No. 15-16909

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

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, and those individuals similarly situated,

Plaintiffs-Appellants,

v.

CISCO SYSTEMS, INC., JOHN CHAMBERS, and FREDY CHEUNG,

Defendants-Appellees.

On Appeal From The United States District Court
For The Northern District Of California At San Jose

SUPPLEMENTAL BRIEF OF DEFENDANTS-APPELLEES

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August 12, 2021

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PRELIMINARY STATEMENT

Defendants respectfully submit this supplemental brief in response to the Court's Order (ECF 77) instructing the parties to "address[] the impact" of the Supreme Court's decision in *Nestlè USA, Inc. v. Doe*, 141 S. Ct. 1931 (2021), and to Plaintiffs'-Appellants' Supplemental Brief (ECF 78) ("Supp. Br.").

In *Nestlè*, the Supreme Court held in an 8-1 decision that ATS claims may not proceed against a U.S.-based corporation where the complaint alleges merely "general corporate activity" "common to most corporations" on U.S. soil. 141 S. Ct. at 1937. Because "[n]early all the conduct" that allegedly aided and abetted the ATS violation (forced labor) in *Nestlè* occurred abroad in the Ivory Coast, and the sole domestic allegations were "generic," the Supreme Court reversed this Court's judgment allowing the ATS claims in *Nestlè* to proceed. *Id.*

The allegations in the Second Amended Complaint ("SAC") here likewise fail under a straightforward application of *Nestlè*, and this Court should affirm the district court's dismissal. Just as in *Nestlè*, "[n]early all of the conduct" alleged underlying plaintiffs' ATS claims occurred abroad—here through Chinese officials' supposed surveillance and persecution of Chinese nationals in Chinese police stations, labor camps and detention centers. Plaintiffs' few allegations of U.S.-based conduct are indistinguishable from the generic allegations rejected in *Nestlè*. For example, plaintiffs allege that San Jose Cisco employees supposedly provided "direction,"

"supervision," "management" or "approval" of "high-level" corporate strategies, and made all "essential" decisions. Such allegations fail under *Nestlè*. And the SAC offers no connection beyond conclusory allegations between Cisco's alleged U.S.-based corporate conduct and the injuries suffered abroad. The same deficiencies plague plaintiffs' allegations against defendants John Chambers and Fredy Cheung.

This Court should affirm the district court's judgment.

ARGUMENT

I. UNDER *NESTLÈ*, PLAINTIFFS' ALLEGATIONS ARE INSUFFICIENT TO SUPPORT AN ATS CLAIM

A. *Nestlè* Precludes ATS Claims Premised On Mere General Domestic Corporate Activity

Nestlè recognized that allegations of a corporation's generic and commonplace "corporate activity" on U.S. soil are insufficient to allow an ATS claim to proceed against a U.S. corporation for supposedly aiding and abetting foreign human rights violations. 141 S. Ct. at 1937. In *Nestlè*, the plaintiffs alleged they were subject to forced labor on cocoa farms located in the Côte d'Ivoire. *Id.* at 1935. They argued that they were entitled to press ATS aiding-and-abetting claims against U.S. corporate defendants that "allegedly made all major operational decisions from within the United States," including providing those farms "with technical and financial resources—such as training, fertilizer, tools, and cash—in exchange for the exclusive right to purchase cocoa." *Id*.

The Supreme Court rejected the *Nestlè* plaintiffs' argument. In an opinion for the Court, Justice Thomas wrote that the *Nestlè* complaint "would impermissibly seek extraterritorial application of the ATS" because "allegations of general corporate activity—like decisionmaking—cannot alone establish domestic application of the ATS." *Id.* at 1936-37. "Nearly all of the conduct [the plaintiffs] say aided and abetted forced labor—providing training, fertilizer, tools, and cash to overseas farms—occurred in Ivory Coast." *Id.* at 1937. And mere allegations of general domestic corporate activity are not enough: "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.*

Plaintiffs' attempts here (Supp. Br. 3-5) to water down this central holding in *Nestlè* are unavailing. *First*, plaintiffs err in arguing (at 5) that *Nestlè* "implicitly accepted that aiding and abetting activity from the U.S." is enough to overcome the presumption against extraterritorial application of the ATS. *Nestlè* did not reach or decide that question. To the contrary, the Court expressly declined to reach the arguments made by petitioners and the United States that the ATS simply does not encompass domestic aiding and abetting as a matter of statutory construction or federal common law. *See* 141 S. Ct. at 1036. The Court merely stated that, "*[e]ven if* we resolved all these disputes in respondents' favor," the complaint would still fail.

