

**Case No.: 15-16909**

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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DOE I, DOE II, Ivy HE, DOE III, DOE IV, DOE V, DOE VI, ROE VII, Charles  
LEE, ROE VIII, DOE IX, LIU Guifu, WANG Weiyu, individually and on behalf  
of proposed class members,

*Plaintiffs- Appellants,*

v.

CISCO SYSTEMS, INC., John CHAMBERS, Fredy CHEUNG, and Does 1-100

*Defendants- Appellees.*

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On Appeal from United States District Court for the Northern District of  
California, No. 5-11-cv-02449-EJD, Honorable Edward J. Davila, United States  
District Judge

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**PLAINTIFFS'-APPELLANTS' SUPPLEMENTARY BRIEF**

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## INTRODUCTION

Plaintiffs submit this supplemental briefing pursuant to this Court's June 2021 Order instructing the parties to analyze the impact of the decision of the United States Supreme Court in *Nestlé USA, Inc. v. Doe*, 141 S. Ct. 1931 (2021).

In *Nestlé*, the majority did not adopt the proposition that ATS jurisdiction requires allegations that the injury or conduct directly causing it occurred in the United States. *Id.* at 1936. The *Nestlé* Court found that the complaint's "generic allegations" of U.S. "operational decisions" that were not connected to the companies' aiding and abetting did not displace the presumption against extraterritoriality. *Id.* at 1937. The complaint here differs from *Nestlé* in that it does allege that aiding and abetting conduct took place in the United States, and in the sheer number of detailed allegations related to and amounting to aiding and abetting specifically alleged to have occurred in California. Plaintiffs' allegations have easily met any post-*Nestlé* test for displacing the presumption.

In this case, Cisco<sup>1</sup> developed and created in California a custom-made system for religious persecution. Cisco further customized and controlled its implementation, including maintaining, testing, and verifying the system in California. ER 50, 53-54 (¶¶ 95, 99-102). Plaintiffs specifically alleged that Cisco's Advanced

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<sup>1</sup> Here, as in Plaintiff's Second Amended Complaint, "Cisco" refers to Cisco Systems Inc. *See* Second Amended Complaint ("SAC") ¶ 1.

Services Team, made up of experts and engineers in network technology located in San Jose designed, implemented, and optimized both Golden Shield and the specific Falun Gong module<sup>2</sup> which was part of Golden Shield. ER 63-64 (¶¶ 145-46).

These acts directly contributed to the human rights violations suffered by Plaintiffs.

Plaintiffs further allege that Defendants, acting from San Jose, marketed and designed a complex, custom-tailored digital network with multiple unique first-of-a-kind features designed to, and, in fact, used by Chinese security to subject Falun Gong believers to religious persecution and other human rights violations. ER 43 (¶ 62) (stating the tailored design and advertising to assist in the plan to “Strike Hard” against “evil cults” was created in San Jose), 46-47 (¶¶ 75-95) (discussing design activity by San Jose actors); *see also* ER 30-31, 41, 43 (¶¶ 1-4, 53, 56, 65). The SAC makes detailed, extensive allegations of California-based conduct designed specifically to enable Chinese security to commit these violations. This specific aiding and abetting related activity on U.S. soil is a far cry from the general corporate oversight allegations unconnected to aiding and abetting found insufficient to overcome the presumption against extraterritoriality in *Nestlé*. The conduct by Cisco is more than sufficient U.S. conduct to touch and concern the United States; this court need not

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<sup>2</sup> The term “module” is used throughout this brief to refer to the various components and integrated features designed to specifically target Falun Gong, which are laid out in paragraphs 80-86, 97 and 98 of the Second Amended Complaint (ER 46-48, 51-53).

decide the standard for what conduct is sufficient short of aiding and abetting, as this conduct constitutes aiding and abetting occurring in the United States.

