consistent with "the liberalizing 'spirit of the Federal Rules.'" *United States on behalf of Maritime Admin. v. Continental Ill. Nat'l Bank and Trust Co.,* 889 F.2d 1248, 1254 (2nd Cir.1989) (citation omitted). Similarly, "[t]he obvious intent of that language is to evince a bias in favor of granting leave to amend," and the Supreme Court has interpreted this language as creating a presumption that leave to amend should be permitted in the absence of an apparent or declared reason. *Fox v. Board of Trustees,* 764 F.Supp. 747, 757 (N.D.N.Y.1991) (citing *Foman,* 371 U.S. at 182). Defendants cannot meet their burden as leave to amend is freely granted and demanded here where there has been an intervening change in law as well as newly discovered previously unavailable evidence, and therefore none of the factors identified above are present.

Accordingly, Plaintiffs' Motion to Amend should be granted and the [Proposed] TAC deemed filed as of the date of the Court's order.

B. Justice Requires Amendment Because Plaintiffs Have Had No Opportunity to Address the New Requirements Outlined in *Kiobel*

Given that Plaintiffs drafted their previous complaint in accordance with pre-*Kiobel* doctrine, they cannot be faulted for any previous failure to allege facts suggesting that their claims are domestic or touch and concern the United States. In *Absolute Activist Value Master Fund Ltd. v. Ficeto*, 677 F.3d 60 (2nd Cir. 2012), the Second Circuit held that the plaintiffs must have an opportunity to plead additional factual allegations in light of *Morrison*, to support their claim that the transactions at issue took place in the United States. Given the representations below that Plaintiffs' amendments would also highlight the domestic conduct and effects of the violations in this case, especially crimes against humanity perpetrated against Plaintiffs on U.S. soil and in China, Plaintiffs request the opportunity to amend in accordance with the Second Circuit's directive in *Absolute Activist.*

1. The *Kiobel* Presumption Regarding Extraterritoriality is a New Presumption

The majority opinion in *Kiobel* held that federal courts are constrained in recognizing certain causes of action under the jurisdiction provided by the ATS. *Kiobel,* slip op. at 6.

However, the Court made clear that the ATS still extends to claims with respect to conduct abroad that "touch and concern the territory of the United States . . . with sufficient force to displace the presumption against extraterritorial application." *Id.* at 14 (citing *Morrison v. Nat'l Australia Bank Ltd.*, 130 S. Ct. 2869 (2010)). *Kiobel*'s holding was narrow, applying only in the context of a paradigmatic "foreign-cubed" case—foreign defendant, foreign plaintiff, and exclusively foreign conduct—lacking any connection to the United States beyond the "mere corporate presence" of the defendants. *Id*. The *Kiobel* defendants' only connection to the United States was that they were listed on the New York Stock Exchange and maintained an investor servicing office owned by a separate corporate affiliate. *Id*. at 14 (Breyer J., concurring). The Court explicitly left unresolved how other claims may "touch and concern" the United States with "sufficient force" to displace the presumption in other factual contexts, such as claims involving a U.S. conduct or effects.

Kiobel does not apply the usual presumption against extraterritoriality, because that presumption (1) ordinarily applies only to substantive law enacted by Congress; (2) either applies to the statute or not so that (unlike in *Kiobel*) application on the high seas defeats the presumption; (3) does not apply to jurisdictional statutes; and (4) is not ordinarily applied on a case-by-case basis. Instead, in *Kiobel,* the majority opinion applied the "principles" underlying the presumption in what Chief Justice Roberts conceded is an atypical application of the usual presumption against the extraterritorial application of U.S. statutes. *Id*. at 5 (Roberts, C.J.).

Thus, the manner in which these principles apply in other ATS settings, outside the "mere corporate presence" cases, is still to be determined in particular cases considering the purposes of the ATS. Because the new Kiobel presumption, – *e.g.*, whether the facts of the case sufficiently "touch and concern" the United States in order to "displace" the presumption – it is not amenable to a bright line rule; it necessarily mandates a case-by-case analysis.[3] Any warning in *Morrison*

[3] The Supreme Court essentially adopted the U.S. government's position in *Kiobel*:

> There is no need in this case to resolve across the board the circumstances under which a federal common-law cause of action might be created by a court exercising jurisdiction under the ATS for conduct occurring in a foreign country. In particular, the Court should not articulate a categorical rule foreclosing any such application of the ATS. *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980), for example, involved a suit by Paraguayans against a Paraguayan defendant based on

against turning the presumption into a "craven watchdog" every time "*some* domestic activity" is involved in the case refers only to whether the presumption applies in the first place; it has no relevance to the *Kiobel* question of whether the presumption is displaced, a factor that is never addressed or raised in *Morrison*. 130 S. Ct. at 2884.

Accordingly, Plaintiffs have added and/or elaborated on allegations in the complaint to support that the claims in this case are domestic or touch and concern the United States with sufficient force, far greater than mere corporate presence. These amendments include further allegations of specifically directed anti-Falun Gong activity by Defendant Zhao that more directly tie the crimes against humanity including persecution and related alleged human rights abuses to the United States. These new and expanded allegations clarify how the propaganda and related activities of Zhao specifically calling for and intending the *douzheng* of believers residing in the United States directly resulted in these violations and the injuries they encompass. Many of the acts directed towards the United States were partly carried out in the US with all decision making central to the campaign orchestrated by Zhao in collaboration with Party leadership and other Party-controlled individuals and entities. *See, e.g.*, [Proposed] TAC, Ex. A, **§§** VI.A-C, D, G. Because these new facts will determine some of the key issues in this litigation, including the extent of the relevant conduct that occurred on U.S. soil, it is necessary for the Court to have a complaint that more fully incorporates these allegations. Euphemisms used by Defendant, such as "kindness" to describe the hostile animus implied in such terms as "douzheng", "jiepi", and "love and care centers" to describe labor camps where forced conversion/torture practices were routinely carried out fail to address the facts underlying Plaintiffs' allegations.

As discussed below, the relevant conduct is sufficiently domestic not to invoke application of the *Kiobel* presumption, or, in the alternative, ATS claims touch and concern the United States with sufficient force to displace the presumption. Here, where the violations themselves involve

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> alleged torture committed in Paraguay. The individual torturer was found residing in the United States, circumstances that could give rise to the prospect that this country would be perceived as harboring the perpetrator....*Other claims based on conduct in a foreign country should be considered in light of the circumstances in which they arise*.

Supplemental Brief For The United States As Amicus Curiae In Partial Support Of Affirmance, at 4-5, *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491 (filed June 2012) (emphasis added) ("U.S. Suppl. *Kiobel* Br.").

relevant U.S. conduct and effects – particularly when the injuries endured by Plaintiffs in the US are identical to some of the injuries endured by other plaintiffs in China, *Kiobel* is no bar to these proceedings. After *Kiobel*, the allegations connecting the claims against Defendant Zhao to the United States have increased relevance, and Plaintiffs seek the opportunity to amend in order to address this new legal regime.

2. Plaintiffs Did Not Have Notice of *Kiobel*'s Legal Requirements when Drafting the Previous Complaint

Plaintiffs drafted the previous complaint (Second Amended Complaint) on August 16, 2011 (Dkt. No. 85), before the Supreme Court granted the petition for a writ of certiorari in *Kiobel* on October 17, 2011. Plaintiffs drafted the Second Amended Complaint in accordance with pre-*Kiobel* doctrine and have not had an opportunity to allege facts showing that the conduct in question was domestic and/or touches and concerns the United States with sufficient force.

At the time Plaintiffs submitted the Second Amended Complaint, there were no ATS decisions restricting the ATS to claims arising within U.S. territory or on the high seas. Every circuit to consider the issue at the time had rejected the argument that the ATS does not apply extraterritorially. *See Filartiga v. Peña-Irala*, 630 F.2d 876, 885 (2nd Cir. 1980); *In re Marcos Human Rights Litig.*, 978 F.2d 493, 499-501 (9th Cir. 1992); *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 20-28 (D.C. Cir. 2011); *Flomo v. Firestone Natural Rubber Co.*, 643 F.3d 1013, 1025 (7th Cir. 2011). Plaintiffs therefore had no notice of a need to meet a newly established regime under *Kiobel*.

Accordingly, justice requires that Plaintiffs be granted leave to amend in light of the Supreme Court's newly issued teachings regarding extraterritoriality under the ATS.