Id. (emphasis added). Thus, contrary to plaintiffs' suggestion (Supp. Br. 4-5), the question remains open whether, in a future ATS case, the Court may decide that the "focus" of an ATS aiding-and-abetting claim is where the primary violation or injuries occurred, precluding allegations of domestic aiding-and-abetting altogether.

Second, plaintiffs err in suggesting (Supp. Br. 5) that the Supreme Court's decision left "intact" this Court's decision in *Doe v. Nestlè, S.A.*, 906 F.3d 1120, 1125-26 (9th Cir. 2018), *as amended*, 929 F.3d 623 (9th Cir. 2019), with respect to the domestic conduct that may properly fall within the "focus" of the ATS. To the contrary, the Supreme Court reversed this Court's decision *notwithstanding* this Court's prior conclusion that the *Nestlè* plaintiffs had alleged a "narrow set of domestic conduct [that] is relevant to the ATS's focus," including travel from "United States headquarters [to] regularly inspect operations in the Ivory Coast and report back to the United States offices, where financing decisions" were made, 929 F.3d at 641-42. No such conduct is remotely alleged here, but even if it had been, the Supreme Court has made clear that such generic activities in the United States are insufficient.

B. The Domestic Allegations Against Cisco Do Not State An ATS Claim Under *Nestlè*

Under the Supreme Court's holding in *Nestlè*, plaintiffs fail to state any particularized facts about Cisco's supposed domestic aiding-and-abetting activities sufficient to overcome dismissal of their ATS claims. This is so for several reasons.

First, the SAC paragraphs referenced in plaintiffs' supplemental brief (at 5-10) overwhelmingly allege purely foreign conduct: that Chinese public security officers and other Chinese actors subjected practitioners of Falun Gong to police brutality, torture, forced labor, beatings and forced religious conversions in Chinese police stations, labor camps, and detention centers. *See, e.g.*, ER39, 78-94 (¶¶ 41-42, 230-356). But such allegations are plainly insufficient to overcome the presumption against extraterritorial application of the ATS. Even assuming that Chinese public security authorities monitored and apprehended members of Falun Gong (which the PRC has identified as an illegal organization since 1999), and that torture and other heinous acts of brutality against such members by Chinese officials are illegal under Chinese law (*see* Ans. Br. 2-3), the SAC fails to connect the illegal acts of Chinese security authorities in China to any corporate conduct alleged to have taken place in Cisco's San Jose headquarters. Even as to the "Golden Shield," plaintiffs' allegations themselves describe how it was marketed, designed, and implemented by employees located *in China*, not the United States. *See* Ans. Br. 21-22 (citing paragraphs).

Second, the few allegations of U.S. conduct that can be cherry-picked from the foreign conduct described at length in the SAC overwhelmingly assert merely generic domestic corporate "decision-making" "supervision," "control," "direction," or "authorization"—precisely the same kind of domestic activities the Supreme Court found insufficient to support the ATS claims in *Nestlè*. The SAC, for example,

repeatedly relies on general allegations that all "essential" "decisions" were made at Cisco's headquarters. *See, e.g.*, ER 55 (¶ 108) (San Jose "controlled all decision-making and related management"); ER 59 (¶ 127) ("all decision-making essential to the project was orchestrated in San Jose"); ER 61 (¶ 134) ("San Jose … exercis[ed] decision-making authority" and made "major decisions"). The same applies to the SAC's repeated but generic allegations that conduct that occurred in China relating to the Golden Shield ultimately occurred under the "full control" of San Jose (*e.g.*, ER45, 55, 59 (¶¶ 75, 108, 127)), were "approved" or "authorized" by San Jose (*e.g.*, ER44, 52 (¶¶ 68, 97(c))), or must have "involved" San Jose (*e.g.*, ER54, 59, 61 (¶¶ 102, 126, 135)). These allegations are indistinguishable from the failed allegations in *Nestlè* that "[e]very major operational decision" relating to cocoa farming was "made in or approved in the U.S." Just as those allegations were not enough in *Nestlè*, allegations of supposed "decisions," "approvals" or "involvement" from San Jose are not enough here.

