C.A. No. 10-56739

In the United States Court of Appeals for the Ninth Circuit

JOHN DOE I; JOHN DOE II; JOHN DOE III, INDIVIDUALLY AND ON BEHALF OF PROPOSED CLASS MEMBERS; AND GLOBAL EXCHANGE,
Plaintiffs-Appellants,

v.

NESTLÉ U.S.A.; ARCHER DANIELS MIDLAND COMPANY; AND CARGILL, INCORPORATED,
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 DEFENDANTS-APPELLEES NESTLÉ U.S.A.; ARCHER-DANIELS-MIDLAND COMPANY; AND CARGILL, INCORPORATED

Craig A. Hoover
Christopher T. Handman
HOGAN LOVELLS US LLP
555 Thirteenth Street., N.W.
Washington, DC 20004
Telephone: (202) 637-56000
Facsimile: (202) 637-5910

Attorneys for Defendant-Appellee Nestlé U.S.A.

Andrew J. Pincus
MAYER BROWN LLP
1999 K Street, N.W.
Washington, D.C. 20006
Telephone: (202) 263-3000
Facsimile: (202) 263-3300

Attorneys for Defendant-Appellee Cargill, Incorporated

Kristin Linsley Myles
MUNGER, TOLLES & OLSON LLP
560 Mission Street, 27th Floor
San Francisco, CA 94105-2907
Telephone: (415) 512-4000
Facsimile: (415) 512-4077

Daniel P. Collins
MUNGER, TOLLES & OLSON LLP
355 South Grand Avenue, 35th Floor
Los Angeles, CA 90071
Telephone: (213) 683-9100
Facsimile: (213) 687-3702

Attorney for Defendant-Appellee Archer Daniels Midland Company

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[1] For consistency, citations to the district court's opinion utilize the Excerpt of Record ("ER") pagination used in the parties' merits briefs in this Court. Those page numbers have been added to the bottom right-hand corner of each page.

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INTRODUCTION AND RULE 35(b) STATEMENT

The panel's decision addresses three of the most controversial and frequently-litigated questions arising under the Alien Tort Statute ("ATS"), creating conflicts with other courts of appeals as to each:

- The *mens rea* standard for aiding and abetting;
- The *actus reus* standard for aiding and abetting; and
- The test for determining when an ATS claim is impermissibly extraterritorial under *Kiobel v. Royal Dutch Petroleum,*133 S.Ct. 1659 (2013).

The panel's rulings fail to close the door to ATS aiding-and-abetting claims based entirely on ordinary commercial transactions in ordinary commercial goods—the first appellate court to countenance that result.

Moreover, the panel's cryptic decision leaves district courts and litigants in this Circuit to guess at what its legal standards mean. The decision will generate confusion and uncertainty in ATS actions—a category of cases for which clear legal standards are important, as this Court recognized when it considered these very issues *en banc* in *Sarei v. Rio Tinto, PLC*, 671 F.3d 736 (9th Cir. 2011), *vacated*, 133 S.Ct. 1995 (2013), *judgment of dismissal affirmed without opinion*, 722 F.3d 1109 (9th Cir. 2013). *See also Doe v. Unocal Corp.*, 395 F.3d 978 (9th Cir. 2003) (granting rehearing *en banc*), *dismissed*, 403 F.3d 708 (9th Cir. 2005).

Rehearing *en banc* is warranted.

STATEMENT

Plaintiffs' Allegations. Plaintiffs claim that, beginning when they were 14 or younger, they were forced to work at three cocoa plantations in Côte d'Ivoire; that they were not paid; that John Does I and II received minimal nourishment; and that each Plaintiff was guarded, kept at night in a locked room, and beaten. (ER258-60.)

Plaintiffs do *not* allege that Defendants engaged in any of this conduct. Rather, the acts allegedly were committed by unidentified "guards" and "overseer[s]" on "farm[s] and/or farmer cooperative[s]," none of whom is either a party here or employed by any party. (ER244, 251, 258-60.)