III. Amendment of the Complaint is Not Futile, as Plaintiffs' New Allegations Meet the Touch and Concern Standard of *Kiobel*

Although leave to amend complaint should not be granted if amendment would be futile, proposed claim is futile only if it is clearly frivolous or legally insufficient on its face; if a proposed claim sets forth facts and circumstances which may entitle plaintiff to relief, then futility is not proper basis on which to deny amendment. *Saxholm AS v. Dynal, Inc.*, 938 F.Supp. 120,

124 (E.D.N.Y. 1996). Thus, "[i]f the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits." *Foman v. Davis*, 371 U.S. 178, 182 (1962).

A. The Presumption Against Extraterritoriality Is Not Invoked or Is Displaced in this Case under Various Tests.

The presumption against extraterritoriality is not invoked or is displaced under several tests.

1. The Presumption against Extraterritoriality Does Not Apply and/or the Claims Touch and Concern the United States with Sufficient Force under the "Substantial, Direct and Foreseeable Effects" Test.

In *Sexual Minorities Uganda v. Lively*, --- F.Supp.2d ----, 2013 WL 4130756 (D. Mass. Aug. 14, 2013) ("SMUG"), the district court denied the motion to dismiss ATS claims for injuries against foreign plaintiffs for injuries occurring abroad, concluding, "[a]n exercise of jurisdiction under the ATS over claims against an American citizen who has allegedly violated the law of nations in large part through actions committed within this country fits comfortably within the limits described in *Kiobel*." *Id.* at *14. The district court noted that Chief Justice Roberts, in *Kiobel*, "emphasized that the Court's holding applied to a factual scenario where 'all the relevant conduct took place outside the United States.'" *Id.* at *13 (quoting *Kiobel v. Royal Dutch Petroleum Co.,* 569 U.S. ____,133 S. Ct. 1659, 1669 (2013)). The district court therefore allowed claims to proceed against Defendant Lively, a U.S. pastor who fomented an atmosphere of repression against LGBT people in Uganda largely from the United States. The fact that Plaintiffs' injuries occurred abroad did not deprive plaintiffs of a claim: "Defendant's alleged actions in planning and managing a campaign of repression in Uganda from the United States are analogous to a terrorist designing and manufacturing a bomb in this country, which he then mails to Uganda with the intent that it explode there." *Id.*

Defendant's alleged actions in planning and managing a campaign of repression in China and United States are the inverse of the facts of SMUG, analogous to a terrorist designing and manufacturing a bomb in China, which he then mails to the U.S. with the intent that it explode there – and which does in fact explode. Rather than an instance in which persecution and other

violations are directed primarily towards Uganda as a result of Lively and his cohorts' efforts in the United States, Defendant directed his calls for the suppression of Falun Gong towards the US as one of his primary targets directly and in concert with others with some of the very same injuries in the United States as those that form the bases in *SMUG*.

Just as Lively, an extremist anti-gay activist who resides in the United States, called for the persecution of LGBTI persons residing abroad in Uganda through Internet writing and speeches, so too Zhao, an extremist anti-Falun Gong activist who resides in China, specifically called for the persecution of Falun Gong believers residing abroad in the United States through writing and speeches he disseminated on the Internet.[4] Like Lively who worked with his cohorts to rid Uganda of all non-hetereosexuals based on his hostile animus towards all LGBTI, whom he characterized as "evil" and part of the most dangerous social and political movement of our century, Zhao, based on his own view of Falun Gong believers as "evil," and their so called "movement" as a threat and danger to humankind, similarly called for and worked with his cohorts to rid the United States (and the entire world) of Falun Gong.[5] Just as the LGBTI community in Uganda endured severe discrimination and rights deprivations in virtually every aspect of their civil lives (including threats, harassment, physical harm, and severe humiliation) as a direct result of the activities Lively and his cohorts orchestrated largely from the United States, so

[4] Zhao describes the purpose of the persecutory campaign he is endorsing against Falun Gong via the Internet as "rais[ing] an emergency alarm to the entire world" in an attempt to influence the U.S. as a whole, but especially Chinese communities within the U.S., to treat the religious group as if they were terrorists. Proposed TAC at ¶ 136. See also, proposed TAC at ¶ 135, and more generally § VI (B). Zhao's personal Website statements disclose his unwavering dedication to the formation of a website geared to designate Falun Gong as threats to and enemies of all states, including in particular the United States: "I once had a deep discussion with my American friends. . . . Those who harbor prejudice and take China's malignant tumor (i.e. Falun Gong) as treasure will only bring disaster to themselves." See e.g., proposed TAC at ¶ 137.

[5] For over a decade, Zhao has directed anti-Falun Gong activities towards and created a continuous presence in Chinese communities in the United States in concert with others through via (1) the display of anti-Falun Gong propaganda materials on the CACA website he founded, designed and managed (which provides a vast and ever-growing library of anti-Falun Gong hate materials seeking to convince US and other audiences that Falun Gong is a dangerous, subhuman threat to society) that are specifically directed towards the US and cited and disseminated on a daily basis in the US by anti-Falun Gong hate groups; 2) the CACA organization he founded, manages and controls, which regularly sends anti-Falun Gong delegations to the United States (who reiterate the content and phrases of Zhao's agenda-setting anti-Falun Gong narratives on US soil); and 3) CACA domestic branch offices and affiliates, which carry out anti-Falun Gong activities 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 directly quoting from, distributing, and otherwise making use of Zhao's personally-created or compiled anti-Falun Gong materials. See, TAC at ¶¶ 134 and ff.

too did Plaintiffs Ning Yan, Erh Boon Tiong, Doe 4 and the class they represent endure severe injuries on US soil as a direct result of the crimes against humanity and related transgressions Zhao orchestrated partly from abroad.[6]

The differences between SMUG and the instant case, that Lively and his cohorts manufactured the "bomb" in the US with injuries felt abroad, whereas Zhao and his cohorts manufactured the "bomb" in China (and in part in the US) with injuries felt on US soil in no way bars litigation of the instant case. Indeed, where crimes against humanity, including the deprivation of such fundamental rights as freedom of conscience, belief and peaceful association, take place on U.S. soil, the ATS is an apposite means of redress.

U.S. courts have long recognized international legal principles that allow liability for claims originating abroad which nonetheless have important effects with the United States. "[I]t is settled law […] that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends; and these liabilities other states will ordinarily recognize." *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 443 (2nd Cir. 1945) (finding that agreements between foreign corporations that were intended to and did indeed affect United States imports violated the Sherman Act) (internal citations omitted). This principle – allowing claims to proceed based on effects in the United States (or where failure to apply laws extraterritorially will have negative effects in the United States) — has been uniformly applied across legal contexts, including tort, criminal law, unfair competition, antitrust, and Racketeer Influenced and Corrupt Organizations

[6] See, e.g., proposed TAC at ¶ 184 (For example, their digital temple has been subjected to the ongoing suppressive campaign endorsed by Zhao; their religious gatherings have been disrupted by violent threatening mobs, and adherents have even been physically assaulted while meditating in the Buddhist lotus position with eyes closed and have been physically isolated and surrounded while taking part in religious activities). As a result of these and similar acts they have been deprived of their fundamental rights to religious freedom and the freedoms of belief, association, assembly, and self-expression. As also alleged in the Complaint, Falun Gong US citizens and residents are not treated as equal members of society. In many cases, they are not even treated as human beings worthy of dignity or respect. Rather, adherents are referred to and treated as inhuman, dangerous, or pestilential, just as they are described in Zhao's vast library of anti-Falun Gong materials. Zhao's tireless efforts to define Falun Gong adherents as an "epidemic", "demon", "ulcer", "enemy", "insane", "criminal", or "terrorist" threat, and the violent example set by his own 610 Office (in China) and CACA (in the U.S) co-conspirators, have deprived U.S.-based Falun Gong adherents of even the most basic guarantees of safety or the freedom to openly believe in the faith of their choice." See, proposed TAC at ¶¶ 194-203.

(RICO) cases. *See, e.g.*, *id*. *See also, Laker Airways, Ltd. v. Sabena, Belgian World Airlines* 731 F.2d 909, 922 (1984) (stating that anti-competitive "conduct outside the territorial boundary which has or is intended to have a substantial effect within the territory may also be regulated by the state"); *Steele v. Bulova Watch Co*., 344 U.S. 280, 285 (1952) (finding that unfair competition laws apply extraterritorially where the failure to extend the statute's reach would have negative consequences within the United States); *Ford v. United States*, 273 U.S. 593, 620-21 (1927) (holding that a defendant, who outside of a country willfully puts in motion a force to take effect in it, is answerable at the place where the evil is done); *Strassheim v. Daily*, 221 U.S. 280, 285 (1911) ("Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a state in punishing the cause of the harm as if [the wrongdoer] had been present at the effect, if the state should succeed in getting him within its power."); Restatement of Conflict of Laws Sec. 65.