Comparison of these portions of the SAC with the materially identical allegations dismissed in *Nestlè* is instructive. The plaintiffs' allegations of domestic activity in *Nestlè* included:

- The defendants were "headquartered in and had *main management operations*" (as to Cargill and ADM), or had a "major operation" (as to Nestlè), in the United States (¶¶ 34, 35);

- "*Every major operational decision*" by the defendants, including all operational decisions regarding Nestlè's U.S. market, "is made in or *approved* in the U.S." (¶¶ 34, 35);

- The defendants "regularly had employees from their … U.S. headquarters inspecting their operations in Côte d'Ivoire and *reporting back*" to the U.S. headquarters "so that the U.S.-based decision-makers had accurate facts on the ground" (¶¶ 34, 35);

- The defendants "had the ability and *control* in the U.S. to take any necessary steps to eradicate the practice of using child slaves to harvest its cocoa in Côte D'Ivoire" (¶¶ 34, 35); and

- The "[d]efendants, through U.S.-based employees, had *first-hand knowledge* of the widespread use of child labor harvesting cocoa on the farms they were working with and purchasing from" (¶ 44).

Doe v. Nestlè USA, Inc., No. 17-55435, ECF 12-2 at 142-143, 146 (9th Cir.) (emphases added). Plaintiffs' domestic allegations here are similarly generic.

Third, to the extent plaintiffs argue (at 7-10) that the SAC sufficiently alleges *specific* domestic conduct by Cisco from its San Jose headquarters, the SAC itself simply does not say what the supplemental brief says it does. For example, while plaintiffs argue (Supp. Br. 7) that "U.S.-based designs" were developed to subject Falun Gong practitioners to forced conversion through torture, the cited paragraphs of the SAC itself simply contain no such allegations. *See* ER30-32, 41-42, 45-48, 50, 52-53, 107 (¶¶ 1-5, 54-56, 73, 76, 78, 80, 82-86, 93, 98(h)-(j), 125, 419). The cited paragraphs barely even mention Cisco's San Jose headquarters. The few paragraphs that do mention San Jose rely merely on undefined generic terms like "direction" and "control" (ER 45, 47, 55 (¶¶ 75, 81, 108)); "decision-making" (ER55, 59 (¶¶ 108,

127)); "study" (ER46 (¶ 79)); "development" of any project's "high level designs provided by Cisco to Chinese customers" (ER50 (¶ 95)); and general "communication" with politicians (ER60 (¶ 129)).

The same is true of plaintiffs' arguments (Supp. Br. 9) concerning supposed "project management" from San Jose. The cited paragraphs overwhelmingly do not mention San Jose at all. *See* ER42-47, 52, 54-55, 59-61, 63 (¶¶ 58-59, 64-71, 80-82, 98, 104-108, 110, 126-135, 143). And those that do merely allege general corporate activity, such as the "decision" to "implement" the Golden Shield, which is insufficient under *Nestlè* for the reasons given above. Such "generic allegations … do not draw a sufficient connection between the cause of action [plaintiffs] seek"—*i.e.*, torture and persecution by Chinese actors in Chinese locations—"and domestic conduct." *Nestlè*, 141 S. Ct. at 1937. Plaintiffs posit (Supp. Br. 9) that all key "decision-making … relevant to Falun Gong persecution" occurred in San Jose, but the SAC itself alleges no U.S.-based "specific" decisions at all, much less any specific decisions that draw a sufficient connection between San Jose and the underlying persecution of Falun Gong in China by Chinese actors.

Similarly, while plaintiffs argue (Supp. Br. 8-10) that the Golden Shield was "marketed, implemented, and serviced" from the United States, the SAC identifies no specific U.S.-based conduct connected with human rights violations in China that is anything other than generic domestic corporate activity. For example: (i) While

plaintiffs argue (Supp. Br. 8) that U.S.-based engineers were convened to "advance … the persecution of Falun Gong," the SAC alleges that San Jose "*routinely* assigns its own engineering resources" to *any* "large-scale overseas projects," ER63-64 (¶ 145) (emphasis added), which is simply general corporate activity; (ii) plaintiffs argue (Supp. Br. 8) that "U.S.-based engineers designed" and "integrated" the Golden Shield to "enabl[e] … torture" of Falun Gong, but the cited paragraph does not mention "U.S.-based engineers" or integration and instead alleges that any such conduct relating to the Golden Shield occurred "in *China*," not in the United States, ER64 (¶ 146) (emphasis added); (iii) plaintiffs assert (Supp. Br. 8) that a "San Jose-based customer service team" provided "ongoing support tailored … to advance persecution," but the SAC alleges that it was "Cisco's *Chinese* customer support," which was ultimately "managed … from San Jose," ER63 (¶ 143) (emphasis added); and (iv) plaintiffs point (Supp. Br. 10) to marketing materials allegedly "approved" by corporate officials in San Jose, but this allegation rests on a single powerpoint created *in China*, with the sole alleged connection to San Jose that the Chinese engineer who created it, employed by a Chinese company, reported indirectly to Cisco's then-CEO John Chambers "through intermediary senior executives" in China, ER43 (¶ 65); *see also* ER 44, 66 (¶¶ 68, 155) (referring to marketing entirely in China).