## ARGUMENT

### I. THE SUPREME COURT’S DECISION AND FRAMEWORK.

Justice Thomas wrote for eight Justices in §§ I and II of the *Nestlé* decision. The majority held that the Plaintiffs’ allegations in *Nestlé* did not allege a domestic application of the ATS sufficient to overcome the *Kiobel* presumption against extraterritoriality. *Kiobel v. Royal Dutch Petroleum Co.*, 569 U. S. 108 (2013); *Nestlé*, 141 S. Ct. at 1936-37. The issue was whether “conduct relevant to the statute’s focus occurred in the United States.” *Id.* at 1936 (quoting *RJR Nabisco, Inc. v. European Community*, 579 U. S. 325, 337 (2016)). Specifically, the Court found that Plaintiffs’ allegations concerning the Defendants’ “general corporate activity” in the United States were insufficient to overcome the presumption. *Id.* at 1937. The decision was based on the Court’s view that because “making ‘operational decisions’ is an activity common to most corporations, generic allegations of this sort do not draw a sufficient connection between the cause of action respondents seek—aiding and abetting forced labor overseas—and domestic conduct.” *Id.*<sup>1</sup>

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<sup>1</sup> The Court likewise did not accept Defendants’ argument that there was no corporate liability under the ATS. In fact, there are now five Justices on record as supporting corporate liability under the ATS. *See, e.g., Nestlé*, 141 S. Ct. at 1940-41 (Gorsuch, J., concurring); *id.* at 1950 (Alito, J., dissenting); *id.* at 1947 n.4 (Sotomayor, J.,

The Court in *Kiobel* stressed that an ATS claim must “touch and concern” the United States substantially to overcome the presumption against extraterritoriality. 569 U.S. at 124-25. In *Kiobel*, there were almost no connections to the United States other than the “mere corporate presence” of foreign corporate defendants. *Id.* at 125. None of the acts relating to the aiding and abetting allegations in that case took place in the United States, nor were any of the defendants U.S. citizens. *Id.* at 113, 125.

In *Nestle*, the Court appears to have focused on the connection between the U.S.-based conduct alleged and the extraterritorial human rights violations and injuries. The Court found the Plaintiffs’ allegations in *Nestle* to be too general but did not indicate the kinds of domestic activity that would overcome the *Kiobel* presumption.

The *Nestle* majority framed this question in the language of the “focus” test but the Court declined to make a final decision on the “focus” or foci of the ATS. 141 S. Ct. at 1936. Significantly the majority would not accept Defendants’ categorical arguments that the “focus” of the ATS was either where the primary human rights violations occurred (in that case the child slavery occurring in the Ivory Coast) or

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concurring). Thus, the issue of corporate liability under the ATS appears to be resolved as a practical matter.



where the injuries occurred (the Ivory Coast), which were precisely the arguments made by the Defendants in *Nestle*. *Id.*<sup>3</sup>

Thus, the Court implicitly accepted that aiding and abetting activity from U.S. territory would overcome the *Kiobel* presumption. The Second Circuit accepted this principle in *Mastafa v. Chevron Corp.*, 770 F.3d 170 (2d Cir. 2014), as did this Court in *Doe v. Nestle, S.A.*, 906 F.3d 1120, 1125-26 (9th Cir. 2018), *as amended* 929 F. 3d 623 (9th Cir. 2019). The *Nestle* majority’s reasoning leaves those decisions intact. Though the precise contours of the U.S.-based corporate conduct required to overcome the *Kiobel* presumption after *Nestle* will require further elaboration, Plaintiffs’ aiding and abetting allegations satisfy any possible post-*Nestle* application of the “focus” test. Here, Cisco, from the United States, created and maintained the systems that directly facilitated the human rights violations committed against Plaintiffs.

