No. 17-55435

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOHN DOE I; JOHN DOE II; JOHN DOE III,
Plaintiffs-Appellants,

v.

NESTLÉ U.S.A., ET AL.
Defendants-Appellees.

On Appeal from the United States District Court for the Central District of California, Case No. C-05-5133-SVW
The Honorable Stephen V. Wilson, United States District Judge

PETITION FOR REHEARING AND REHEARING *EN BANC* OF DEFENDANT-APPELLEE CARGILL, INCORPORATED

Andrew J. Pincus
Kevin S. Ranlett
MAYER BROWN LLP
1999 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000
apincus@mayerbrown.com
kranlett@mayerbrown.com

Lee H. Rubin
MAYER BROWN LLP
Two Palo Alto Square, Suite 300
3000 El Camino Real
Palo Alto, CA 94306
(650) 331-2000
lrubin@mayerbrown.com

Counsel for Defendant-Appellee Cargill, Incorporated

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Defendant-Appellee Cargill, Incorporated is a domestic corporation, the shares of which are not publicly traded. No publicly traded company owns 10% or more of its common stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

INTRODUCTION AND RULE 35(B) STATEMENT

For the second time, a panel of this Court has stretched the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, well beyond the breaking point in order to revive this lawsuit—which has not progressed beyond the motion-to-dismiss stage in the *13 years* it has been pending.

Four years ago, nine Judges of this Court voted to rehear the prior panel decision, which overturned the district court's prior dismissal of this action. The dissent from the denial of rehearing *en banc* joined by eight Judges explained that "the panel majority * * * substituted sympathy for legal analysis." *Doe I v. Nestle USA, Inc.*, 788 F.3d 946, 946 (9th Cir. 2015) (Bea, J., dissenting) ("*Doe Dissent*").

This case involves allegations of forced child labor in harvesting cocoa in Côte d'Ivoire. But, as Judge Bea explained, Plaintiffs "do not bring this action against the slavers who kidnapped them, nor against the plantation owners who harmed them." *Id.* at 947. They instead sued purchasers of cocoa grown in Côte d'Ivoire, alleging that Defendants aided and abetted the forced labor—even though Defendants engaged only in ordinary business transactions and Defendants strongly oppose forced labor and are working to eradicate that horrific practice.

The *en banc* dissent criticized the prior panel's opinion on three grounds. *First*, for holding that the *mens rea* element of aiding and abetting is satisfied if a complaint alleges that a defendant acted with the goal of reducing its cost of raw materials, as long as the defendant is aware that human-rights violations sometimes occur in producing those materials (something true in many less-developed countries).

Second, for reaffirming that corporations are subject to ATS liability, which, the dissent stated, "opens our doors to an expansive vision of corporate liability." *Id.* at 956. *Third*, for adopting an erroneous standard for determining whether an ATS claim is extraterritorial and therefore impermissible. *Id.* at 951-54.

The most recent panel's rulings are even more egregious:

- Applying a different—but again erroneous—legal standard for determining when an ATS claim is extraterritorial, the panel created a direct conflict with two other circuits and essentially nullified decisions of this Court and of the Supreme Court by holding that general oversight from a U.S. headquarters is sufficient to render a claim not extraterritorial;
- Reaffirming Circuit precedent that U.S. corporations are subject to ATS liability notwithstanding the Supreme Court's intervening decision in *Jesner v. Arab Bank, PLC*, 138 S. Ct.

1386 (2018), which held that foreign corporations are not liable under the ATS, reserved decision on the liability of U.S entities, and analyzed the issue under standards different from, and rejected in, the prior Circuit precedent; and

- Refusing to address substantial arguments that Plaintiffs lack standing to maintain this action, even though the Supreme Court has repeatedly emphasized a court's duty to ensure its jurisdiction.

The combined practical effect of the two panel rulings is that a U.S.-based business could be subject to an ATS action simply by doing business in a country in which human-rights violations occur. The *mens rea* element would be satisfied by alleging that the company sought lower input costs with knowledge that human-rights violations occurred in the relevant supply-chain market—even though the company is working to eradicate such human-rights violations.

The claim would avoid dismissal as extraterritorial as long as the complaint contained general allegations of oversight from the U.S. headquarters and visits to the foreign country by employees from headquarters. Again, these actions are routine business practices commonplace in virtually every large company that engages in cross-border commerce.

Finally, both the prior panel and this panel refused to address a key open question regarding ATS liability: whether the complaint here satisfies the *actus reus* element of aiding-and-abetting liability—although that is a question of law and was fully briefed on both appeals.

The decision not to address that issue, and to remand for filing of a *fourth* version of the complaint does not simply impose litigation costs; it also permits Plaintiffs and others to continue to inflict damage on Cargill's reputation by falsely associating Cargill with human-rights abuses even though, as the operative complaint acknowledges, Cargill is working to eradicate those abuses.

The panel's approach also allows private plaintiffs to use the ATS as "a vehicle for private parties to impose embargos or international sanctions." *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 264 (2d Cir. 2009). U.S. courts will increasingly be asked to pass judgment on events occurring in remote corners of the globe, despite the Supreme Court's admonition that the ATS not be used to allow "unwarranted judicial interference in the conduct of foreign policy." *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 116 (2013).

The practical consequences of the panel's ruling—as well as its legal errors—plainly necessitate *en banc* review.

STATEMENT

A. Plaintiffs' Allegations

Plaintiffs are Malians who allege that, when they were 14 or younger, they were forced to work without pay and mistreated at three cocoa plantations in Côte d'Ivoire. ER158-61. They do not allege that Cargill committed these crimes. Instead, they accuse various farm operators, not parties to this litigation and unidentified guards and overseers not employed by or known to Cargill. ER147, 158-61.

Plaintiffs do not allege that Cargill had *any* business relationship with these particular farms, guards, or overseers. Nor do they allege that Cargill intended to promote child labor, forced or otherwise. To the contrary, Plaintiffs cite Cargill's express statements and policies *condemning* unlawful child labor and forced labor in Côte d'Ivoire. ER151-55.