As a final example, plaintiffs direct the Court (Supp. Br. 2 n.2) for the first time to something they call a "specific Falun Gong module," which they describe as a

collection of "components" and "features" that supposedly were "designed to specifically target Falun Gong." But the SAC contains no such allegation or even reference to such a "module," so it cannot be considered on this appeal. *See Allen v. City of Beverly Hills*, 911 F.2d 367, 372 (9th Cir. 1990) ("our review is limited to the contents of the complaint").

For all these reasons, the SAC fails to come remotely close to the specificity required by *Nestlè* to overcome the presumption against extraterritoriality.

C. The Domestic Allegations Against Cisco's Executives Do Not State An ATS Claim Under *Nestlè*

Plaintiffs' supplemental brief makes no reference to defendants John Chambers and Fredy Cheung. But should there be any doubt, the SAC's allegations as to these executives—which were never sufficient (*see* Ans. Br. 44)—also do not satisfy *Nestlè*.

The SAC offers no allegations to support ATS liability against Mr. Chambers, Cisco's former CEO—it merely offers general statements that Mr. Chambers "oversaw" or "directed" other employees who worked on the Golden Shield, and had "relationships" with Chinese politicians. *See, e.g.*, ER 43-45 (¶¶ 197-199, 202). Allegations of a CEO's high-level "oversight" of executives, or having "meetings," is generic business "activity common to most corporations" that, without more, cannot support domestic application of the ATS under *Nestlè*. 141 S. Ct. at 137.

As to Mr. Cheung, the Vice President of Cisco China, there are virtually no allegations of domestic conduct—the SAC contends he "oversaw much of Cisco's

work … *in China*" on the Golden Shield. ER 36 (¶ 24) (emphasis added); *see also, e.g.*, ER 75 (¶¶ 210-212) (Mr. Cheung "managed engineers working on the Golden Shield project" from China and "manage[s] the sales and service operation plans for the Greater China region"). The only specific U.S.-based allegations are that he ultimately reports to executives in San Jose "through intermediaries" and attends bi-yearly "marketing and high-level management meetings" in San Jose. ER 75 (¶ 211). Again, such unrelated domestic conduct cannot support an ATS claim under *Nestlè*.[1]

II. PLAINTIFFS' U.S.-BASED ALLEGATIONS INDEPENDENTLY FAIL BECAUSE THEY ARE IMPERMISSIBLY CONCLUSORY AND SPECULATIVE

While all of plaintiffs' U.S.-based allegations are insufficient to establish domestic application of the ATS under *Nestlè*, even if did, they would still independently fail because they are impermissibly conclusory.

Circumstantial and speculative allegations cannot state an ATS aiding-and-abetting claim. *See, e.g.*, *Mujica v. AirScan Inc.*, 771 F.3d 580, 592 & n.6 (9th Cir. 2014) ("speculation," "highly circumstantial allegations," or "mere conjecture … does not meet that [pleading] burden") (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). Here, the SAC is replete with such conclusory allegations that cannot satisfy

[1] The SAC also offers conclusory allegations that Mr. Chambers and Mr. Cheung were "aware of" or "knew of" the torture and persecution of Falun Gong practitioners in China, and were "in a position" to prevent or influence it. *See* ER 74-75 (¶¶ 207-208, 219). The same allegations were insufficient in *Nestlè*.