## **II. PLAINTIFFS ALLEGE CISCO’S AIDING AND ABETTING ACTIVITY DIRECTLY CONNECTED TO THE ALLEGED HUMAN RIGHTS VIOLATIONS.**

The Chinese Communist Party (the “CCP”) has waged violent suppression or purge campaigns against targeted citizen groups, especially religious groups, for

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<sup>3</sup> See Brief for Petitioner Nestle USA, Inc. at 21-22, *Nestle USA, Inc. v. Doe*, 141 S. Ct. 1931 (2021) (Nos. 19-416, 19-453) (arguing that focusing on the injury’s location will yield and administrable rule and enforce the Court’s admonitions to apply the ATS narrowly); Brief for Petitioner Cargill, Inc., at 28, *Nestle USA, Inc. v. Doe*, 141 S. Ct. 1931 (2021) (Nos. 19-416, 19-453) (claiming that the “focus” of the ATS is the location of the injury).

decades. ER 37 (¶ 31). These campaigns identify groups as collective enemies of the Party and mobilize the security forces to identify, round up, arbitrarily detain and forcibly convert group members. The goal is to eliminate these groups, especially through the application of “rectification” or “forced conversion” practices.<sup>4</sup>

Falun Gong believers were branded enemies of the Party and the People, and appropriate targets of “douzheng,” including torture, religious persecution, and extrajudicial killing. ER 38-41 (¶¶ 36-38, 43, 49-52). CCP leaders specifically sought a technology which would identify and eliminate Falun Gong adherents and activity. ER 41-42 (¶ 53, 57). Lacking the expertise to do so, China turned to prominent Western high-tech corporations, which affirmatively and actively sought to gain a stronghold in the lucrative Chinese security market. ER 41 (¶¶ 54-56). Cisco was at the forefront of this rush to assist China in repressing dissidents. To this end, Cisco created a system to identify, analyze, store and share “Falun Gong’s continuously updated geographical locations, Internet usage patterns, profiles of prior dissident activities, and other sensitive information stored in the databases such as biometric data and susceptibility to interrogation and ideological conversion”—software that was specifically designed to identify, round up, convert and violently suppress believers. ER 60 (¶ 131). The company marketed and implemented their designs to Chinese

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<sup>4</sup> Such campaigns are designated a “douzheng” in China and include public humiliation parades, eye-gougings, killings, in addition to the roundups, detention and conversion through torture. *See, e.g.,* Perry Link, *An Anatomy of Chinese Rhythm, Metaphor, and Politics* 312 (Harvard University Press, 2013).

authorities through their own specially tasked engineers in San Jose. ER 42, 51,63-64 (¶¶ 58,96, 145).

**A. Cisco’s U.S.-Based Designs Were Specifically Developed to Subject Believers to Forced Conversion through Torture through their Identification, Location, and Arbitrary Apprehension and Detention.**

Acutely aware that China was primarily concerned with whether the technology could “stop” Falun Gong, ER 41, 45-46 (¶¶ 56, 75, 78), Cisco pitched and invented state-of-the-art design features that their client could never have conceptualized – no less produced – on its own to further the CCP’s persecution, ER 30-32, 41, 45-48, 50, 59-60, 107 (¶¶ 1-5, 54-55, 73, 75-76, 81, 84, 93, 125, 127, 129, 419); and they did it from San Jose. ER 45, 50, 59-61 (¶¶ 75, 95, 126-27, 129, 135). As internal Cisco documents show, Falun Gong specific components were integrated into the system in designs created in California, ER 45, 50, 59-60 (¶¶ 75, 95, 127, 129), to enable Chinese security to forcibly convert members of the religion, e.g., ER 48, 53 (¶¶ 84-86, 98 (h-j)) through their identification and high-tech tracking, ER 46-47 (¶¶ 80, 82), round up and apprehension, ER 53 (¶ 98(g)), and detention, ER 46-48, 51-52 (¶¶ 79-80, 82-83, 97 (a-d)).<sup>5</sup> The module that San Jose engineers designed to specifically eliminate the CCP’s Falun Gong “problem” comprised well-integrated first-of-a-kind “solutions,” tailored specifically for that very purpose. ER 31, 47-48 (¶¶ 4, 81-85).

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<sup>5</sup> See also, Brief for Electronic Frontier Foundation et al. as Amici Curiae Supporting Plaintiffs-Appellants at 27-29, detailing the allegations that support the inference that Cisco designs (and products) were intended to and used by Chinese Security to identify, round up, and suppress Falun Gong.