Plaintiffs' assertion that Defendants are subject to suit for aiding and abetting the alleged forced labor rests solely on the claimed commercial relationships between Defendants and various farmers in Côte d'Ivoire:

- Defendants allegedly purchased cocoa beans that they "knew or should have known" were harvested using forced labor and provided "ongoing financial support, including advance payments and personal spending money" to farmers or cooperatives with whom they had "exclusive supplier/buyer relationships." (ER251, 255.)

- Defendants allegedly provided "logistical" support to farms in Côte d'Ivoire by providing farmers with (1) "farming supplies, including fertilizers, tools and equipment"; (2) training in "growing and fermentation techniques"; and (3) "training" on "appropriate labor practices." (ER251, 257.) These practices allegedly required "frequent and ongoing visits to the farms" by Defendants or their agents. (*Id*.)
- Defendants allegedly failed to use their "economic leverage"—purportedly gained through "exclusive supplier/buyer agreements"—to "control and/or limit the use of forced child labor" by their suppliers. (ER255.) Plaintiffs quote from Defendants' policies condemning unlawful child labor and forced labor, and assert that Defendants should have used their leverage to enforce these policies more effectively. (ER251-57.)

These allegations are the entire basis of the aiding-and-abetting claim. Notably, Plaintiffs do *not* allege that any Defendant had an economic relationship with the particular farms or cooperatives where Plaintiffs allegedly suffered abuse. (ER250-59.) Nor do Plaintiffs allege that Defendants knew of forced labor on any farm from which Defendants purchased cocoa. Plaintiffs merely assert that Defendants knew of the "widespread use of child labor," and that non-governmental organizations have concluded that "many, if not most, of the

children working on Ivorian cocoa plantations are being forced to work." (ER254-55.)

The District Court's Ruling. After multiple rounds of extensive briefing on the motion to dismiss, the filing of an amended complaint, and Plaintiffs' further elaboration on the allegations in the amended complaint, the district court (Wilson, J.) issued a 161-page order dismissing the action. (Addendum ("Add.") B.)

Engaging in a detailed analysis of international-law norms governing aiding and abetting (ER47-110), the court held that a plaintiff asserting an ATS aiding-and-abetting claim must plead and prove that the defendant (1) "act[ed] with the specific intent (*i.e.*, for the purpose) of substantially assisting the commission of that crime"—the "*mens rea*" requirement; and (2) "carrie[d] out acts that have a substantial effect on the perpetration of a specific crime" under international law—the "*actus reus*" requirement. (ER63.)

As to *mens rea*, the court held that "Plaintiffs do not—and, as they conceded at oral argument on November 10, 2009, cannot—allege that Defendants acted with the purpose and intent that their conduct would perpetuate child slavery on Ivorian farms." (ER107-08.) As to *actus reus*, the court held that Plaintiffs' allegations established no more than "purchasing cocoa and assisting the production of cocoa," and that such "ordinary commercial transactions do not lead

to aiding and abetting liability." (ER106, emphasis omitted.) Plaintiffs failed to identify acts by the Defendants "that had a material and direct effect on the Ivorian farmers' specific wrongful acts." (*Id.*)

The district court gave Plaintiffs an opportunity to amend their allegations to satisfy these legal standards. (ER174.) Plaintiffs declined and conceded before this Court that they could not satisfy the district court's test. (Appellants' Opening Brief ("AOB") 48.)

The Panel's Decision. A panel of this Court vacated the district court's judgment and remanded for further proceedings. With respect to *mens rea*, the majority held that "the district court erred in requiring plaintiff-appellants to allege specific intent in order to satisfy the applicable purpose *mens rea* standard," citing *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 259 (2d Cir. 2009). (Add. 5.) Judge Rawlinson dissented from this ruling, stating that "the Plaintiff must plead that the Defendants acted with specific intent to violate the norms of international law" and that the district court, following the Second Circuit, properly equated purpose and specific intent. (Add. 6, 7-8.)