In *U.S. v. Philip Morris USA Inc.,* 566 F.3d 1095, 1130-31 (D.C. Cir. 2009), for instance, the foreign entity's acts that were carried out abroad were not sufficiently "extraterritorial" to invoke the presumption, due to "substantial, direct, and foreseeable" effects within the United States. In that case, several cigarette manufacturers, including a British manufacturer BATCo, were charged with deceptive practices related to the health effects of smoking cigarettes, including fraudulently denying that smoking causes cancer and that nicotine is an addictive drug. *Id*. at 1105-06. BATCo had conducted sensitive nicotine research abroad on the effects of the drug but refused to acknowledge the results; instead, it intentionally misrepresented nicotine's addictiveness to the public. *Id*. at 1131. Moreover, BATCo, together with other defendants, "pursu[ed] a united front on smoking and health issues" and, over an extended period of time, "created, controlled, used, or participated in an astonishing array of international entities" where they identified "threats" to the industry and developed responses to these perceived "threats." *United States v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 1, 121 (D.D.C. 2006). Notwithstanding scientific evidence to the contrary, BATCo and other defendants "publicly denied and distorted the truth," "suppressed research showing [nicotine's] addictiveness, and . . . repeatedly used misleading statistics as to the number of smokers who have quit voluntarily and without

professional help." *Id.* at 209.

Rejecting BATCo's argument that it cannot be held liable because its "activities and statements took place outside of the United States," the D.C. Circuit emphasized that "conduct with substantial domestic effects implicates a state's legitimate interest in protecting its citizens within its borders," and thus "the regulation of foreign conduct meeting this 'effects' test is 'not an extraterritorial assertion of jurisdiction." 566 F.3d at 1130. The presumption against extraterritoriality hence does not apply when "a statute is applied to conduct" with a "substantial, direct, and foreseeable effect within the United States." *Id.* Because defendants were highly successful in "influenc[ing] public opinion and persuad[ing] people that smoking was not dangerous . . . [and thus] ke[pt] more people smoking, recruit more new smokers, and maintain or increase their earnings," 449 F. Supp. 2d. at 209, the court found that the effects test was met and the presumption against extraterritoriality did not apply.

Like BATCo, Defendant's purposefully directed actions against U.S. residents had a substantial, direct, and foreseeable effect in the United States, and thus the presumption against extraterritoriality does not apply as well. Just as BATCo intentionally misrepresented the effects of nicotine from its research, Zhao concocted lies and false stories about Li Hongzhi and Falun Gong believers, *see*, Proposed TAC, Ex. A, at ¶¶54-55, 64-66, 113, 122-23, 128, characterizing Falun Gong practitioners as psychopaths, terrorists and mass murderers in blatant disregard of evidence to the contrary. *See, e.g.*, *id.* at ¶¶26, 38, 113-14, 117-18. Similar to BATCo, Zhao and his co-conspirators founded several organizations such as the CACA, its national and foreign subsidiaries and affiliates to further disseminate these lies, identify Falun Gong "threats," and perpetuate their campaign to suppress Falun Gong. *See*, *id.* at ¶¶56-59, 161-66. Zhao's co-conspirators and subordinates acting under Zhao's guidance, leadership and/or directives attended numerous international conferences and events, including in the United States, as part of their international campaign to eradicate Falun Gong. *Id.* at ¶153-60. Zhao publicly denied and distorted the truth about Falun Gong and repeatedly used misleading—totally fabricated—stories attributing to Falun Gong acts no less unconscionable, twisted and inaccurate than those attributed by the Nazis to the Jewish people during the Holocaust, by the Tutsis to the Hutu in

Rwanda, and by the Serbs to the Bosnians in the former Yugoslavia. *Id.* at ¶¶74-76.

As a result, Zhao was not only highly successful, as in *Philip Morris*, in "influenc[ing] public opinion and persuad[ing] people that [Falun Gong] was [] dangerous . . . [and thus] incited more people [to hate Falun Gong], recruit[ed] more new [anti-Falun Gong activists], and maintain[ed] or increase[d] their [political agenda to eliminate Falun Gong]," but Falun Gong adherents in US communities were also deprived of their fundamental rights based on their group identity as a direct result of the joint effort. As alleged in the TAC, Plaintiffs Yan, Erh, Doe 4 and the class of U.S. Falun Gong practitioners they represent were subjected to widespread persecution as a crime against humanity in that they were routinely deprived of their right to freedom of religious belief, the right to the freedoms of association and expression, and the right to live without fear of harassment, hate based intimidation, violence and the threat of violence or death. See TAC §VI.D. As indicated *supra*, the class has endured severe discrimination in every meaningful aspect of their civil lives. In addition to these injuries, they have been targeted by hate literature posing as investigative journalism; and have been terrorized and live in a state of constant alarm, especially in Chinese diaspora communities. *Id.* at ¶161-66, 184. According to several US Falun Gong believers, including Erping Zhang, the practice of Falun Gong that had been viewed positively in the United States up through May or June 1999 shifted as more and more anti-Falun Gong programs and polemic were aired on the all Chinese CCTV Channel four that simulcasts in the US the exact same programs aired in China on Zhao's Wuhan Television. *Id.* at ¶176. The extent to which adherents were persecuted based on their religion extended from beatings, threats, mob assaults and dehumanizing insults to routine exclusion from community parades and events, and routine ostracism and vilification as a social pariah group. *Id.* at ¶176. Zhao's collaborators, subordinates and other cohorts constantly surveil Falun Gong rallies, prayer, meditation, and parades in the US in order to identify perpetual targets for anti-Falun Gong violence. *Id.* at ¶189. Individuals or groups, who have attacked plaintiffs Erh, Doe 4, Yan, and the class they represent, in such incidents explicitly link their acts to Defendant and the common plan to violently suppress Falun Gong. Such effects within the borders of the United States goes far beyond what the D.C. Circuit found to be a "substantial, direct and foreseeable

effect" in *Philip Morris*.

Because the regulation of such foreign conduct with substantial, direct and foreseeable effects in the United States is "not an extraterritorial assertion of jurisdiction," the *Kiobel* presumption against extraterritoriality does not apply. 449 F. Supp. 2d. at 209.[7]

Similarly, the effects test fits coherently within decades of anti-trust jurisprudence. The application of U.S. antitrust laws to foreign conduct has been prominently recognized since Judge Learned Hand's opinion for the Second Circuit in *United States v. Aluminum Co. of America,* 148 F.2d 416, 444 (2d Cir. 1945). There, the Second Circuit (sitting as a court of last resort because the Supreme Court lacked a quorum) held that the Sherman Act covers imports when there are actual and intended effects in the United States. *Id.*; *Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845 (7th Cir. 2012) (discussing *Alcoa*). In 1982, in response to concerns about the extraterritorial application of the Sherman Act, Congress passed the Foreign Trade Antitrust Improvements Act (FTAIA) limiting the scope of the Sherman Act to extraterritorial conduct that has a "direct, substantial, and reasonably foreseeable effect" on American commerce. *See* H.R.Rep. No. 97-686, pp. 1-3, 9-10 (1982), U.S. Code Cong. & Admin.News 1982, 2487, 2487-2488, 2494-2495.

The Supreme Court most recently reaffirmed the effects test in *F. Hoffman-La Roche Ltd. V. Empagran S.A.*, 542 U.S. 155 (2004). In that case, plaintiffs brought suit on behalf of foreign and domestic purchasers of vitamin products against defendants for an international vitamin price-fixing conspiracy that is "in significant part foreign, that causes some domestic antitrust injury, and that independently causes separate foreign injury." *Id*. at 158. Justice Breyer, writing for the Court, rejected application of U.S. antitrust laws to those claims where foreign conduct causes independent foreign injuries unrelated to any domestic injuries and [where] "that foreign harm alone gives rise to the plaintiff's claim." *Id*. at 165. Thus, "a purchaser in Ecuador could not bring a Sherman Act claim based [solely] on foreign harm." Id. at 159. However, whereas here, foreign conduct has given rise to the same and related injuries in the US and China, this test would allow claims for any direct, substantial, foreseeable "domestic [ ] injury that foreign [ ]

[7] Even if the Kiobel presumption were to apply, the claims touch and concern the United States with significant impact based on conduct intended to and giving rise to extensive effects in the US including the injuries suffered by Plaintiffs Erh, Yan, Doe 4 and the class they represent.

conduct has caused" as well as related foreign injuries. Id. at 165.