Nevertheless, Plaintiffs allege that Cargill is liable under the ATS for purportedly aiding and abetting the Ivorian farmers and guards who allegedly perpetrated these crimes by:

- making decisions within the United States to conduct business with Ivorian cocoa farms, including providing supplies, training, and money to those farms, when Cargill knew or should have known that the farmers were engaged in slavery (ER 142, 144-45, 147);

- making public statements condemning child slavery and holding cocoa producers to an anti-slavery standard (ER 148-55); and
- engaging in domestic lobbying that ultimately resulted in the Harkin-Engel Protocol, a voluntary agreement under which cocoa companies work to combat child labor abuses (ER 156).

B. Prior Proceedings

In 2010, the district court dismissed Plaintiffs' first amended complaint on the grounds that, among other things (1) corporations cannot be sued under the ATS; (2) Plaintiffs did not plead facts sufficient to establish the *mens rea* element of aiding and abetting—*i.e.*, that Cargill "act[ed] with the specific intent (*i.e.*, for the purpose) of substantially assisting the … crime"; and (3) Plaintiffs did not plead facts sufficient to establish the *actus reus* element of aiding and abetting—*i.e.*, that Cargill committed acts "specifically directed" to perpetrating a "certain specific crime" under international law and had "a substantial effect on the perpetration of [that] crime." *Doe I v. Nestle, S.A.*, 748 F. Supp. 2d 1057, 1079, 1080, 1088, 1110, 1130 (C.D. Cal. 2010) ("the 2010 Order"), rev'd in part, 766 F.3d 1013 (9th Cir. 2014). Cargill had also argued that the claim should be dismissed on extraterritoriality grounds, but the district court did not reach the issue in its 2010 decision. Dist. Ct. Dkt. 90 at 19-20.

A panel of this Court reversed and remanded over the dissent of Judge Rawlinson. *Doe I v. Nestle USA, Inc.*, 766 F.3d 1013 (9th Cir. 2014) ("*Nestle I*"). The panel held that (1) corporate liability is available under the ATS (*id.* at 1021-22), and (2) that Plaintiffs' allegations support the "inference" that Cargill acted with the requisite *mens rea*—*i.e.*, "the purpose to facilitate child slavery" because Cargill had a profit motive to "fail[] to stop or limit" it. *Id.* at 1024-25. The Court remanded without deciding the proper legal standard for *actus reus* or extraterritoriality. *Id.* at 1026-29.

In dissent, Judge Rawlinson "strongly disagree[d]" with the panel's inference of *mens rea* from the mere allegation that Cargill had "acted with the intent to reduce the cost[s]." *Id.* at 1031-32. Moreover, she expressed deep skepticism that Plaintiffs' ATS claim was not extraterritorial, given "the admittedly extraterritorial child slave labor that is the basis of this case." *Id.* at 1034-35.

Over the dissent of nine judges, the Court denied Cargill's petition for rehearing *en banc*. *Doe Dissent*, 788 F.3d at 946.

C. The District Court's Decision.

On remand, Plaintiffs filed a second amended complaint, and Defendants again moved to dismiss. On March 2, 2017, the district court granted the motion, holding the claims impermissibly extraterritorial.

ER3-14. The district court reasoned that the extraterritoriality inquiry must center on the alleged domestic "conduct of Defendants that [allegedly] aided and abetted forced child labor." ER7. The court held that because the alleged domestic conduct was simply "ordinary business conduct," it did not displace the presumption against extraterritoriality. ER23. Plaintiffs appealed.

D. The Panel's Decision.

The panel again reversed and remanded the case for further proceedings on the motion to dismiss. *First*, the panel reaffirmed corporate liability under the ATS, notwithstanding the Supreme Court's ruling in *Jesner*. Op. 9. *Second*, it held that Plaintiffs' claims were not impermissibly extraterritorial because Plaintiffs alleged that Defendants provided "spending money" to farmers. *Id.* at 13. The panel inferred that these "financing decisions" must have "originated" in Cargill's U.S. headquarters, that they were "not ordinary business conduct," and that they "perpetuated" overseas slave labor. *Id.* On the basis of these inferences, the panel concluded that the alleged ATS claims were sufficiently domestic to proceed. *Id.* at 13.

The panel declined to consider whether Plaintiffs' allegations satisfied the *actus reus* element of aiding and abetting. *Id.* at 14. Nor did the

panel address Cargill's argument that Plaintiffs lack standing to sue Cargill, because they do not allege any connection between their alleged injuries and Cargill's alleged conduct.

REASONS FOR GRANTING THE PETITION

Rehearing *en banc* is warranted for three reasons. *First*, the panel applied an incorrect legal standard for the ATS's extraterritoriality inquiry. *Second*, the panel erred in holding that domestic corporations are proper ATS defendants. *Third*, the panel failed to resolve the serious questions regarding its jurisdiction.

A. Extraterritoriality

The Supreme Court held in *Kiobel* that the ATS does not apply extraterritorially. 569 U.S. at 116-24.

RJR Nabisco, Inc. v. European Community, 136 S. Ct. 2090 (2016), explained that, under *Kiobel*, a proposed application of a statute is extraterritorial in two situations: (1) when "all" of the conduct "relevant" to the plaintiff's claims took place outside the U.S.; and (2) when "the conduct relevant to the [statute's] focus occurred in a foreign country, * * * regardless of any other conduct that occurred in U.S. territory." *Id.* at 2101.

Here, Africa plainly is where the conduct that is the focus of the ATS occurred. Plaintiffs' claim is extraterritorial, as the district court correctly held. ER23-28.

To avoid this conclusion, the panel pointed to Plaintiffs' allegation that the U.S. defendants provided Ivoirian farmers with "spending money"; then inferred that Cargill must have decided to do so in its U.S. headquarters; and concluded for that reason that the alleged aiding and abetting was sufficiently related to the United States. Op. 13.