With respect to *actus reus*, the panel granted leave to amend the complaint "in light of recent authority," citing two 2013 decisions by international tribunals. (Add. 5.) The panel also granted leave to amend in light of the Supreme Court's decision in *Kiobel*, which held that the ATS does not apply extraterritorially. (*Id.*)

REASONS FOR GRANTING THE PETITION

I. The Panel's Aiding-And-Abetting Rulings Conflict With Decisions Of Other Circuits And Will Create Confusion In The District Courts.

This action, like the overwhelming majority of ATS cases, involves only an aiding-and-abetting claim. That is because most international-law norms apply only to government actors, and because claims invoking norms that apply more broadly (such as the prohibition against slave labor) invariably involve foreign principal wrongdoers who are beyond the jurisdiction of U.S. courts, lack substantial resources, or both—as is the case here. ATS claims therefore typically allege that private corporate defendants aided and abetted the government actors or other foreign parties alleged to have engaged in the prohibited acts. Specifying clear standards for aiding-and-abetting liability is therefore crucial to enable district courts to determine whether a plaintiff's allegations are legally sufficient.

The panel's cursory ruling does just the opposite. By creating conflicts with other courts of appeals, ignoring the ATS liability standard announced by the Supreme Court in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), and remanding without meaningful guidance on issues that the district court already addressed in depth, the panel's ruling will foster confusion and prolong the resolution of long-running ATS lawsuits. Moreover, the panel opens the door to aiding-and-abetting liability based on nothing more than ordinary commercial transactions in emerging markets.

A. The *Mens Rea* Ruling.

The district court expressly adopted the *mens rea* standard for ATS aiding-and-abetting liability applied by the Second Circuit in *Talisman* (ER52), holding that "the aider and abettor … acts with *the specific intent (i.e., for the purpose)* of substantially assisting the commission of th[e] crime." (ER63, emphasis added.) In reversing, the panel majority—also citing *Talisman*—held, without analysis, that the district court "erred in requiring plaintiff-appellants to allege specific intent in order to satisfy the applicable purpose *mens rea* standard." (Add. 5.)

By drawing this unexplained distinction between "specific intent" and "purpose" and holding that only the latter is required, the panel's *mens rea* ruling creates a conflict with both the Second and Fourth Circuits, sows confusion in Ninth Circuit caselaw, and leaves lower courts with no meaningful guidance.

The Second Circuit held in *Talisman* that an ATS claimant alleging aiding and abetting "must show that the defendant provided substantial assistance with the purpose of facilitating the alleged offenses." 582 F.3d at 247. It equated that purpose standard with a specific-intent requirement. *Id.* at 264 (interchangeably describing standard as requiring proof of "a defendant's *intent* to aid and abet the principal" and a "*purpose* to advance violations of international humanitarian law") (emphases added).

The Fourth Circuit in *Aziz v. Alcolac, Inc.*, 658 F.3d 388 (4th Cir. 2011), explicitly adopted the *Talisman* standard, using "specific intent" and "purpose" interchangeably to describe the test. *Id*. at 396 ("specific intent"), 400 ("adopting the specific intent mens rea standard"), 400 ("purposes"), 400-01 n.14 ("the Second Circuit's specific intent analysis").

The panel's ruling squarely conflicts with these decisions by holding that what is required is a showing of purpose, but not of specific intent. Judge Rawlinson recognized this conflict in her partial dissent, stating that *Talisman* and *Aziz* require a plaintiff to "plead that the Defendants acted with specific intent to violate the norms of international law" and that "[t]he district court utilized the same analysis as that used in [*Talisman*]." (Add. 6, 8.)