In this case, Defendant's acts violating such SOSA norms as crimes against humanity have given rise to the same and related injuries in the United States (and China) including, e.g., those enumerated in the Proposed TAC at § VI. E, ¶¶ 181 -202). Applying the effects test to the current case, the aforementioned and related claims are exempt from the presumption against extraterritoriality and may be properly brought herein because Defendant intentionally and proximately caused the same (or related) substantial, direct, and foreseeable effects in the United States as in China. *See supra* at p. 14-15.

Even if the Kiobel presumption did apply, these and other claims touch and concern the United States with significant impact based on conduct intended to and giving rise to extensive effects in the US including the injuries suffered by Plaintiffs Erh, Yan, Doe 4 and the class they represent. See, e.g., Proposed TAC at, § VI. E; and at ¶¶ 34-36.

2. **The Domestic Conduct in This Case is Sufficient Either Not to Invoke the Presumption Against Extraterritoriality or to Touch and Concern the US with Sufficient Force**

Unlike in Kiobel, where the claims consisted solely of abuses suffered abroad without any direct effect or (overt or other) conduct in the United States, the claims in this matter include crimes against humanity and other egregious abuses carried out on U.S. soil with injuries felt in the United States. Comprising (*inter alia*) violence, threats of violence and death, intimidation and other dehumanizing activities, these and related SOSA violations were carried out on US soil under the Defendant's directives, guidance and/or leadership and as part of his larger global campaign to suppress a minority religion in the United States. *See* proposed TAC at §§ VI.B-G. Resulting both from Defendant's direct acts, directives and guidance and the related collaborative actions of CACA branch office members in the United States, CACA delegations in the United States, the media materials broadcast in the United States, and website materials cached in the United States (*see id.*), these acts are not "covered . . . by the reasoning and holding" of the majority in *Kiobel*. 569 U.S. ___ (slip op. at 1) (Kennedy, J., concurring).

Nothing in the *Kiobel* majority opinion even hints that the Court was creating a test that

turned exclusively on whether all or even most of the conduct must have occurred in the U.S. The only reference to conduct in the majority holding was that in that case, "***all the relevant conduct took place outside the United States***" and this did not "touch and concern" the territory of the United States "with sufficient force to displace the presumption against extraterritorial application." *Id*. at 1669 (emphasis added). Only Justice Alito's concurrence, joined by Justice Thomas, took the extreme view that any actionable ATS norm must have occurred within the U.S. *See* 133 S. Ct. at 1670 (Alito, J., concurring). In its narrowly focused denial of a request for mandamus in *Balintulo v. Daimler AG*, --- F.3d ----, 2013 WL 4437057 (2nd Cir. 2013), the Second Circuit also notes that *Kiobel* only bars claims where "*all* the relevant conduct" (emphasis in original) occurred outside of the US, and has "no reason to explore, much less explain, how courts should proceed when *some* of the relevant conduct occurs in the United States." *Id*. at 7 (emphasis original). The court's decision, to the extent a mandamus has any precedential value, only addresses claims that do not in any way tie the alleged abuses "to actions taken within the United States." *Id.* at 8. The Second Circuit does not address a case such as Plaintiffs', where substantial relevant conduct occurs in the U.S.. *Id.* at fn. 26 (declining to address "how much conduct must occur in the United States").

Even under the strictest readings of *Kiobel,* the presumption against extraterritoriality does not block liability for tortious conduct in the United States, merely because tortious conduct was also committed abroad. The Supreme Court has made clear that the presumption against the extraterritorial application of a statute comes into play only where a defendant's conduct lacks sufficient connection to the United States. See *Morrison v. Nat'l Australia Bank Ltd*., 130 S. Ct. 2869, 2884 (2010); *Pasquantino v. United States,* 544 U.S. 349, 125 S.Ct. 1766, 161 L.Ed.2d 619 (2005) (use of federal wire fraud statute to block interstate communications, in the United States, designed to defraud Canada of tax revenues is not an impermissible extraterritorial application). In none of the cases cited as support for this Court's recent dismissal did the defendant further an illegal conspiracy conducted in part and aimed at the United States. *See, e.g., Al Shimari v. CACI Int'l, Inc.,* 1:08–CV–827 GBL/JFA, 2013 WL 3229720, at *10 (E.D. Va. June 25, 2013) ("Plaintiffs' ATS claims are barred because the ATS does not provide jurisdiction

over their claims, which involve tortious conduct occurring exclusively outside the territory of the United States.").

Amendment would not be futile where new or expanded allegations highlight both a defendant's intent to harm this country and its citizens and residents as well as the domestic conduct in this case. In *Mwani v. Bin Laden*, CIV.A. 99-125 JMF, 2013 WL 2325166 (D.D.C. May 29, 2013), for example, the court found that an ATS case involving the bombing of the U.S. embassy in Kenya displaced the presumption against extraterritoriality, even though the litigation was "between foreign nationals and a foreign group for events that occurred in Nairobi, Kenya." The presumption was displaced because 1) Defendants allegedly acted with the intent of "harming this country and its citizens", and 2) "***overt acts in furtherance of that conspiracy took place within the United States***." *Id*. at *2-4 (emphasis added). The domestic overt acts were part of the broader conspiracy – e.g. plotting attacks on the United Nations or Holland Tunnel – and not specifically connected to the foreign attack that caused harm to the foreign plaintiff. *Mwani v. bin Laden,* 417 F.3d 1, 13 (D.C. Cir. 2005). Nor was there any allegation that the named defendant in that case, Osama bin Laden, ever set foot in the United States. *Id.* The DC Circuit in that case also found relevant – for personal jurisdiction purposes – that the defendant had issued a call to kill Americans "in any country in which it is possible to do it," and conducted two television interviews, broadcast in the U.S. in 1997 and 1998, in which he exhorted his followers to "take the fighting to America." *Mwani,* 417 F.3d at 13 n.12.

As in *Mwani*, Defendant explicitly sought to bring about the same sorts of violations in the U.S. as were committed abroad, in such a manner as to harm the United States and its citizens/residents. *See*, *e.g.* TAC at ¶132 ("in a prominent place on the CACA website, Zhao makes clear that the campaign he is endorsing against Falun Gong was designed 'to raise an emergency alarm to the entire world' in an attempt to influence … especially Chinese communities within the U.S., to treat the religious group as if they were terrorists.) Defendant also committed overt acts in the United States in furtherance of his conspiracy or substantial assistance of the relevant violations, aiming to violently suppress and deny rights to Falun Gong adherents worldwide, but especially in the United States and China.

Defendant's domestic overt acts included broadcast and flooding of Chinese communities with massive quantities of anti-Falun Gong propaganda messages and calls to violence (¶¶ 135-145), directing, supporting, and/or controlling the on-the-ground activities of violent anti-Falun Gong hate posses (¶¶ 161-6), and using his personal influence and authority as well as that of his cohorts in the Party propaganda apparatus, et al., to bring about U.S. Chinese communities' ostracism of Falun Gong and denial of rights to its adherents (¶¶ 181-82). These acts were part of the broader conspiracy to eliminate Falun Gong, and were both foreseeable and necessary to bring about the violations suffered by Plaintiffs in both China and the U.S. While the defendant in *Mwani* never visited the United States, Defendant in this case did in fact visit the US several times to give speeches (¶ 160). [8] That much of his personal conduct occurred abroad does not diminish his prolonged, explicitly acknowledged, and intensive focus on U.S. conduct and on bringing about the U.S. effects described in the TAC.

Perhaps even more so than in *Mwani*, Defendants calls to eliminate Falun Gong wherever found – particularly when the largest community and leadership of the religion are found in the United States – as well as his broadcasts of anti-Falun Gong vitriol on domestic U.S. television, demonstrate a connection with the forum that has intimately touched and concerned the U.S., its territory, and citizens/residents, and has brought about significant and ongoing harms. See Proposed TAC noting that the intended injuries have been felt by U.S. residents/citizens on U.S.