The panel's holding squarely conflicts with decisions of other courts of appeals ruling that virtually identical allegations of aiding-and-abetting conduct by U.S. defendants do not displace the presumption against extraterritoriality. And the panel's adoption of an inference that alleged corporate decision-making must have occurred domestically also flouts *Kiobel*'s rejection of "mere corporate presence" as sufficient grounds to override the presumption against extraterritoriality (569 U.S. at 124), and conflicts with a prior decision of this Court.

1. Multiple Courts Of Appeals Have Held That Conduct Similar To The Allegations Here Cannot Save An ATS Claim From Dismissal On Grounds Of Extraterritoriality.

The panel's decision contravenes the decisions of multiple courts of appeal.

Plaintiffs here assert that Cargill aided and abetted the wrongs of Ivorian farmers in Côte d'Ivoire by "decid[ing] in the U.S. to do little or

nothing to stop" that conduct. ER147. But such allegations of a failure to act cannot support an ATS claim for at least two reasons.

First, as the district court observed, a failure to act cannot support a claim of aiding and abetting where (as here) there was no legal duty to act. *2010 Order*, 748 F. Supp. 2d at 1103-1106, 1108-1109. Yet because the panel refused to consider whether Plaintiffs had satisfied the *actus reus* element of aiding-and-abetting liability, the panel simply assumed that the alleged failure to act could provide a sufficient domestic connection to overcome the presumption against extraterritoriality.

Second, if the "failure to act" occurred anywhere, it was in Côte d'Ivoire, where Plaintiffs allege that Cargill failed to stop forced labor on local farms. ER 147, 155, 157. To say that Cargill failed to act from the U.S. on the basis that it was headquartered there is simply to restate that Cargill is located in the U.S. But *Kiobel* has rejected that legal theory. 569 U.S. at 124.

The only affirmative act on which the panel relied is Cargill's alleged domestic decision to provide "personal spending money" to certain unnamed farmers. Op. 13. To be clear, this allegation concerns nothing more than decision-making. The "spending money" is alleged to have been paid in Côte d'Ivoire. ER144. There is no allegation that the payments came from or passed through the United States. And there is no

allegation that the payments were facilitated by any U.S. institution. Thus, the panel rested its holding solely on its inference that, because Cargill maintains a U.S. headquarters, it plausibly *decided* there to make the payment.[1]

In *Doe v. Drummond Co.*, 782 F.3d 576 (11th Cir. 2015), the Eleventh Circuit rejected ATS claims as impermissibly extraterritorial despite the same allegations as here—that corporate defendants "made funding and policy ***decisions*** in the United States" to "aid and abet" international-law violations abroad. *Id.* at 593-594, 598 (emphasis added). The court held that the claims were extraterritorial because "the domestic location of the decision-making alleged in general terms here does not outweigh the extraterritorial location of the rest of Plaintiffs' claims." *Id.* at 598; *see also Cardona v. Chiquita Brands Int'l, Inc.*, 760 F.3d 1185,

[1] The panel improperly characterized these payments as "kickbacks." Op. 13. The operative complaint alleges only that "Defendants * * * provid[ed] local farmers and/or farmer cooperatives with"—in addition to farming supplies and training in proper labor practices—"ongoing financial support, including advance payments and personal spending money to maintain the farmers' and/or the cooperatives loyalty as exclusive suppliers." ER144. Nothing in that allegation supports an inference that the payments were improper—to the contrary, the only plausible inference given the purpose specified in the very same sentence of the complaint is that the payments were an entirely legitimate means of maintaining long-term supplier relationships.

1189-90 (11th Cir. 2014) (barring ATS claim alleging that U.S. defendant "review[ed], approv[ed], and conceal[ed] a scheme of payments" to "Colombian terrorist organizations" as extraterritorial because "[a]ll the relevant conduct in our case took place outside the United States.").

The Fifth Circuit reached the same conclusion in *Adhikari v. Kellogg Brown & Root, Inc.*, 845 F.3d 184 (5th Cir. 2017). The plaintiff in that case alleged that corporate defendants made "domestic payments" to a foreign corporation allegedly involved in "human trafficking." *Id.* at 197. In other words, unlike this case—in which the alleged payments have no alleged connection to the U.S.—the defendants in *Adhikari* allegedly "transferred payments to [the perpetrators] from the United States, using New York Banks." *Id.* at 198. Nevertheless, the Fifth Circuit rejected the ATS claims as extraterritorial for lack of a domestic "connect[ion]" between "the alleged international law violations" and "these payments." *Id.*[2] Again, the allegations here are equally deficient.

The panel simply ignored these decisions. Instead, it purported to rely (Op. 12-13) on the Second Circuit's decisions in *Mastafa v. Chevron*

[2] The *Adhikari* plaintiffs had not expressly advanced an aiding-and-abetting theory, but the court held that the facts would not support such a theory. 845 F.3d at 199-200.

Corp., 770 F.3d 170 (2d Cir. 2014), and *Licci by Licci v. Lebanese Canadian Bank, SAL*, 834 F.3d 201 (2d Cir. 2016). But those decisions cannot be squared with the panel's approach here because they each found that the presumption against extraterritoriality was overcome because—unlike here—the alleged U.S. conduct by itself was illegal and independently constituted aiding and abetting.

For example, in *Mastafa*, the defendants created a domestic banking scheme for facilitating illegal payments to the Saddam Hussein's regime in violation of U.N. sanctions. 770 F.3d at 190. And in *Lucci*, defendants used domestic banks to make illegal payments to Hezbollah, in violation of "terrorist financing and money laundering laws." 834 F.3d at 215.

The panel ignored the distinction between the domestic criminal conduct that the Second Circuit held was sufficient to permit an ATS claim and the ordinary business conduct alleged here. At best, the panel impermissibly (*see* note 1, *supra*) insinuated there was something untoward about Cargill's payments. But the panel did not—and could not—go as far as inferring that these payments are themselves tortious or illegal. At bottom, as the district court recognized, there is neither allegation nor plausible inference that Cargill engaged in any "independently

illegal activity in furnishing funds to the underlying perpetrators." ER 9 n.7.

Rehearing is warranted to address the circuit conflict created by the panel's opinion.