She explained that the majority's purported distinction between purpose and specific intent is untenable: "'purpose' corresponds to the concept of specific intent" in this context because a "person who causes a result prohibited" by law "is said to have acted purposely if he or she consciously desired that result, whatever the likelihood of that result ensuing from his or her actions." (Add. 7 n.1, quoting *United States v. Gracidas-Ulibarry*, 231 F.3d 1188, 1196 (9th Cir. 2000).) That is why *Talisman* and *Aziz* use the terms interchangeably in describing the applicable *mens rea* standard. (*Id.*)

The panel majority's invented distinction will also produce uncertainty in the lower courts. What does the "purpose" standard mean if it does not require a showing that the defendant specifically intended to facilitate the principal's violation? The majority provides no answers. But the district court on remand—and every other district court in this Circuit—now must apply this new, cryptic test. *En banc* review will prevent the confusion and waste of party and judicial resources that will result.

The panel's decision conflicts with *Talisman* in a second, even more fundamental respect. The Second Circuit did not merely announce a *mens rea* legal standard; it went on to apply that standard to the facts before it. If the panel actually followed *Talisman*'s analysis, it could only have upheld the district court's dismissal.

The *Talisman* plaintiffs alleged that an oil company "helped build all-weather roads and improved airports" for Sudan's government, "notwithstanding awareness that this infrastructure might be used for attacks on civilians"; paid royalties to Sudan, knowing the funds might be used by the government to commit human-rights abuses; and "provided fuel for military aircraft taking off on bombing missions." 582 F.3d at 262.

The Second Circuit rejected the claims, holding that the plaintiffs' evidence tended to show only *knowledge* that doing business in Sudan might facilitate

human-rights violations—a showing the court found insufficient. *Id.* What plaintiffs had to show—and could not—was that "the company acted with the *purpose* of harming civilians." *Id.* at 248 (emphasis added).

The allegations here are far more innocuous than the allegations the Second Circuit found wanting in *Talisman*—as the district court held. (ER107.) At most, these allegations (*see* pages 2-4, *supra*) amount to claims that Defendants provided local actors with lawful resources in connection with ordinary commercial transactions, knowing that those local actors might—or might not—put those lawful resources to unlawful ends. But that is *precisely* the theory the Second Circuit rejected as insufficient. Despite citing *Talisman*, therefore, the panel's analysis squarely conflicts with that decision.

For these reasons, this Court should rehear the case *en banc*, reject the panel majority's distinction between purpose and specific intent, and uphold the district court's dismissal. Plaintiffs conceded before the district court (ER107-08 & n.52) and before this Court (AOB 48) that they could not satisfy the specific intent standard. A remand would be futile, particularly given Plaintiffs' rejection of the district court's invitation to replead (*see* page 5, *supra*).

B. The *Actus Reus* Ruling.

After carefully analyzing numerous international-law authorities addressing the *actus reus* standard for aiding-and-abetting liability (ER48-52), the district

court concluded that an ATS plaintiff must allege acts by the purported aider and abettor "that have a substantial effect on the perpetration of a specific crime" (ER63). It further determined that all of the particular alleged conduct relied upon by Plaintiffs had been specifically, and uniformly, rejected as bases of liability by the international-law authorities. (ER84-106.) "[T]he overwhelming conclusion" from Plaintiffs' allegations "is that Defendants were purchasing cocoa and assisting the production of cocoa. It is clear from the caselaw that ordinary commercial transactions do not lead to aiding and abetting liability." (ER106.)

The panel did not address the district court's detailed analysis, instead summarily granting leave to amend the amended complaint "in light of" two *conflicting* recent decisions by international criminal tribunals. (Add. 5.) That determination warrants *en banc* review for three reasons.

First, the panel's ruling conflicts with ATS decisions of the Supreme Court, this Court, and other courts of appeals.

Sosa holds that an international-law norm is actionable under the ATS only if it meets a "demanding standard of definition"—the same "definite content and acceptance among civilized nations" that piracy, violations of safe passage, and infringement of the rights of ambassadors had in 1789. 542 U.S. at 738 n.30, 732. When international-law sources apply divergent standards, *Sosa* requires a court to select the most restrictive test, because that is only that one that "has the requisite

'acceptance among civilized nations.'" *Talisman*, 582 F.3d at 259 (quoting *Sosa*, 542 U.S. at 732).