[8] The domestic conduct does not implicate First Amendment protections. In *SMUG*, the court found that the amended complaint adequately alleged that a US Defendant's US conduct fell "well outside the protections of the First Amendment." 2013 WL 4130756 at *19. In that case, a US pastor's support for a campaign of repression in Uganda would not receive protection if part of a criminal enterprise: "It is well-established that speech that constitutes criminal aiding and abetting is not protected by the First Amendment." *Id.* at *20 (citing *United States v. Bell,* 414 F.3d 474, 483–84 (3rd Cir.2005); *Nat'l Org. for Women v. Operation Rescue,* 37 F.3d 646, 656 (D.C. Cir.1994); *United States v. Freeman,* 761 F.2d 549, 552 (9th Cir.1985); *United States v. Kelley,* 769 F.2d 215, 217 (4th Cir.1985); *United States v. Barnett,* 667 F.2d 835, 842–43 (9th Cir.1982)). Accordingly, according to the allegations in the complaint, "Defendant's conduct has gone far beyond mere expression into the realm not only of advocacy of imminent criminal conduct, in this case advocacy of a crime against humanity, but management of actual crimes . . . that no jury could find to enjoy the protection of the First Amendment." Likewise in the present case, Defendant, a foreign national, cannot enjoy First Amendment protection for management of actual crimes, even those occurring in substantial part in the United States. Defendant's efforts to further crimes against humanity including persecution comprising deprivation of the fundamental rights to religious freedom and the freedoms of belief, association, assembly, and self-expression, and even dehumanization of Falun Gong adherents are violations of the law of nations, outside of the protection of the First Amendment.

soil: Proposed TAC at § VI. E.

As in *Mwani*, Defendant's ultimate objectives regarding the United States were of such a nature as to cause severe and irreversible harm to the nation, its territory, and citizens. Rather than attempting to bring about isolated incidents of foreign interference, Defendant Zhao instead sought to institute in U.S. communities an ongoing, local campaign of violent suppression and deprivation of rights targeting a religious minority, whose believers count large numbers of U.S. residents, in violation of U.S. and international law protections of religious freedom. He sought to make U.S. territory a frontline for his perpetration of crimes against humanity against a peaceful religious minority.

In China, as alleged in the TAC, Zhao's actions and those of his cohorts exerted influence in the following manners: 1) They exerted influence over low-level security officers in various regions, instigating them to violently suppress Falun Gong; 2) they also exerted influence over local communities throughout China at the grassroots, instigating members of such communities to hunt down 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. The second form of influence, over Chinese communities targeting local Falun Gong adherents for violence, intimidation, and deprivation of rights, also extended to the United States. Proposed TAC at ¶119)

As alleged, Defendant Zhao was part of a conspiracy/ joint criminal enterprise (JCE) in which overt acts in furtherance of that conspiracy took place in part within the United States. *Id.* at § VI.F. By founding, hosting, managing, directing and personally proposing the CACA website, Zhao acted as an important leader, agenda-setter and participant in the anti-Falun Gong campaign specifically directed towards Falun Gong citizens and residents in the United States (among other places). *Id.* at § VI.B.A.1. CACA branch office personnel and other individuals have routinely distributed Defendant's anti-Falun Gong materials en masse since at least 2008, distributing them every day in US Chinese communities. *Id.* at § VI.C.3. All of these cartoons and other propaganda were distributed to people in Chinese communities, resulting in violent assaults and threats against Falun Gong practitioners. *Id.* at § VI.C.1. These materials were at all times

electronically available in the U.S. and had electronic data cached on servers in the U.S. *Id.* The Website's presence in the U.S. was a highly rare exception to the total censorship of all Falun Gong related web content, and required Defendant to take deliberate steps to ensure the Website's delivery to and use by overseas Chinese communities – similar to steps regarded by other courts in this circuit as domestic conduct. *Id. See, e.g., Jian Zhang v. Baidu.com Inc.*, --- F.R.D. ----, 2013 WL 2458834 *5 (S.D.N.Y. 2013) (holding that censoring of web content in the US was sufficient to show that "Plaintiffs' [ATS] claims are not premised entirely on conduct abroad"). Similarly, Zhao had to take deliberate steps in order to ensure that the Communist Party propaganda apparatus, including CCTV and related media entities, broadcast huge quantities of his anti-Falun Gong propaganda into the U.S. *See*, *e.g.* TAC at ¶¶ 46, 169-70.

Zhao's specific role in the joint effort to violently suppress and deprive of rights Falun Gong believers in the United States is described at length in the TAC, and extends to such conduct as directing and/or directly participating in CACA delegations to the U.S. (TAC at ¶¶ 152-9), overseeing and controlling the actions of CACA subordinates and/or affiliates in U.S. Chinese communities committing violence and intimidation against local Falun Gong believers (*see*, *e.g.* TAC at ¶¶ 160-5), and Zhao's personal statements in his writings and during public speeches on U.S. soil (*see*, *e.g.* TAC at ¶¶ 68-73, 159, 196-7). In all of the above manners, and as otherwise detailed in the TAC, Zhao sought to and did effectively deny rights to U.S. resident Falun Gong adherents.

B. Other Relevant Tests The ATS Claims Touch and Concern the United States Under International Law

Congress enacted the ATS to permit recovery of damages from those who violated basic international law norms, *See Sosa*, 542 U. S., at 724–725. International law applies jurisdictional tests analogous to the to the non-jurisdictional "substantial, direct, and foreseeable effect" test described above.[9] These international theories of jurisdiction would not consider the claims to be extraterritorial – or at least, would consider them to touch and concern the United States with

[9] These international legal theories are relevant to the *Kiobel* presumption against extraterritoriality regardless of whether the presumption is viewed as a 12(b)(6) or a subject matter jurisdiction question.

sufficient force. In *The S.S. Lotus Case*, P.C.I.J. Ser. A, No. 10 (1927), for example, the Permanent Court of International Justice (PCIJ) endorsed an "Effects Doctrine" as a basis for prescriptive jurisdiction, allowing state jurisdiction for acts committed outside State territory "if one of the constituent elements of the offence, and more especially its effects, have taken place" in that State. In that case, the PCIJ found that Turkey had jurisdiction to try French sailors on charges stemming from their ship's collision with a Turkish ship, as the Turkish ship was involved and affected -- even though the French defendants were on a French boat in international waters at the time of the accident.[10] Accordingly, international law now recognizes the theory of objective territorial jurisdiction, which holds that a state may exert jurisdiction over conduct occurring abroad which includes the intent to affect the state and its residents, and actual effects in the state arising therefrom. Courts have recognized jurisdiction when the intent to produce effects in the United States amounts to negligence, provided it was reasonably foreseeable that the effects would be felt in the United States. *See Duple Motor Bodies, Ltd. V. Hollingsworth*, 417 F.2d 231, 233-35 (9th Cir. 1969); *see also Matter of SEDCO, Inc.*, 543 F.Supp. 561, 569 (S.D. Tex. 1982) (damage to Texas coastline a foreseeable result of Gulf Coast oil drilling); *Trail Smelter Case* (U.S. v. Can.) 3 R. INT'L ARB. AWARDS 1905 (1949) (US was competent to complain about pollutant particles that were not "willfully" set in motion from Canada but were reasonably foreseeable to produce transnational effects). In particular, courts have recognized objective territorial jurisdiction under the "continuing act theory," where the defendant engages in an act or activity that the law views as continuing into the territory of another country. *See Ford v. United States*, 273 U.S. at 623 (an act begun abroad which continues into the territory of the United States to effect significant harm may be subjected to U.S. jurisdiction); *Strassheim v. Daily*, 221 U.S. 280, 285 (1911) ("Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a state in punishing the cause of the harm as if he had been present at the effect"). As noted above and as alleged in the TAC, Defendant Zhao not only intended to extend his persecutory campaign against Falun Gong into the United States, but it was foreseeable that the campaign would be felt in US Chinese communities, where many of

[10] *See,* Report of the International Law Commission, pages 520-23, UN Doc. A/61/10 (2006).

the residents view the Party's media apparatus, CACA website, brochures, and demonstrations as authoritative in its repressive view of Falun Gong. Moreover, as described above, US citizens and residents, including Plaintiffs, were subjected to crimes against humanity in the United States as the proximate result of Defendant Zhao's global campaign. Under international legal principles, Defendant's repressive campaign is domestic, or at the very least touches and concerns the United States with sufficient force.

C. ATS Claims are Domestic or Touch and Concern the United States with Sufficient Force, Because the Defendants Proximately Caused Injuries to Plaintiffs on US Soil.