2. The Panel's Decision Effectively Nullifies Holdings By The Supreme Court And This Court That A Corporate Defendant's Presence In The U.S. Does Not By Itself Render An ATS Claim Permissible.

The panel's decision in this case also undermines the Supreme Court's holding, and a similar determination by this Court, that the presence of a corporation within the U.S. cannot by itself displace the ATS's bar on extraterritorial application.

Kiobel involved an ATS suit against foreign corporations accused of aiding and abetting the Nigerian government's crimes by providing support in Nigeria. 569 U.S. at 113. Although the defendants were present in the U.S., the Court explained that such a domestic connection is too tenuous: "[c]orporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices" to overcome the presumption. *Id.* at 124-25.

Subsequently, this Court reached a similar conclusion in *Mujica v. AirScan Inc.*, 771 F.3d 580, 592 (9th Cir. 2014). The plaintiffs there con-

tended that their ATS claims were not impermissibly extraterritorial "because Defendants are U.S. corporations and because Plaintiffs have alleged that '***actions or decisions*** furthering the [purported]' [tort] * * * 'took place in the United States.'" *Id.* at 591 (emphasis added). This Court rejected those allegations, explaining that "Plaintiffs have the burden of pleading 'sufficient *factual matter*'" and that "a mere conjecture that conduct may have occurred in the United States does not meet that burden." *Id.* at 592.

The panel's ruling circumvents *Kiobel* and *Mujica*. As discussed above, it first transforms Cargill's "mere corporate presence" into grounds for an inference of domestic decision-making, even though the operative complaint alleges nothing more than general headquarter oversight. It then attaches ATS jurisdiction to that presumed decision-making.

That ruling allows the ATS to apply notwithstanding the presumption against extraterritoriality whenever a domestic corporation is a defendant, because the same general oversight activity could be alleged, as here, based on a U.S. headquarters location. The panel's effective nullification of both *Kiobel* and *Mujica* warrants *en banc* review.

B. Corporate Liability.

The full Court also should reconsider the panel's decision that the ATS subjects domestic corporations to liability.

The previous panel decision in this case reinstated this Court's holding in *Sarei v. Rio Tinto PLC*, 671 F.3d 736, 748 (9th Cir. 2011), vacated by 569 U.S. 945 (2013), that corporations can be liable under the ATS. *See Nestle I*, 766 F.3d at 1021. That holding dictated that corporate liability exists where the norm is "universal and absolute" or applicable to "all actors" and rejected consideration of for the lack of international precedent enforcing the norm against corporations. *Id.* at 1021-1022.

As eight Judges of this Court observed in dissent from the previous denial of rehearing *en banc*, the test ensures that "any norm 'categorical' enough to give rise to an ATS claim based on customary international law necessarily gives rise to corporate liability for violation of that norm." *Doe Dissent*, 788 F.3d at 955.

The Supreme Court's decision in *Jesner* casts serious doubt on the prior panel's conclusion. Although *Jesner* held only that foreign corporations are not subject to ATS liability, the Court expressly reserved the question whether its analysis would also preclude liability for U.S. corporations. 138 S. Ct. at 1402. And the analysis applied in *Jesner* confirms that *Sarei*'s analysis was incorrect:

- The Court emphasized the need for "judicial caution" in expanding ATS liability and that such liability should be recognized only when needed to advance the ATS's goal of "promoting] harmony in international relations." *Id.* at 1406-1407.
- *Jesner* analyzed the question for foreign corporate liability under the *Sosa* framework. With respect to *Sosa*'s first step, it held that "[t]he international community's conscious decision to limit the authority of [international criminal tribunals] to natural persons counsels against a broad holding that there is a specific, universal, and obligatory norm of corporate liability under currently prevailing international law." *Id.* at 1401. And in analyzing *Sosa*'s second step, *Jesner* recognized that Congress' decision to *exclude* corporations from TVPA liability—and to instead limit liability to natural persons—is "all but dispositive" regarding corporate liability under the ATS. *Id.* at 1404. Those factors apply equally to U.S. entities.
- The *Jesner* plurality also warned that "allowing plaintiffs to sue foreign corporations under the ATS" would "discourage[] American corporations from investing abroad," which could prevent the "economic development that so often is an essential foundation for human rights." *Id.* at 1406. These factors

> weigh heavily against expanding ATS liability to U.S. corporations. And they particularly do so here, because Plaintiffs allege that their injuries resulted from "the acts and/or omissions of responsible state officials and/or their agents" (ER164), and seek an injunction altering practices in Côte d'Ivoire (ER132, 168). It is difficult to imagine a clearer example of an application of the ATS interfering with another nation's prerogatives. *See Jesner*, 138 S. Ct. at 1404 (plurality) (citing aiding-and-abetting claims as an example of plaintiffs' use of "corporations as surrogate defendants to challenge the conduct of foreign governments").

The panel dismissed *Jesner* with a single sentence: "*Jesner* did not eliminate all corporate liability under the ATS, and we therefore continue to follow *Nestle I*'s holding as applied to domestic corporations." Op. 9. The panel ignored *Jesner*'s express reservation of the question whether domestic corporations are liable under the ATS; it ignored *Jesner*'s use of the *Sosa* test to determine the propriety of corporate liability—the test that *Nestle I* had rejected in reaffirming corporate liability—and it ignored the other factors cited in *Jesner* that bear directly on the propriety of subjecting corporations to ATS liability.

Review by the *en banc* Court is needed to address *Jesner* and the question of U.S. corporate liability.

C. Standing.

The Supreme Court has repeatedly recognized that every federal appellate court has a special obligation to "satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review." *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986) (internal quotation marks omitted). And courts almost always must resolve jurisdictional issues before addressing a case on the merits. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 95 (1998).

Cargill raised just such a jurisdictional issue in this case, arguing on appeal that Plaintiffs lack Article III standing because they have not alleged facts supporting a plausible inference that Cargill purchased cocoa from farms on which Plaintiffs worked at times when Plaintiffs worked there. Dkt. 24, at 54-57.[3]

[3] The operative complaint alleges that Cargill purchased cocoa grown on a farm from which slaves were rescued (ER 144)—but it does not allege that any of the Plaintiffs worked on that farm or that Cargill's alleged purchases occurred at the time that the abusive labor practices took place.