The *Sosa* standard thus closely resembles the test applied in determining whether a government official has violated a "clearly established" constitutional right and therefore is subject to monetary liability under 42 U.S.C. § 1983. *Sosa*, 542 U.S. at 743 (Scalia, J., concurring in part and in judgment) ("*Bivens* provides perhaps the closest analogy"). A "robust 'consensus of cases'" is required to satisfy that test. *Ashcroft v. al-Kidd*, 131 S.Ct. 2074, 2084 (2011).

Finding that international-law tribunals applied divergent *actus reus* tests, the district court faithfully followed *Sosa* by applying the more restrictive standard—that aiding and abetting requires acts that "have a substantial effect on the perpetration of a specific crime." (ER63.) The conflicting cases cited by the panel cannot change that result.

One held that aiding and abetting requires acts "'specifically directed to assist … the perpetration of a certain specific crime.'" *Prosecutor v. Perišić*, No. IT-04-81-T, ¶28, n.70 (ICTY Appeals Chamber Feb. 28, 2013). The other, by contrast, rejected that specific-direction standard. *Prosecutor v. Taylor*, No. SCSL-03-01-A Judgment, at ¶¶475-46 & n.1442 (SCSL Sept. 26, 2013).

Sosa mandates adoption of the more restrictive standard, because it alone imposes liability consistent with all of the international-law sources. The panel's

remand thus conflicts with *Sosa*'s requirement of a universally accepted and well-defined norm, and with decisions of this and other circuits applying *Sosa*. *Abagninin v. AMVAC Chem. Corp.*, 545 F.3d 733, 738 (9th Cir. 2008) (applying more restrictive definition of genocide under ATS); *Talisman*, 582 F.3d at 259 (applying stricter *mens rea* standard). *En banc* review is warranted for that reason alone.

Second, the panel's remand on *actus reus*—like its enigmatic remand on *mens rea*—leaves the parties and the district court in this and other ATS cases with no guidance regarding the governing legal standard. Plaintiffs will not know the standard against which their allegations will be judged, and defendants and district courts will be left in the dark regarding the governing law as well. The inevitable result will be wasted resources and prolonged litigation.

There is no reason to send this purely legal question back to the district court. The district court's opinion analyzes the authorities in great detail; the briefs before this Court address the issue thoroughly; and the parties filed Rule 28(j) letters addressing the two 2013 decisions. The panel's failure to specify the governing *actus reus* standard will produce significant, tangible harm in the form of wasted resources in all aiding-and-abetting cases pending in this Circuit.

Nor is a remand necessary. If the district court's determination is correct—and *Sosa*'s "definite content and acceptance" standard precludes a different result

based on two conflicting 2013 decisions—then the dismissal should be affirmed because Plaintiffs already acknowledged their inability to allege facts meeting the legal standard when they rejected the district court's invitation to file another amended complaint.

Third, as the district court explained, Plaintiffs' allegations amount to "ordinary commercial transactions"—purchases of commodities, associated logistical support for farmers, and the "economic leverage" inherent in such relationships. By suggesting that such allegations could satisfy the *actus reus* requirement, the panel leaves the door open to claims that companies should be held liable anytime they do business in a nation alleged to have engaged in human-rights violations. As the district court recognized, however, the international-law authorities specifically and definitively *preclude* that result. (ER78-83, 84-106.)

Indeed, permitting such claims is the functional equivalent of empowering "private parties … [to] impose embargos or international sanctions through civil actions in United States courts." *Talisman*, 582 F.3d at 264. That improperly "imping[es] on the discretion of the Legislative and Executive Branches in managing foreign affairs." *Sosa*, 542 U.S. at 727.

II. The Extraterritoriality Ruling Creates A Circuit Conflict And Provides No Guidance On This Frequently-Recurring Issue.

Although the district court did not reach the issue, Defendants argued below and in this Court that the complaint should be dismissed on the ground that the

ATS does not apply extraterritorially. While the case was pending in this Court, the Supreme Court issued its ruling in *Kiobel*, holding "that the presumption against extraterritoriality applies to claims under the ATS, and that nothing in the statute rebuts that presumption." 133 S.Ct. at 1669. The parties filed letter briefs addressing *Kiobel*.