Via Aiding and Abetting

Zhao's conduct proximately caused Falun Gong to be deprived of rights through the extensive, intentional substantial assistance he provided to CACA-affiliated groups and others involved in anti-Falun Gong hate promulgation, thereby aiding and abetting the subjection of U.S. Falun Gong believers to persecution and other abuses on US soil. *See* TAC at § VI.F.

The conduct Zhao carried out himself and in concert with others was specifically aimed at suppressing Falun Gong believers in the U.S. *See*, *e.g.*, TAC at §§ VI B, C, and ¶¶ 204-212. While some of this conduct was carried out collaboratively with and through colleagues and subordinates at CACA, the CACA website, and other Party-controlled entities including the entire propaganda apparatus (*see*, *e.g.* proposed TAC at ¶ 209), much of this conduct was carried out by Zhao himself, as set forth especially at §§ VI. B and C.

Zhao's conduct successfully provided the essential means through which the injuries alleged to have occurred on US soil took place (*see*, *e.g.*, ¶¶ 212-217), and in other ways caused the alleged harm as set forth in the Proposed TAC at § V. E.

The Proposed TAC recites the forms of assistance provided by Zhao via 1) his anti-Falun Gong propaganda materials (cited on a daily basis by anti-Falun Gong hate groups); 2) his CACA organization (which has branch offices in the U.S. to provide "boots on the ground" for anti-Falun Gong activities and instigation of hate rallies, violent assaults, threats and intimidation); 3) his personally founded and directed CACA Website (which provides a vast and ever-growing library of anti-Falun Gong hate materials seeking to convince their audiences that Falun Gong is a

dangerous, subhuman threat to society); 4) through the constant physical presence in Chinese communities of his direct subordinates in the CACA hierarchy, who carry out anti-Falun Gong hate instigation on a regular basis, often directly quoting from, distributing, and otherwise making use of Zhao's personally-created or compiled anti-Falun Gong materials while doing so; and, 5) through his own personal, direct conduct on U.S. soil.

As noted in the TAC at ¶ 160 Zhao visited the United States often -- even attempting at least once to participate in an anti-Falun Gong panel in Connecticut (*see* TAC at ¶ 215). Zhao through and with the Party propaganda apparatus directed dozens of anti-Falun Gong forums, rallies, and other such hate-based events, disseminating throughout U.S. Chinese communities the "call to arms" against the group and the need to target it for violent suppression.

As noted above, both Zhao's immediate personal conduct and that of his subordinates was specifically directed to violently suppress and deny rights to Falun Gong believers in U.S. Chinese communities. Zhao's own explicit statements repeatedly make this clear. *See especially* TAC at ¶¶ 207-10.

As a JCE/Conspiracy Participant

Zhao's conduct as a co-conspirator, and/or participant in the common plan to violently suppress and deny rights to Falun Gong adherents in the United States, proximately caused Falun Gong to be deprived of rights through the actions of his cohorts in CACA-affiliated groups and others involved in anti-Falun Gong hate promulgation. Zhao conspired to bring about, and committed overt acts in furtherance of, the subjection of U.S. Falun Gong believers to persecution and other abuses on US soil.

Zhao's explicit indications of his intent to bring about the successful implementation of the common plan, in the form of depriving rights to Falun Gong adherents in the U.S. such as the U.S.-based Plaintiffs in this matter, are summarized *supra* at p. 21-2.

Zhao has acted overtly in furtherance of the deprivation of rights of Falun Gong adherents in the U.S., by 1) creating anti-Falun Gong propaganda materials (cited on a daily basis by anti-Falun Gong hate groups) (*see* TAC at ¶¶ 145-52); 2) founding and supervising or directing the activities of the CACA, including its formation of branch offices in the U.S. and their subsequent

activities (*see id*. at §VI.C.2-3); 3) personally founding, controlling and directing the CACA Website and creating materials for it, (*see id*. at §VI.C.1) 4) supervising, endorsing, and providing assistance to his direct subordinates in the CACA hierarchy, who carry out anti-Falun Gong hate instigation in U.S. Chinese communities on a regular basis (*see id*. at §VI.C.2-3).

In collaboration with his co-conspirators in the Party propaganda apparatus, Zhao has directed dozens of anti Falun Gong forums, rallies, and other such hate-based events, which separately and cumulatively disseminated throughout U.S. Chinese communities the "call to arms" against the group and the need to target it for violent suppression. Members of CACA branches and/or affiliates acting as Zhao's cohorts and/or co-conspirators have carried out anti-Falun Gong violence, threats, and intimidation in the U.S. because other Party branches are unable to do so. *See supra* at p. 16-21.

Zhao's direct, personal overt acts in furtherance of the conspiracy have also included such actions as Zhao's attempt to lead a 2003 delegation of the CACA to the U.S. in order to promote anti-Falun Gong activities both in China and the U.S., and similar successfully completed trips to the U.S. taken on a number of other occasions, where he gave speeches and presentations seeking to instigate the violent suppression of Falun Gong. *See supra* at page 21.

Zhao's and his co-conspirators' anti-Falun Gong propaganda materials have successfully instigated anti-Falun Gong animus throughout U.S. Chinese communities, and his co-conspirators in CACA branches and/or affiliates have perpetrated specific incidents of violence and intimidation, including those suffered by Plaintiffs Erh and Doe IV (*see* TAC at ¶¶ 34-36), in furtherance of the explicit goals of Zhao and all others involved in the common plan to violently suppress and deny rights to Falun Gong adherents in the U.S.

D. Sole Remedium

In *Kiobel*, unlike here, Holland and England were each available and more appropriate jurisdictions in which the claims should have been brought. *See*, e.g. *Kiobel* oral argument at 15-16; *confer Sosa* at 733 n. 21. In contrast, where, as here, the United States is the only or best forum capable of adjudicating upon a serious violation of international law, particularly one occurring in part in its jurisdiction, failure to do so implicates failure to fulfill the international

obligations of the United States and thus significantly touches and concerns this country, its residents and territory. In the *Kiobel* majority opinion, Justice Roberts notes the obligation to provide judicial relief for violations of international law, where failure to hear a claim would cause the United States "embarrassment by its potential inability to provide judicial relief."

Failure to adjudicate upon international law violations when no other state can do so, particularly when the relevant conduct occurs in part in a state's jurisdiction, constitutes the breach of an international obligation. A recent codification of states' obligations under international law is the Draft Articles on the Responsibility of States for Internationally Wrongful Acts, Report of the International Law Commission on the Work of its Fifty-third Session, UN GAOR, 56th Sess, Supp No 10, p 43, UN Doc A/56/10 (2001) (Draft Articles). The Draft Articles clearly set forth that states must not, by *omitting* to act, permit international law violations to occur or fail to prevent or punish such acts. Judicial failure to vigilantly enact the international law commitments of the United States may constitute an omission infringing U.S. responsibilities. Draft Articles, Article 12 (2). Failure to provide judicial remedy where obliged to do so is a serious breach. All major international instruments that the United States has ratified, where relevant to valid *Sosa* norm violations, require a judicial remedy be provided. *See*, e.g., Torture Convention art. 14 ("Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation"). The corresponding duty of states to provide a remedy for such international law violations is a binding obligation. *See Chorzów Factory* (Ger. v. Pol.), 1928 P.C.I.J. (ser. A) No. 17, at 29 (Sept. 13) ("[I]t is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation"). *See also*, *e.g.* International Covenant on Civil and Political Rights at arts. 2(3), 9(5), 14(6) (obliging remedies and compensation for wrongful convictions and imprisonment); see also article 18. 2 ("No one shall be subject to coercion which would impair his freedom to have or adopt a religion or belief of his choice.")

The United States has repeatedly and explicitly stated that an ATS claim touches and concerns the United States when, as here, "a refusal to recognize a private cause of action in these

circumstances might seriously damage the credibility of our nation's commitment to the protection of human rights." *See* Memorandum for the United States as Amicus Curiae, *Filartiga v. Pena-Irala* (2d Cir. 1980), reprinted in 19 INT'L LEG. MATS. 585, 601-604 (1980); *see also* Statement of Interest of the United States, *Kadic v. Karadzic*, No. 94-9035 (2d Cir. 1995) (affirming the remedial reach of the ATS for wrongs committed in foreign territory). Echoing the above authorities, at oral argument in *Kiobel*, U.S. Solicitor General Verrilli responded to a hypothetical about extraterritorial application of the ATS, saying: "The question in the case would be whether […] [there is] sufficient justification for subjecting the [Defendant] to these international law norms to avoid undermining the credibility of our Nation's commitment to those norms." *Kiobel* oral argument transcript at 45.