The panel refused to address the issue, instead allowing Plaintiffs to file their fourth complaint in this action—and asserting that *Jesner* "changed the legal landscape." Op. 14.

But *Jesner* has nothing to do with this defect. The flaw is not only that Plaintiffs fail to distinguish between U.S. corporations and non-U.S. entities; it is that Plaintiffs fail to connect their alleged harm to any Defendant. There is not a single allegation that any Plaintiff worked on a farm during the time that any Defendant purchased cocoa from that farm. *See* ER132-169.

Moreover, Defendants raised this issue at earlier stages of the litigation—prior to the filing of Plaintiffs amended complaints. Dist. Ct. Dkt. No. 111, at 20 & n.7. Yet Plaintiffs have failed to cure this fatal defect. Three complaints over 13 years is enough.

CONCLUSION

Rehearing or rehearing *en banc* should be granted.

Dated: November 27, 2018

Respectfully submitted,

/s/ *Andrew J. Pincus*

Andrew J. Pincus
Kevin S. Ranlett
MAYER BROWN LLP
1999 K Street, N.W.
Washington, DC 20006
(202) 263-3000
apincus@mayerbrown.com
kranlett@mayerbrown.com

Lee H. Rubin
MAYER BROWN LLP
Two Palo Alto Square, Suite 300
3000 El Camino Real
Palo Alto, CA 94306
(650) 331-2000
lrubin@mayerbrown.com

Counsel for Defendant-Appellee Cargill, Incorporated

CERTIFICATE OF COMPLIANCE

I hereby certify that pursuant to Circuit Rule 40-1, this petition for rehearing and rehearing *en banc* is proportionately spaced, has a type-face of 14 points or more, and contains 4,170 words.

Dated: November 27, 2017

By: /s/ Andrew J. Pincus
Andrew J. Pincus

CERTIFICATE OF SERVICE

I hereby certify that on November 27, 2018, I electronically filed the foregoing petition for rehearing and rehearing *en banc* with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Dated: November 27, 2018

By: /s/ Andrew J. Pincus
Andrew J. Pincus

EXHIBIT 1

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN DOE, I; JOHN DOE, II; JOHN DOE, III; JOHN DOE, IV; JOHN DOE, V; and JOHN DOE, VI, each individually and on behalf of proposed class members, *Plaintiffs-Appellants*, v. NESTLE, S.A.; NESTLE USA, INC.; NESTLE IVORY COAST; CARGILL INCORPORATED COMPANY; CARGILL COCOA; CARGILL WEST AFRICA, S. A.; ARCHER DANIELS MIDLAND COMPANY, *Defendants-Appellees.*	No. 17-55435 D.C. No. 2:05-cv-05133-SVW-MRW OPINION

Appeal from the United States District Court
for the Central District of California
Stephen V. Wilson, District Judge, Presiding

Argued and Submitted June 7, 2018
Pasadena, California

Filed October 23, 2018

Before: Dorothy W. Nelson and Morgan Christen, Circuit Judges, and Edward F. Shea,* District Judge.

Opinion by Judge D.W. Nelson;
Concurrence by Judge Shea

SUMMARY**

Alien Tort Statute

The panel reversed the district court's dismissal of claims alleging aiding and abetting slave labor that took place in the United States under the Alien Tort Statute (ATS).

The plaintiffs, former child slaves who were forced to work on cocoa farms in the Ivory Coast, brought the action against large manufacturers, purchasers, processors, and retail sellers of cocoa beans. The district court concluded that the complaint seeks an impermissible extraterritorial application of the ATS.

Rejecting the defendants' argument that the focus of the ATS is limited to principal offenses, the panel held that aiding and abetting comes within the ATS's focus on torts committed in violation of the law of nations.

* The Honorable Edward F. Shea, United States District Judge for the Eastern District of Washington, sitting by designation.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

The panel also held that a narrow set of specific domestic conduct alleged by the plaintiffs is relevant to the ATS's focus – namely, that the defendants provided personal spending money outside the ordinary business contract with the purpose to maintain ongoing relations with the farms so that the defendants could continue receiving cocoa at a price that would be not be obtainable without child slave labor; and that the defendants had employees from their United States headquarters regularly inspect operations in the Ivory Coast and report back to the United States offices, where these financing decisions or arrangements originated.

The panel deemed it unnecessary at this time to reach the issue of whether the plaintiffs have sufficiently alleged the elements of aiding and abetting. In light of *Jesner v. Arab Bank*, 138 S. Ct. 1386 (2018), which changed the legal landscape on which the plaintiffs constructed their case, the panel remanded to allow the plaintiffs to amend their complaint to specify whether aiding and abetting conduct that took place in the United States is attributable to the domestic corporations in this case.

District Judge Shea concurred in the result.

COUNSEL

Paul L. Hoffman (argued), John Washington, and Catherine Sweetser, Schonbrun Seplow Harris & Hoffman LLP, Los Angeles, California; Terrence P. Collingsworth, International Human Rights Advocates, Washington, D.C.; for Plaintiffs-Appellants.

Theodore J. Boutrous, Jr. (argued), Abbey Hudson, Matthew A. Hoffman, and Perlette Michèle Jura, Gibson Dunn & Crutcher LLP, Los Angeles, California; Christopher B. Leach and Theodore B. Olson, Gibson Dunn & Crutcher LLP, Washington, D.C.; Colleen Sinzdak, David M. Foster, Craig A. Hoover, and Neal Kumar Katyal, Hogan Lovells US LLP, Washington, D.C.; for Defendant-Appellee Nestlé USA, Inc.

Andrew John Pincus (argued) and Kevin S. Ranlett, Mayer Brown LLP, Washington, D.C.; Lee H. Rubin, Mayer Brown LLP, Mayer Brown LLP, Palo Alto, California; for Defendant-Appellee Cargill Incorporated.