Without explaining what facts would be relevant under *Kiobel*, the panel granted leave to amend the complaint in light of *Kiobel*. That decision merits *en banc* review for three reasons.

First, the application of *Kiobel* in cases involving U.S. corporations, and the type of U.S. involvement necessary to make a case "domestic" and therefore potentially actionable under the ATS, are questions of great importance that arise in every ATS case. Remanding with no guidance on how *Kiobel* applies will generate confusion in this and other pending ATS cases. The *en banc* Court should resolve this purely legal question and provide the needed guidance.

Second, Plaintiffs' claims are barred by a straightforward application of *Kiobel* and the Supreme Court's other extraterritoriality precedents. Failing to correct the Panel's decision would needlessly prolong not only this case but other pending ATS actions.

Kiobel specified that the test for whether the rule against extraterritorial application precludes a claim is set out in *Morrison v. National Australia Bank*,

130 S.Ct. 2869 (2010). *See Kiobel*, 133 S.Ct. at 1669 (citing *Morrison*, 130 S.Ct. at 2883-88).

Morrison held that Section 10(b) of the Securities Exchange Act of 1934 did not apply extraterritorially, and went on to determine that a fraud claim involving securities traded on foreign exchanges was impermissibly extraterritorial, even though the false statements emanated from the U.S. from U.S. defendants, who supposedly committed other acts in the U.S. relating to the fraud. 130 S.Ct. at 2884-88. The relevant question, the Court held, was not the domicile of the parties or the location of some acts related to the violation, but rather the location of the "event [or] … relationship [that] was the 'focus' of congressional concern" under the statute. *Id*. at 2884. Because the "focus" of the Exchange Act is on the purchase and sale of securities, the dispositive question was where the *trades* took place. *Id*. at 2884-85. The Court expressly rejected the view that a claim was not extraterritorial simply because it involved "significant conduct in the United States that is material to the fraud's success." *Id*. at 2886.

Morrison explained its "focus" test by discussing two labor precedents, *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 247 (1991) ("*Aramco*"), and *Foley Brothers v. Filardo*, 336 U.S. 281 (1949). The *Morrison* Court noted that the Title VII plaintiff in *Aramco* was hired by a U.S. employer and was a U.S. citizen, but that "neither that territorial event nor that relationship was the 'focus'

of congressional concern." 130 S.Ct. at 2884. Rather, in both *Aramco* and *Foley* the focus of the labor laws was the employment relationship. Because that relationship was overseas, the defendants' domestic citizenship—even with a U.S. plaintiffs and significant U.S. connections—did not make the case "domestic." *Id.*

Applying this standard here is straightforward. The focus of congressional concern in enacting the ATS was on "tort[s] … committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. *See Sosa*, 542 U.S. at 715 (concern was a "narrow set of violations of the law of nations"); *Kiobel*, 133 S.Ct. at 1666; *id*. at 1670 (Alito, J., concurring). And the "focus" of the labor-related international-law norms that Plaintiffs invoke here—the international condemnation of forced labor (*see* AOB 3 n.2)—is on the labor relationship itself, as with the labor laws at issue in *Aramco* and *Foley*.

Here, as in *Kiobel*, "all the relevant conduct took place outside the United States." 133 S.Ct. at 1669. Plaintiffs allege that the forced labor took place in Côte D'Ivoire. (ER245 (Plaintiffs forced to "work harvesting and/or cultivating cocoa beans" in "Cote D'Ivoire"); *see also* ER258-59.) Although Plaintiffs argue that "significant conduct took place in the United States," Pl. Ltr. Br. 3, they point only to Defendants' alleged assistance with farming activities *in Côte d'Ivoire*—namely, the provision of "ongoing financial support," "farming supplies," and "training." (ER251-55.)