In this case, the victims have alleged conduct constituting severe violations of *Sosa* norms including crimes against humanity, with conduct and effects occurring in part within the United States. The disregard of and infringement upon the right to freedom of thought, conscience, religion or belief, especially where they serve as a means of foreign interference in the internal affairs of the United States and amount to the "kindling of hatred between peoples" on US soil especially touch and concern the United States with sufficient force to displace the *Kiobel* presumption,[11] which bars cases in which there is no important international obligation implicated or another state is better positioned to fulfill the obligation.

E. The ATS Claims are not Futile, as There is No Danger of International Discord

The underlying purpose of the presumption against extraterritoriality is "to protect against unintended clashes between our laws and those of other nations which could result in international discord." *Kiobel*, 569 U.S. ___ (slip op. at 4) (internal quotation omitted). Accordingly, *Kiobel* does not preclude cases where the risk of "international discord" is minimal. *Id.*

The risk of "international discord" is minimal or non-existent in this case. The Department of State has not given any indication that the case should be dismissed, nor has the government of

[11] *See*, "Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief", UN doc. A/36/684 (1981), (Preamble).

China expressed any concern about this case moving forward. Thus, the principles that guide application of the *Kiobel* presumption support its displacement in this case.

F. Balintulo and other post-Kiobel cases do not bar Plaintiff's Claims

Furthermore, the claims in this case are not futile, because the allegations in this case are in no way barred by post-*Kiobel* ATS decisions. As explained above, the Supreme Court in *Kiobel* explicitly left unresolved how other claims may "touch and concern" the United States with "sufficient force" to displace the presumption in other factual contexts beyond "mere corporate presence". The Second Circuit's ruling in *Balintulo v. Daimler AG*, --- F.3d ----, 2013 WL 4437057 (2nd Cir. 2013) also left this question unresolved. The facts of *Balintulo*, a denial of mandamus with little precedential value, is clearly distinguishable from the present case. In that case, plaintiffs asserted that South African subsidiaries of the various corporate defendants aided and abetted in violations of customary international law during the repressive "apartheid" legal regime in South Africa. *Id.* at *2. There was no allegation that any part of the violations involved conduct or an effect in the United States. The court in that case posited that plaintiffs' claims would not survive the presumption, because the only actions alleged in the complaint took place by the corporations' subsidiaries in South Africa. *Id.* at *9. Accordingly, the court explicitly did not address a case such as this, where crimes against humanity and other relevant human rights violations are tied to a domestic campaign of persecution – including flooding the US with anti-Falun Gong invective in Chinese-language media and on the CACA website, sending anti-Falun Gong CACA delegations to the US, and supporting CACA branch offices in their campaign of repression and violence against US Falun Gong communities. *Id.* at *7 fn. 26 ("[W]e have no reason to address how much conduct must occur in the United States because all the relevant conduct that purportedly violated the law of nations in this case is alleged to have occurred on the territory of a foreign sovereign.").

Nor do any of the cases cited by this court in its recent dismissal order involve claims that include domestic conduct or domestic effects alleged herein, such as persecution. *See Hua Chen v. Honghui Shi*, 09 CIV. 8920 RJS, 2013 WL 3963735 (S.D.N.Y. Aug. 1, 2013) (barring claims

that contain no allegation that defendant, Director of the Bureau of Reeducation through Labor of Guangdong Province, is connected to any relevant conduct or effects outside of China); *Ahmed-Al-Khalifa v. Minister of Interior, Fed. Republic of Nigeria*, 5:13-CV-172-RS- GRJ, 2013 WL 3991961, at *2 (N.D. Fla. Aug. 2, 2013) (one of six "frivolous" complaints filed by plaintiff, and containing no allegation that defendant, Minister of the Interior for the Federal Republic of Nigeria, was connected to any relevant conduct or effects outside of Nigeria); *Ahmed-Al-Khalifa v. Trayers*, 313- CV-00869CSH, 2013 WL 3326212, at *2 (D. Conn. July 1, 2013) (another of six "frivolous" claims filed by plaintiff, which "solely concern acts and events which are alleged to have occurred *outside* the United States"); *Al Shimari v. CACI Int'l, Inc*., 1:08-CV-827 GBL/JFA, 2013 WL 3229720, at *10 (E.D. Va. June 25, 2013) (barring plaintiffs' ATS claims that "involve tortious conduct occurring exclusively outside the territory of the United States."); *Mohammadi v. Islamic Republic of Iran*, CIV.A. 09-1289 BAH, 2013 WL 2370594, at *15 (D.D.C. May 31, 2013) (barring plaintiff's ATS claims "for conduct that occurred entirely within the sovereign territory of Iran"). *Compare with Sexual Minorities Uganda v. Lively*, 12-CV-30051-MAP, 2013 WL 4130756, at *2 (D. Mass. Aug. 14, 2013) (finding that the *Kiobel* restrictions on extraterritorial application of the ATS did not apply where the defendant was a citizen of the United States and where the alleged conduct occurred in substantial part within the United States); *Mwani v. Bin Laden*, --- F.Supp.2d ----, 2013 WL 2325166, at *4 (D.D.C., May 29, 2013) (finding that the Kiobel restrictions on extraterritorial application of the ATS did not apply where the tortious conduct 1) was plotted in part within the United States, and 2) was directed at a United States Embassy and its employees). As none of the cases listed by the court involve violations of the law of nations occurring in part or affecting US territory, none of these cases render the present case futile.

IV. The State Law Claims are Not Barred

Plaintiffs' state law claims are not barred based on extraterritorial considerations. The doctrine of transitory torts has long been recognized in British common law. *See Mostyn v. Fabrigas*, 98 Eng. Rep. 1021 (K.B. 1774) ("there is not a colour of doubt that any action which is transitory may be laid in any county in England, though the matter arises beyond the seas.") The

Supreme Court has also recognized that the transitory tort doctrine has been "repeatedly affirmed in the courts of the states of this Union." *McKenna v. Fisk*, 42 U.S. 241, 249 (1843) ("It then appears from our books, that the courts in England have been open in cases of trespass other than trespass upon real property, to foreigners as well as to subjects, and to foreigners against foreigners when found in England, for trespasses committed within the realm and out of the realm, or within or without the king's foreign dominions"); *see also Mitchell v. Harmony*, 54 U.S. 115 (1851) ("The trespass, it is true, was committed out of the limits of the United States. But an action might have been maintained for it in the Circuit Court for any district in which the defendant might be found, upon process against him, where the citizenship of the respective parties gave jurisdiction to a court of the United States"); *Filartiga v. Pena-Irala*, 630 F.2d 876, 885 (stating that the doctrine of transitory tort "came into our law as the original basis for state court jurisdiction over out-of-state torts"); *Abramovitch v. U.S. Lines*, 174 F. Supp. 587 (S.D.N.Y. 1959) ("venue is proper, for transitory actions, wherever the defendant may be found"); *Gardner v. Thomas*, 14 Johns. 145 (N.Y. 1817) ("Courts of this state have jurisdiction of actions brought for torts, committed on board of a foreign vessel, on the high seas, where both parties are foreigners; for actions of personal injuries are of a transitory nature, and follow the person or forum of the defendant."); *Peas v. Burt*, 3 Day 485 (Conn. 1806) ("all rights of a personal nature are transitory. A right . . . [of] tort acquired under the laws of one government, extend to, and may be exercised, and enforced in, any other civilized country, where the parties happen to be . . . Trover and trespass will lie here for injuries done to things personal *in any part of the world*.") (emphasis added).

Even without the ATS claims, the state law claims filed on behalf of US residents, i.e., Doe 4, Ning Yan, Erh Boon Tiong, and Charles Lee, are properly before this court based on diversity jurisdiction.