Marc B. Robertson and Richard A. Stamp, Washington Legal Foundation, Washington, D.C., for Amicus Curiae Washington Legal Foundation.

OPINION

D.W. NELSON, Circuit Judge:

OVERVIEW

Plaintiffs-Appellants ("Plaintiffs"), former child slaves who were forced to work on cocoa farms in the Ivory Coast, filed a class action lawsuit against Defendants-Appellees Nestle, SA, Nestle USA, Nestle Ivory Coast, Archer Daniels Midland Co. ("ADM"),[1] Cargill Incorporated Company, and Cargill West Africa, SA ("Defendants"). In their Second Amended Complaint, plaintiffs alleged claims for aiding and

[1] Plaintiffs voluntarily dismissed ADM from this case.

abetting slave labor that took place in the United States under the Alien Tort Statute, 28 U.S.C. § 1350 ("ATS"). The district court dismissed the claims below based on its conclusion that plaintiffs sought an impermissible extraterritorial application of the ATS. We reverse and remand. In light of an intervening change in controlling law, we think it unnecessary to consider the other issues this case presents at this juncture.

BACKGROUND

I. Factual Background

We discussed much of the factual background of this case in *Doe I v. Nestle USA, Inc.*, 766 F.3d 1013 (9th Cir. 2014) ("*Nestle I*"). Child slavery on cocoa farms in the Ivory Coast, where seventy percent of the world's cocoa is produced, is a pervasive humanitarian tragedy.

Plaintiffs are former child slaves who were kidnapped and forced to work on cocoa farms in the Ivory Coast for up to fourteen hours a day without pay. While being forced to work on the cocoa farms, plaintiffs witnessed the beating and torture of other child slaves who attempted to escape.

Defendants are large manufacturers, purchasers, processors, and retail sellers of cocoa beans. Several of them are foreign corporations that are not subject to suit under the ATS. *Jesner v. Arab Bank*, 138 S. Ct. 1386, 1407 (2018). The effect of *Jesner* in tandem with plaintiffs' habit of describing defendants en masse presents a challenge we address below. For now, we describe the case as plaintiffs present it. We take their plausible allegations as true and

draw all reasonable inferences in their favor. *See Nestle I*, 766 F.3d at 1018.

Because of their economic leverage over the cocoa market, defendants effectively control cocoa production in the Ivory Coast. Defendant Nestle, USA is headquartered in Virginia and coordinates the major operations of its parent corporation, Nestle, SA, selling Nestle-brand products in the United States. Every major operational decision regarding Nestle's United States market is made in or approved in the United States. Defendant Cargill, Inc. is headquartered in Minneapolis. The business is centralized in Minneapolis and decisions about buying and selling commodities are made at its Minneapolis headquarters.

Defendants operate with the unilateral goal of finding the cheapest source of cocoa in the Ivory Coast. Not content to rely on market forces to keep costs low, defendants have taken steps to perpetuate a system built on child slavery to depress labor costs. To maintain their supply of cocoa, defendants have exclusive buyer/seller relationships with Ivory Coast farmers, and provide those farmers with financial support, such as advance payments and personal spending money. 19 Malian child slaves were rescued from a farm with whom Cargill has an exclusive buyer/seller relationship. Defendants also provide tools, equipment, and technical support to farmers, including training in farming techniques and farm maintenance. In connection with providing this training and support, defendants visit their supplier farms several times per year.

Defendants were well aware that child slave labor is a pervasive problem in the Ivory Coast. Nonetheless, defendants continued to provide financial support and

technical farming aid, even though they knew their acts would assist farmers who were using forced child labor, and knew their assistance would facilitate child slavery. Indeed, the gravamen of the complaint is that defendants depended on—and orchestrated—a slave-based supply chain.

II. Procedural History

Plaintiffs began this lawsuit over a decade ago, and we had occasion to consider it once before in *Nestle I*. On remand after *Nestle I*, defendants moved to dismiss the operative complaint and the district court granted the motion. In its order, the district concluded that the complaint seeks an impermissible extraterritorial application of the ATS because defendants engaged domestically only in ordinary business conduct. The district court did not decide whether plaintiffs stated a claim for aiding and abetting child slavery.

Plaintiffs timely appealed.

STANDARD OF REVIEW

We review a dismissal for lack of jurisdiction de novo. *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 979 (9th Cir. 2007) (citing *Arakaki v. Lingie*, 477 F.3d 1048, 1056 (9th Cir. 2007)). "A dismissal for failure to state a claim is reviewed de novo. All factual allegations in the complaint are accepted as true, and the pleadings construed in the light most favorable to the nonmoving party." *Nestle I*, 766 F.3d at 1018 (quoting *Abagninin v. AMVAC Chem. Corp.*, 545 F.3d 733, 737 (9th Cir. 2008) (internal citations omitted)).

DISCUSSION

The legal landscape has shifted since we last considered this case, including during the pendency of this appeal. The Supreme Court's decisions in *Jesner* and *RJR Nabisco, Inc. v. European Community*,136 S. Ct. 2090 (2016), require us to revisit parts of *Nestle I*.

I. Corporate Liability Post-*Jesner*

In *Nestle I*, we held that corporations are liable for aiding and abetting slavery after applying three principles from our en banc decision in *Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 746 (9th Cir. 2011) (en banc), *vacated on other grounds by Rio Tinto PLC v. Sarei*, 133 S. Ct. 1995 (2013). *Nestle I*, 766 F.3d at 1022. Our court in *Sarei* adopted a norm-specific analysis that determines "'whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued.'" *Sarei*, 671 F.3d at 760 (quoting *Sosa*, 542 U.S. at 732 n.20). "First, the analysis proceeds norm-by-norm; there is no categorical rule of corporate immunity or liability." *Nestle I*, 766 F.3d at 1022 (citing *Sarei*, 671 F.3d at 747–48). Under the second principal, "corporate liability under an ATS claim does not depend on the existence of international precedent enforcing legal norms against corporations." *Id.* (citing *Sarei*, 671 F.3d at 760–61). "Third, norms that are 'universal and absolute,' or applicable to 'all actors,' can provide the basis for an ATS claim against a corporation." *Id.* (citing *Sarei*, 671 F.3d at 764–65). We reaffirmed these principles in *Nestle I* and held that since the prohibition of slavery is "universal," it is applicable to all actors, including corporations. *Id.* at 1022.