**B. The Falun Gong Module Was Marketed, Implemented, and Serviced from the U.S. to Advance the CCP's Persecution.**

Cisco not only designed and created the product in the United States—Cisco also provided customer service, implementation, and ongoing optimization and customization from the United States. Due to the importance of the deal and a complexity that was beyond China's expertise, ER 41, 72 (¶¶ 54-55, 196), Cisco convened its very own U.S.-based team of engineers to respond to and advance every CCP objective throughout the project, including the persecution of Falun Gong. ER 63-64 (¶ 145).

**Implementation.** U.S.-based Cisco engineers designed the specialized Falun Gong module enabling the identification, round up, detention and torture (forced conversion) of Falun Gong members in all Chinese regions, and ensured its optimization to achieve these objectives. ER 64 (¶ 146). They ensured the proper integration of the Falun Gong surveillance systems, databases, and other systems into the network infrastructure, and optimized the module through a highly iterative process of analysis and customization. *Id.*

**Customer Service.** In addition, a San Jose-based customer service team provided ongoing support tailored, *inter alia*, to advance the persecution of the Falun Gong. ER 63 (¶ 143). This team was based in San Jose until at least 2008, during which time period Cisco sold and implemented the networked video surveillance system as well as the “Ironport” system custom designed to analyze and identify

pictorial material in emails that related to Falun Gong. ER 51-52, 63 (¶¶ 97(c), 97(e), 143). The training of Chinese security in all uses of the apparatus was also carried out with heavy involvement of San Jose-based engineers and operational specialists. ER 54, 61 (¶¶ 102, 134).

**Project Management.** All key project decision-making processes and management, including those relevant to Falun Gong persecution, took place in San Jose. *See, e.g.*, ER 42-45, 59-61 (¶¶ 58-59, 64-71, 126-35).<sup>6</sup> Rather than simply alleging major operational decisions or general corporate activity, the complaint alleges *specific decisions* and actions that were taken in San Jose, namely: “implement[ation of] additional features to facilitate the apprehension, detention, interrogation, and forced conversion of . . . believers, ” ER 52 (¶ 98); the high-level design of Falun Gong databases and their integration with the broader Golden Shield network, ER 46-47 (¶¶ 80-82); the first phase designs including carefully analyzed patterns of Falun Gong internet activity, ER 46-47 (¶ 80); the decision to train Chinese security officers to implement the system, ER 54-55 (¶¶ 104-08, 110); and the decision to provide ongoing customer service and network implementation to facilitate the use of the apparatus for, e.g., religious persecution. ER 61, 63 (¶¶ 134-35, 143).

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<sup>6</sup> See Plaintiffs’ April 28, 2017 Index, Dkt. No. 45 at 3-4, for further detail as to Cisco’s control over each phase of the project as a decision-maker, including to enable the religious persecution and forced conversion through torture.

**Marketing.** In marketing materials emanating from San Jose, including Cisco’s “Success Stories,” the company demonstrated its deliberate attempts to further the repressive purposes of the apparatus and knowledge of so-called “Strike Hard” campaigns—CCP-style euphemisms described in Cisco’s own literature as a key component of the persecutory campaign. ER 42-43 (¶ 60). In an internal PowerPoint, a high-level Cisco engineer, who reported to CEO Chambers, reiterated Cisco’s commitment to meet the *douzhen* of Falun Gong. ER 43 (¶ 65). The marketing materials which claimed that the technology could and would eliminate the Falun Gong problem were approved and authorized by Cisco in San Jose. ER 44, 66 (¶¶ 68, 155).

### **III. PLAINTIFFS’ ALLEGATIONS ESTABLISH AIDING AND ABETTING LIABILITY UNDER THE ATS.**

The SAC alleges substantial aiding and abetting activity by Cisco from U.S. territory. These allegations are more than sufficient to overcome the *Kiobel* presumption after *Nestle*.