plaintiffs' pleading burden under *Iqbal* and *Mujica*, even if they could overcome *Nestlè* (and they cannot). These include, for example: (i) plaintiffs' empty speculation that Cisco staff in China acted with San Jose's "express or implied authority" to "deal with" Falun Gong, ER51 (¶ 97(b)); (ii) plaintiffs' conclusory assertions that San Jose-based acts were conducted to "enable" or "further … persecution" by Chinese authorities, *see, e.g.*, ER46-48, 52-53 (¶¶ 79-80, 82-86, 98), when the allegations at most permit only an inference that Cisco intended to advance the PRC's use of the Golden Shield as a security tool for apprehending lawbreakers, as the district court below agreed, properly recognizing that "[a]llegations of … acknowledgement that the [Golden Shield] system was used to 'stop' or apprehend Falun Gong still do not establish Defendants' planning, direction, or participation in the human rights abuses committed against plaintiffs," ER24; and (iii) plaintiffs' baseless suggestion that any of Cisco's U.S.-based acts supposedly "furthered" persecution in China, when the allegations merely state that Cisco supposedly created a "surveillance and internal security network" that "perform[s] … standard crime control police functions," ER30 (¶¶ 1-2). Plaintiffs' conclusory labels, unaccompanied by any particularized alleged factual support, are not connected to any human rights violations except through *ipse dixit*. Speculation is not enough to render claims plausible enough to survive dismissal.

III. *NESTLÈ* HAS NO IMPACT ON CISCO'S ALTERNATIVE GROUNDS FOR AFFIRMANCE BASED ON LACK OF *ACTUS REUS* AND *MENS REA*

The Court should disregard plaintiffs' supplemental brief to the extent it raises (at 10-15) arguments about *actus reus* and *mens rea* that are unrelated to "the impact of the Supreme Court's decision in" *Nestlè* (ECF 77), which did not address those issues. If the Court considers plaintiffs' arguments, it should reject them for the reasons set forth in Cisco's answering brief (at 27-39). For example, as to *actus reus*, the SAC fails to allege a sufficient causal link between the provision of security technologies that have lawful uses and the injuries plaintiffs suffered at the hands of Chinese authorities. As to *mens rea*, putting aside that the purpose standard applies, the SAC fails to allege facts suggesting that Cisco knew Chinese officials would go beyond lawful security and law-enforcement purposes to *use the Golden Shield* to torture or mistreat Falun Gong practitioners in Chinese prisons, in violation of Chinese law. Plaintiffs' re-argument presents nothing new, largely just cross-referencing their earlier briefing.[2]

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[2] The only new authority cited (Supp. Br. 12) is *Prosecutor v. Blagojevic*, Case No. IT-02-60-A, Judgement (ICTY May 9, 2007), for the proposition that *actus reus* was established "where a defendant sent machines and engineering personnel for digging mass graves," but plaintiffs omit that the defendant there also "went to the field to carry out engineering tasks himself" and that he "effectively ordered members of the Engineering Company to dig mass graves," *Blagojevic*, ¶ 198. There is, of course, no allegation that Cisco ever "went to the field" of China to use the Golden Shield itself, let alone that it "effectively ordered" Chinese authorities to use it to persecute anyone.
(*footnote continued*)

In any event, this Court may still affirm the judgment below on the ground of nonjusticiability. As previously argued (Ans. Br. 47-56), adjudication of whether the PRC complies with its own laws implicates political questions, acts of state, and international comity. *Jesner v. Arab Bank, PLC* cautioned against needless entrenchment upon the "foreign-policy and separation-of-powers concerns inherent in ATS litigation," especially given that "[t]he political branches, not the Judiciary, have the responsibility and institutional capacity to weigh [these] foreign-policy concerns." 138 S. Ct. 1386, 1403 (2018); *see also* ECF 59 at 6-11 (Cisco detailing foreign policy concerns here). Nothing in *Nestlè* undermines affirmance of the judgment on this alternative ground.

Plaintiffs' other international authorities are distinguishable for similar reasons. For example, plaintiffs cite (Supp. Br. 12) *Prosecutor v. Bagaragaza*, Case No. ICTR-05-86-S, Sentencing Judgment (ICTR Nov. 17, 2009), for the proposition that the defendant there 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," even though "the money was fungible," but plaintiffs ignore that the defendant there (who pleaded guilty) also authorized that "personnel from [his] factories participate in attacks" and authorized that those "attackers be provided with heavy weapons," *Bagaragaza*, ¶ 25—a far cry from the facts alleged here.

CONCLUSION

The judgment should be affirmed, as required by *Nestlè*.

Dated: August 12, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the Court's type-volume limitation as set forth in the Order issued July 1, 2021 (ECF 77) because it does not exceed 15 pages.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionately spaced typeface using Microsoft Word in Times New Roman, 14-point type.

Dated: August 12, 2021

/s/ Kathleen M. Sullivan
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CERTIFICATE OF SERVICE

I, Kathleen M. Sullivan, a member of the Bar of this Court, hereby certify that on August 12, 2021, I electronically filed the foregoing "Supplemental Brief of Defendants-Appellees" 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 certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: August 12, 2021

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