As we have noted, the Supreme Court in *Jesner* held that foreign corporations cannot be sued under the ATS. *Jesner*, 138 S. Ct. at 1407. *Jesner* thus abrogates *Nestle I* insofar as it applies to foreign corporations. But *Jesner* did not eliminate all corporate liability under the ATS, and we therefore continue to follow *Nestle I*'s holding as applied to domestic corporations. *See Miller v. Gammie*, 335 F.3d 889, 893 (9th Cir. 2003) (en banc).

II. Extraterritorial ATS Claim

In *Kiobel v. Royal Dutch Petroleum Co. (Kiobel II)*, the Supreme Court held that the ATS does not have extraterritorial reach after applying a canon of statutory interpretation known as the presumption against extraterritorial application, which counsels that "[w]hen a statute gives no clear indication of an extraterritorial application, it has none." 569 U.S. 108, 115 (2013) (citing *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247, 248 (2010)). The Court acknowledged that the canon is not directly on point given that the ATS "does not directly regulate conduct or afford relief." *Id.* But given the foreign policy concerns the ATS poses, the Court stated that "the principles underlying the canon of interpretation similarly constrain courts considering causes of action that may be brought under the ATS." *Id.*

The Court in *Kiobel II* left the door open to the extraterritorial application of the ATS for claims made under the statute which "touch and concern the territory of the United States . . . with sufficient force to displace the presumption." *Id.* at 123 (citing *Morrison*, 561 U.S. at 264–73). Because "all the relevant conduct" in *Kiobel II* took place abroad, the Court did not need to delve into the

contours of the touch and concern test. *Id.* The only guidance the Court provided about the "touch and concern" test was that "mere corporate presence" would not suffice to meet it. *Id.*

In announcing the "touch and concern" test, the Supreme Court cited to its decision in *Morrison v. National Australia Bank Lt*. In *Morrison*, the Supreme Court undertook a two-step analysis, known as the "focus" test, to determine whether Section 10(b) of the Securities Exchange Act of 1934 applies extraterritorially. *Morrison*, 561 U.S. at 262. Under the first analytical step, the Court asked if there is any indication that the statute is meant to apply extraterritorially, and concluded there is not. *Id.* at 265. Under the second step, the Court asked what the "'focus' of congressional concern" was in passing Section 10(b). *Id.* The Court found that the "focus is not on the place where the deception originated, but on purchases and sales of securities in the United States. Section 10(b) [therefore] applies only to transactions in securities listed on domestic exchanges and domestic transactions in other securities." *Id.* at 249.

In the first appeal of this case, we reasoned that "*Morrison* may be informative precedent for discerning the content of the touch and concern standard, but the opinion in *Kiobel II* did not incorporate *Morrison's* focus test. *Kiobel II* did not explicitly adopt *Morrison's* focus test, and chose to use the phrase 'touch and concern' rather than the term 'focus' when articulating the legal standard it did adopt." *Nestle I*, 766 F.3d at 1028.

Defendants argue that the Supreme Court's recent decision in *RJR Nabisco* requires us to apply the focus test to claims under the ATS. In *RJR Nabisco*, the Court applied the

Morrison focus test to the Racketeer Influenced and Corrupt Organizations Act ("RICO") and reiterated that *Morrison* reflects a two-step inquiry regarding extraterritoriality. *Id.* at 2103. The Court further stated that "*Morrison* and *Kiobel* [also] reflect a two-step framework for analyzing extraterritoriality issues." *Id.* at 2101.

Because *RJR Nabisco* has indicated that the two-step framework is required in the context of ATS claims, we apply it here. *See Miller v. Gammie*, 335 F.3d at 893. First, we determine "whether the [ATS] gives a clear, affirmative indication that it applies extraterritorially." *RJR Nabisco*, 136 S. Ct. at 2101. The Court in *Kiobel II* already answered that the "presumption against extraterritoriality applies to claims under the ATS, and that nothing in the statute rebuts that presumption." *Kiobel II*, 569 U.S. at 185.

Because the ATS is not extraterritorial, then at the second step, we must ask whether this case involves "a domestic application of the statute, by looking to the statute's 'focus.'" *RJR Nabisco*, 136 S. Ct. at 2101. Defendants insist that any acts of assistance that took place in the United States are irrelevant because the extraterritoriality analysis should focus on the location where the principal offense took place or the location the injury occurred, rather than the location where the alleged aiding and abetting took place. We disagree.

The focus of the ATS is not limited to principal offenses. In *Mastafa v. Chevron Corp.*, the Second Circuit held that "the 'focus' of the ATS is on . . . conduct of the defendant which is alleged by plaintiff to be either a direct violation of the law of nations or . . . *conduct that constitutes aiding and abetting* another's violation of the law of nations." 770 F.3d at 185 (emphasis added); *see also Adhikari v. Kellogg Brown*

& Root, Inc., 845 F.3d 184, 199 (5th Cir. 2017) (stating that aiding and abetting conduct comes within the focus of the ATS). We also hold that aiding and abetting comes within the ATS's focus on "tort[s] . . . committed in violation of the law of nations." 28 U.S.C. § 1350.

As part of the step two analysis, we then determine "whether there is any domestic conduct relevant to plaintiffs' claims under the ATS." *Adhikari*, 845 F.3d at 195. Under *RJR Nabisco*, "if the conduct relevant to the statute's focus occurred in the United States, then the case involves a permissible domestic application *even if other conduct occurred abroad*." *RJR Nabisco*, 136 S. Ct. at 2101 (emphasis added).

In *Mastafa*, the Second Circuit held that the following constituted "specific, domestic conduct": "Chevron's [Iraqi] oil purchases, financing of [Iraqi] oil purchases, and delivery of oil to another U.S. company, all within the United States, as well as the use of a New York escrow account and New York-based 'financing arrangements' to systematically enable illicit payments to the Saddam Hussein regime that allegedly facilitated that regime's violations of the law of nations." *Mastafa*, 770 F.3d at 195.