#### **A. Plaintiffs Sufficiently Allege the Requisite *Actus Reus* for Aiding and Abetting Liability.**

In *Nestle*, this court “decline[d] to adopt an *actus reus* standard for aiding and abetting liability under the ATS.” *Doe I v. Nestle USA, Inc.*, 766 F.3d 1013, 1026 (9th Cir. 2014). The *actus reus* standard under international law remains any conduct at all that constitutes “practical assistance, encouragement, or moral support” which

substantially affects a crime. *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Judgement, ¶ 249 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10 1998).

Here, Cisco designed a system without which Chinese security officers would not have been able to identify the Plaintiffs based on their internet and email activity and innocuous conduct on video. ER 80-83, 90-91 (¶¶ 252, 256, 268, 269, 279, 321-326). Sensitive information collected through surveillance was also used to torture Plaintiffs. ER 83 (¶ 279). In this case, the causal connections between Cisco's alleged U.S.-based actions and the human rights violations Plaintiffs suffered are direct, specific, and substantial.

Cisco provided the equipment and means by which these violations of international law could take place. ER 60 (¶¶ 129-35). The SAC clearly alleges that these violations *could not have taken place* without Cisco, as there were no engineers in China capable of providing such an elaborate and sophisticated surveillance system. ER 54-55 (¶ 106). The company's U.S.-based contributions were essential to and even the "*conditio sine qua non* for the acts of the principal." Reply Br. 17 (citing *Furundžija*, Case No. IT-95-17/1-T at ¶ 249). While Plaintiffs need not establish specific direction or but-for causality, their allegations establish both.

Cisco does not deny that the activities of the Public Security and Office 610 officers constituted violations of international law. They argue that any tool provided that could be used for other purposes cannot constitute an *actus reus*. Answer Br. 13. But the complaint is absolutely clear that Cisco did not design and sell the same

generic hardware or software that was available to any customer. Cisco specifically customized, sold, maintained and supported a system explicitly designed to identify, round up, detain, and forcibly convert religious believers. ER 55, 57 (¶¶ 108, 115).

This was a custom-tailored system. *Id.*; *see also* Appellant Br. 16.

Even if the product they had provided could have been used for other purposes, the creation and provision of a product to facilitate the crime still constitutes aiding and abetting. In *Prosecutor v. Bagaragaza*, the International Criminal Tribunal for Rwanda (ICTR) held that Bagaragaza was guilty of aiding and abetting because he provided a substantial amount of money for the purpose of buying alcohol to motivate the Interahamwe to continue with the killings of the Tutsi. *Prosecutor v. Bagaragaza*, Case No. ICTR-05-86-S, Sentencing Judgement, ¶ 25 (Nov. 17, 2009). The fact that the money was fungible did not matter. *See also Prosecutor v. Blagojevic*, Case No. IT-02-60-A, Judgement, ¶ 196 (Int'l Crim. Trib. for the Former Yugoslavia May 9, 2007) (finding assistance substantial where a defendant sent machines and engineering personnel for digging mass graves); *Prosecutor v. Taylor*, Case No. SCSL-03-01-A, Appeals Judgment ¶ 395 & n. 1238 (Sept. 26, 2013) (“How any assistance *could* be used is a speculative question: perfectly innocuous items, such as satellite phones, could be used to assist the commission of crimes.”)

Moreover, substantially assisting the apprehension of individuals while knowing that the apprehended individuals would be tortured, as alleged here, *see infra* at II.B, is



sufficient to establish the actus reus of aiding and abetting. *See* Reply Br. 18 (citing *The Einsatzgruppen Case*, 4 Trials of War Criminals 569 (1948)).

**B. Plaintiffs’ Allegations Satisfy Either the Knowledge or Purpose Standard.**

Knowledge is the customary international law standard for aiding and abetting. *See* Reply Br. 9-10 (citing Brief of Former Amb. Scheffer as *Amicus Curiae* at 5-20).

Ambassador Scheffer explains the “purpose” standard discussed by this Court in *Nestle* does not require specific intent or that an aider and abettor share the direct perpetrator’s *mens rea*, as Cisco contends. *Id.* However, Plaintiff satisfies either the knowledge or purpose standard.