A remand is pointless because even if Plaintiffs could amend their complaint to assert that some tangentially-related activities occurred in the U.S., that would not satisfy *Morrison's* "focus" test. Under *Morrison*, even "significant conduct" in the U.S. that advances a violation elsewhere is insufficient. 130 S.Ct. at 2886. *See also United States v. Chao Fan Xu*, 706 F.3d 965, 979 (9th Cir. 2013) ("[u]nder *Morrison*, we look 'not upon the place where the deception originated,' but instead on the connection of the challenged conduct to the proscription in the statute"; what mattered for RICO purposes was not where an unlawful scheme was planned, but where it was "executed and perpetrated").

Nor does Defendants' domestic citizenship change the analysis, as the Supreme Court has made clear. *Aramco*, 499 U.S. at 247, 259 (application of statute impermissibly extraterritorial); *Foley*, 336 U.S. at 285 (same); *see also Morrison*, 130 S.Ct. at 2884.

Third, the Second Circuit reached this precise conclusion in *Balintulo v. Daimler AG*, 727 F.3d 174 (2d Cir. 2013), rejecting the very arguments that Plaintiffs advanced in this Court. The panel's standardless remand conflicts with the Second Circuit's determination.

The *Balintulo* plaintiffs sued U.S. companies under the ATS, alleging that their South African subsidiaries aided and abetted apartheid-era abuses in South Africa by doing business in that region. The court held that *Kiobel* "plainly bars"

ATS suits "like this one, alleging violations of customary international law based solely on conduct occurring abroad." *Id.* at 182. It determined that neither the defendants' U.S. citizenship nor the assertion that they were vicariously liable for their subsidiaries' actions took the case outside of *Kiobel*. *Id.* at 189-90. "Nothing in the Court's reasoning in *Kiobel* suggests that the rule of law it applied somehow depends on a defendant's citizenship." *Id.* at 190 n.24.

The *Balintulo* plaintiffs—like Plaintiffs here—argued that the defendants' "affirmative steps in this country" were relevant to the alleged aiding-and-abetting claim and sought a remand to amend the complaints. Plaintiffs-Appellees Ltr. Br. 13, *Balintulo*, *supra*, No. 09-2778-cv (2d Cir. May 24, 2013). The Second Circuit rejected both arguments.

This Court should reconsider the case *en banc* to clarify the law regarding this important and recurring issue.[2]

[2] The panel's blanket ruling that "corporations can face liability for [ATS] claims" (Add. 4) provides further grounds for *en banc* review. It conflicts with the Second Circuit's holding in *Kiobel*, which the Supreme Court affirmed on other grounds and the Second Circuit has since reaffirmed. 621 F.3d 111, 149 (2d Cir. 2010), *aff'd on other grounds*, 133 S.Ct. 1659 (2013); *Balintulo*, 727 F.3d at 191 n.26. The panel's categorical approach also ignores the majority opinion in *Sarei*, which concluded that corporate liability must be analyzed on a norm-specific basis. 671 F.3d at 748.

CONCLUSION

Rehearing or rehearing *en banc* should be granted.

DATE: January 9, 2014 Respectfully submitted,

HOGAN LOVELLS US LLP

By: */s/ Craig A. Hoover*
Craig A. Hoover
Attorneys for Defendant-Appellee
NESTLÉ U.S.A.

MUNGER, TOLLES & OLSON LLP

By: */s/ Kristin L. Myles*
Kristin L. Myles
Attorneys for Defendant-Appellee
ARCHER DANIELS MIDLAND COMPANY

MAYER BROWN LLP

By: */s/ Andrew J. Pincus*
Andrew J. Pincus[3]
Attorneys for Defendant-Appellee
CARGILL, INCORPORATED

[3] Pursuant to Ninth Cir. R. 25-5(f), the filing attorney attests that all other parties on whose behalf this brief is submitted concur in the filing's content.

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 typeface of 14 points or more, and contains 4,171 words (petitions and answers must not exceed 4,200 words).

Dated: January 9, 2014

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

CERTIFICATE OF SERVICE

I hereby certify that on January 9, 2014, 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: January 9, 2014

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