In *Licci by Licci v. Lebanese Canadian Bank, SAL*, the Second Circuit again held that the Lebanese Canadian Bank's ("LCB") "provision of wire transfers between Hezbollah accounts" through a United States bank constituted domestic conduct which rebutted the presumption against extraterritoriality. 834 F.3d 201, 214–15, 219 (2d Cir. 2016). There, LCB made "numerous New York-based payments and 'financing arrangements' conducted exclusively through a

New York bank account." *Id.* at 217 (citing *Mastafa*, 700 F.3d at 191).

Like in *Mastafa* and *Licci*, plaintiffs have alleged that defendants funded child slavery practices in the Ivory Coast. Specifically, plaintiffs allege that defendants provided "personal spending money to maintain the farmers' and/or the cooperatives' loyalty as an exclusive supplier." Because we are required to "draw all reasonable inferences in favor" of plaintiffs, *Mujica v. Airscan*, Inc., 771 F.3d 580, 589 (9th Cir. 2014), we infer that the personal spending money was outside the ordinary business contract and given with the purpose to maintain ongoing relations with the farms so that defendants could continue receiving cocoa at a price that would not be obtainable without employing child slave labor. Contrary to the district court's reasoning, providing personal spending money to maintain relationship above the contract price for cocoa is not ordinary business conduct, and is more akin to "kickbacks." *Mastafa*, 770 F.3d at 175. Defendants also had employees from their United States headquarters regularly inspect operations in the Ivory Coast and report back to the United States offices, where these financing decisions, or "financing arrangements," originated. *Licci by Licci*, 834 F.3d at 217 (citing *Mastafa*, 770 F.3d at 191). In sum, the allegations paint a picture of overseas slave labor that defendants perpetuated from headquarters in the United States. "This particular combination of conduct in the United States . . . is both specific and domestic." *Id.* at 191. We thus hold that foregoing narrow set of domestic conduct is relevant to the ATS's focus.

III. Aiding And Abetting Claim

Defendants invite us to rule in the alternative that plaintiffs have not sufficiently alleged the elements of aiding and abetting. We think it unnecessary to reach that issue at this time. As we have explained, *Jesner* changed the legal landscape on which plaintiffs constructed their case. The operative complaint names several foreign corporations as defendants, and plaintiffs concede those defendants must be dismissed on remand. The operative complaint also discusses defendants as if they are a single bloc—a problematic approach that plaintiffs would do well to avoid. In light of *Jesner*, it is not possible on the current record to connect culpable conduct to defendants that may be sued under the ATS.

As we observed in *Nestle I*, "[i]t is common practice to allow plaintiffs to amend their pleadings to accommodate changes in the law, unless it is clear that amendment would be futile." *See Nestle I*, 766 F.3d at 1028 (citations omitted). We are mindful that this case has lingered for over a decade, and that delay does not serve the interests of any party. But we cannot conclude that amendment would be futile, so we remand with instructions that plaintiffs be given an opportunity to amend their complaint. On remand, plaintiffs must remove those defendants who are no longer amenable to suit under the ATS, and specify which potentially liable party is responsible for what culpable conduct.

CONCLUSION

For the reasons set forth above, we **REVERSE** the district court and **REMAND** to allow plaintiffs to amend their complaint to specify whether aiding and abetting

conduct that took place in the United States is attributable to the domestic corporations in this case.

SHEA, District Judge:

I concur in the result.

United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)
Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
  - ► A material point of fact or law was overlooked in the decision;
  - ► A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
  - ► An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ► Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ► The proceeding involves a question of exceptional importance; or
- ► The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms*.
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms*.

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
  - ► Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Jean Green, Senior Publications Coordinator);
  - ► and electronically file a copy of the letter via the appellate ECF system by using "File Correspondence to Court," or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

Form 10. Bill of Costs .....***(Rev. 12-1-09)***

United States Court of Appeals for the Ninth Circuit

BILL OF COSTS

This form is available as a fillable version at:
http://cdn.ca9.uscourts.gov/datastore/uploads/forms/Form%2010%20-%20Bill%20of%20Costs.pdf.

Note: If you wish to file a bill of costs, it MUST be submitted on this form and filed, with the clerk, with proof of service, within 14 days of the date of entry of judgment, and in accordance with 9th Circuit Rule 39-1. A late bill of costs must be accompanied by a motion showing good cause. Please refer to FRAP 39, 28 U.S.C. § 1920, and 9th Circuit Rule 39-1 when preparing your bill of costs.

_____ v. _____ 9th Cir. No. _____

The Clerk is requested to tax the following costs against: _____

Cost Taxable under FRAP 39, 28 U.S.C. § 1920, 9th Cir. R. 39-1	**REQUESTED** *(Each Column Must Be Completed)*				**ALLOWED** *(To Be Completed by the Clerk)*			
	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST
Excerpt of Record			$	$			$	$
Opening Brief			$	$			$	$
Answering Brief			$	$			$	$
Reply Brief			$	$			$	$
Other**			$	$			$	$
			TOTAL:	$			**TOTAL:**	$

* *Costs per page*: May not exceed .10 or actual cost, whichever is less. 9th Circuit Rule 39-1.

** *Other*: Any other requests must be accompanied by a statement explaining why the item(s) should be taxed pursuant to 9th Circuit Rule 39-1. Additional items without such supporting statements will not be considered.

Attorneys' fees **cannot** be requested on this form.

Continue to next page

Form 10. Bill of Costs - *Continued*

I, _____ , swear under penalty of perjury that the services for which costs are taxed were actually and necessarily performed, and that the requested costs were actually expended as listed.

Signature _____

("s/" plus attorney's name if submitted electronically)

Date _____

Name of Counsel: _____

Attorney for: _____

(To Be Completed by the Clerk)

Date _____ Costs are taxed in the amount of $ _____

Clerk of Court

By: _____ , Deputy Clerk