In *Doe I. v. Nestle USA, Inc.*, this court declined to decide between the knowledge or purpose standards because the defendants “obtained a direct benefit” from the violations, from which an inference of purpose arose. 766 F.3d at 1024. Under either the knowledge or purpose standard, Plaintiffs’ allegations establish that Cisco had the required *mens rea*. The San Jose Defendants not only knew that their software was being used to identify, apprehend and forcibly convert religious persons, they specifically designed the software to fulfill those purposes. Cisco’s Public Security Sales team was tasked with accessing and sharing with company superiors all public security information and reports about the Golden Shield, including information emphasizing the purpose of the Falun Gong databases of forced conversion through torture. ER 50 (¶ 91).

Cisco purposefully cultivated relationships with Chinese government personnel responsible for the persecution, torture, and extrajudicial killing, by touting the ability of their product to surveil and locate believers, and by working in close collaboration to optimize the product to those ends. ER 47, 61 (¶¶ 81, 135). Cisco used this close collaboration and support to obtain “successive contracts.” ER 61 (¶ 135).

Cisco knew that its conduct would assist the underlying violations. First, they actively sought out, researched and pitched to their client’s goal of persecuting Falun Gong. ER 41, 45-46 (¶¶ 56, 75, 78). Second, Cisco developed unique technological systems that comprise the Falun Gong module such as (a) a specific anti-Falun Gong database system that stores sensitive “lifetime profiles” of Falun Gong practitioners, which is independent and apart from the ordinary criminal justice system, and is uniquely integrated with black jails and detention centers, ER 51 (¶ 96), and (b) custom “Falun Gong” signatures that achieve an industry-leading ability of recognizing over 90% of Falun Gong-related pictures, many of which depict torture and persecution, which were customized in San Jose, ER 72 (¶ 192). Third, Cisco knew of the persecutory uses of the Cisco’s systems in China from shareholder inquiries and resolutions presented to Cisco Executives in San Jose and responded to, ER 46-47, 60, 67-70 (¶¶ 80, 129, 166, 174, 178). Fourth, Cisco knew of the underlying violations because of Congressional hearings in 2006 and 2009 that specifically asked US-based Cisco Executives about the alleged violations. *See* Appellant Br. 28; Reply Br. 12. Fifth, Defendants knew of these violations because of

information about Chinese torture and abuses against Falun Gong detainees publicly and widely distributed in media Cisco Executives followed. ER 40-41, 66-69 (¶¶ 49-52, 159-65, 167, 173).

Plaintiffs' allegations also establish that US-based Cisco Executives acted with the purpose to facilitate the torture and persecution of Falun Gong. Plaintiff's allegations meet the purpose standard this Court discussed in *Nestle*. Cisco profited not just generally from selling its software but specifically profited from its willingness and intent to assist in the abuses. ER 43 (¶¶ 61-64); Reply Br. 14. Cisco embarked on an entire marketing campaign around its ability to assist in violating international law. ER 44-45 (¶¶ 70-74). Cisco carefully studied the persecutory apparatus of the Party and past activities such as re-education through labor camps and ideological conversion through torture, ER 42-45 (¶¶ 59-74), to further its relationship with the client and tailor the product to the intended purpose of detaining, interrogating, and torturing Falun Gong practitioners.

## CONCLUSION

This court should find that Plaintiffs' allegations displace the presumption against extraterritoriality and that Plaintiffs have adequately alleged aiding and abetting of violations of international law from the United States. Plaintiffs should be allowed to proceed with their claims in the District Court.

Dated: July 22, 2021

s/ Paul Hoffman

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## **CERTIFICATE OF SERVICE**

I hereby certify that on July 22, 2021, I electronically filed the foregoing document **PLAINTIFFS'-APPELLANTS' SUPPLEMENTARY BRIEF** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I hereby certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Date: July 22, 2021

By: /s/ William Hoffman  
William Hoffman