V. Defendants are Not Prejudiced by the Proposed Amendments

In determining prejudice, courts consider whether the proposed new claims would (i) "require the opponent to expend significant additional resources to conduct discovery and prepare for trial"; (ii) "significantly delay the resolution of the dispute"; or (iii) "prevent the plaintiff from

bringing a timely action in another jurisdiction." *Block v. First Blood Assocs.,* 988 F.2d 344, 350 (2nd Cir.1993). Any delay, by itself, caused to Defendants by Plaintiff's desire to have the opportunity to present allegations under the post-*Kiobel* governing legal standards is insufficient to support a finding of prejudice. *Middle Atlantic Utilities Co. v. S. M. W. Development Corp.,* 392 F.2d 380, 384 (2nd Cir. 1968) (holding that unless a motion to amend either was made in bad faith or would prejudice defendant, delay by itself was not enough to deny the requisite relief). *Cf. Cissell Mfg. Co. v. United States,* 101 F.3d 1132, 1137 (6th Cir.1996) (granting remand on a claim directly invalidated by an intervening rule change); *PPG Indus., Inc. v. United States,* 52 F.3d 363, 366 (D.C. Cir. 1995) (same); *Harlan Bell Coal Co. v. Lemar,* 904 F.2d 1042, 1047–48 (6th Cir. 1990) (same).

When considering prejudice as cause for denial, the court must weigh the prejudice that will be suffered by the moving party by not allowing the proposed amendment. *See H.L. Hayden Co. of New York, Inc. v. Siemens Medical Systems, Inc.*, 112 F.R.D. 417 (S.D.N.Y. 1986.). Plaintiffs' addition of facts to meet the new standard articulated under *Kiobel*, and to add newly discovered previously unavailable facts and the Proposed Plaintiffs whose claims are substantially similar to the existing Plaintiffs, simply do not unduly prejudice Defendants.

First, courts have consistently held that there is no prejudice when a party seeks to amend the complaint in the early stages of litigation, as is the case here. *See E*Trade Financial Corp. v. Deutsche Bank AG*, 420 F.Supp.2d 273, 282 (S.D.N.Y. 2006) (citing with approval from an unreported case: "Considering the relatively early stage of this litigation and the lack of prejudice to the defendants that will result from the amendment, and in light of the requirement that leave to amend be given freely, it is the decision and order of this Court that plaintiff's motion to amend is granted."). Here, this action is in the very early stages of litigation, despite the fact that it was filed in 2004. The Court has not had the opportunity to rule on a single issue in this action apart from the insufficiency of the Second Amended Complaint under precedent established after it was filed. On October 17, 2011, while the Parties were briefing Defendants' Motion to Dismiss Plaintiffs' Second Amended Complaint, the Supreme Court granted cert in *Kiobel* on issues that directly related to Plaintiffs' complaint, to the extent Plaintiffs' complaint relied on the ATS.

Now that the Supreme Court has expressed its views on extraterritoriality for claims brought pursuant to the ATS, all Parties and the Court have further direction as to the standards that must be met in order to proceed with the ATS claims in this action.

Second, the passage of time since Plaintiffs' initial filing of the complaint does not prejudice Defendants as no discovery has been conducted. *See Hiller by Hiller v. Board of Educ. of Brunswick Cent. School Dist.*, 687 F.Supp. 735 (N.D.N.Y. 1988) ("[T]here is absolutely no prejudice to defendants as no discovery has been conducted yet.").

Third, at the time they filed Second Amended Complaint, Plaintiffs could not reasonably have anticipated that the standards to state a claim under the Alien Tort Statute would be modified by a subsequent Supreme Court decision. Therefore Plaintiffs diligently presented to the court their desire for leave to amend at the first available opportunity, both at the telephone conference on May 3 (Dkt. No. 114) and the memorandum submitted on July 1 (Dkt. No. 115). Plaintiff's proposed amendments simply allege facts that relate to the change in controlling law under *Kiobel*, *see* proposed TAC at § VI. These facts could not have been obtained earlier because they were not relevant. As all of these facts are connected to the existing claims and Defendant, Plaintiff's proposed amendments would not greatly alter the nature of the litigation.

Finally, denial of leave to amend would not serve the interests of justice or judicial efficiency. Plaintiffs and the Proposed Plaintiffs have faced enormous difficulties in order to be able to file this lawsuit, and remain at great risk by participating in this lawsuit. Failure to allow amendment at this time would also impede their ability to be heard.

Accordingly, Plaintiffs' Motion for Leave to Amend does not prejudice Defendants and should be granted.

VI. Plaintiffs' Proposed Amendments are Not Brought in Bad Faith

Plaintiffs notified Defendant and the Court of their intent to seek leave to amend at the first opportunity following the Supreme Court's decision in *Kiobel*, at the proceedings held before this Court on May 3, 2013, *see* DE 114. As per the Court's instructions, Plaintiffs did not immediately file a motion to amend at that time and is filing at the first opportunity granted by this Court. Plaintiffs were prepared to accept a judgment on the pleadings before *Kiobel* without

further amendment, but now the *Kiobel* decision has changed the legal standards from those originally governing the Second Amended Complaint. Plaintiffs do not seek leave for any improper purpose or harassment, but rather to amend the complaint in light of the newly articulated legal standards from *Kiobel*, to add newly-discovered facts that support Plaintiffs' causes of action and which were unavailable while *Kiobel* was pending before the Supreme Court, and to add additional similarly-situated plaintiffs to this putative class action. *Cf.* 6 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure,* § 1487 (3d ed. 1998) ("When the motivation for filing a new complaint is to attempt to forestall a ruling against plaintiff on the motion for summary judgment, the denial of permission to file a new complaint is justified." (citing *Reisner v. General Motors Corp.,* 511 F.Supp. 1167 (S.D.N.Y.1981), *aff'd,* 671 F.2d 91 (2nd Cir.1982), *cert. denied,* 459 U.S. 858 (1982)). Plaintiffs are changing very little of the existing complaint, and only adding newly alleged facts that are relevant to the existing claims and were discovered through reasonable inquiry in light of the new requirements of *Kiobel*. These newly alleged facts include, for example, Defendant's role in extending into the United States the same transgressions that form the basis of the Second Amended Complaint, the specific course of conduct that took place in the United States as part of Defendant's campaign, the effects within the United States of the campaign, Defendant's proximate causation of those effects, and the connection of these facts to Plaintiffs' injuries in the US and China. Accordingly, Plaintiffs' motion is not brought in bad faith.

VII. Granting Leave To Filed the Second Amended Complaint Will Not Cause Undue Delay

While the prospect of undue delay is one of the factors considered by courts in the Second Circuit, the factors are not of equal weight. Unless the motion to amend either was made in bad faith or will prejudice defendant, delay by itself is not enough to deny the requisite relief in this circuit. *Middle Atlantic Utilities Co. v. S.M.W. Development Corp.,* 392 F.2d 380, 384 (2nd Cir. 1988); *see Rachman Bag Co. v. Liberty Mut. Ins. Co.,* 46 F.3d 230, 234–35 (2nd Cir. 1995) ("Delay alone unaccompanied by such a 'declared reason' does not usually warrant denial of leave to amend.") Only if the delay results in some form of prejudice to defendants, or bad faith

on the part of plaintiffs can be shown – neither of which exists here – will leave to amend a pleading be denied. The Second Circuit has previously reversed the denial of a motion for leave to amend where the district court did not establish that a three-year delay unduly prejudiced the defendant. *State Teachers Retirement Bd. v. Fluor Corp.,* 654 F.2d 843, 856 (2d Cir.1981)

As described *supra*, amending the complaint would not be prejudicial, in bad faith, or futile. In addition, leave to amend the complaint will not result in any delay in the proceedings. No discovery has been propounded or produced in this case. The Court's first ruling on a motion to dismiss was just three weeks ago, *see* DE 123, and Plaintiffs have followed the schedule set by the Court to submit this motion. Thus there is no evidence that Defendant would be prejudiced by the timing of the proposed amendment.

Accordingly, given that Plaintiffs are entitled to amend based on the recent clarifications in applicable law discussed in *Kiobel*, it is entirely in the furtherance of justice to grant Plaintiffs' motion for leave to amend to add facts that address *Kiobel*, add newly discovered facts that were previously unavailable, and add additional plaintiffs to ensure a speedy and just resolution for Proposed Plaintiffs whose claims echo those of the existing Plaintiffs.

VIII. FED R. CIV. P. RULE 15

Pursuant to Fed. R. Civ. P. Rule 15, Central District Local Civil Rules, Plaintiffs' [Proposed] TAC is attached, filed and incorporated herein by reference as Exhibit A.

IX. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully submit that the Motion for Leave to File a Third Amended Complaint should be granted, and that the proposed Third Amended Complaint should be deemed filed as of the date of the Order granting the Motion.

Respectfully submitted on this October 11, 2013 by

PLAINTIFFS

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CERTIFICATE OF SERVICE

I hereby certify that on October 11, 2013, a copy of foregoing Notice of Motion and Motion for Leave to File a Third Amended Complaint was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

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