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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

Keo Ratha, Sem Kosal, Sophea Bun, Yem Ban, Nol Nakry, Phan Sophea, and Sok Sang,

Plaintiffs,

v.

Phatthana Seafood Co., Ltd.; S.S. Frozen Food Co., Ltd.; Doe Corporations 1-5; Rubicon Resources, LLC; and Wales & Co. Universe Ltd.,

Defendants.

Case No. 2:16-cv-04271-JFW (ASx)
Hon. John F. Walter

NOTICE OF MOTION AND MOTION TO DISMISS COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES

[F.R.C.P. 12(b)(1) & 12(b)(6)]

Hearing
Date: Monday, October 17, 2016
Time: 1:30 p.m.
Courtroom: 16 Spring St. Floor, 312 N. Spring Street

Complaint Filed: June 15, 2016

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NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on October 17, 2016 at 1:30 p.m. in Courtroom 16, Spring St. Floor of the United States District Court, Central District of California, located at 312 N. Spring Street, Los Angeles, CA 90012-4701, Defendants Phatthana Seafood Co., Ltd. ("Phatthana"), S.S. Frozen Food Co., Ltd. ("S.S. Frozen"), Rubicon Resources, LLC ("Rubicon"), and Wales & Co. Universe Ltd. ("Wales") will and hereby do move for an order dismissing, without leave to amend, the Complaint of Plaintiffs Keo Ratha, Sem Kosal, Sophea Bun, Yem Ban, Nol Nakry, Phan Sophea, and Sok Sang on the following grounds:

COUNT I Against Defendants Phatthana and S.S. Frozen (¶¶102-122)

(1) Pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure ("FRCP"), this Court does not have subject matter jurisdiction over Count I brought against these Defendants under the Trafficking Victims Protection Reauthorization Act ("TVPRA"), 18 U.S.C. §1595, for alleged peonage, involuntary servitude, forced labor, trafficking, and document servitude because the conduct complained of occurred outside the United States and the Complaint does not fall within the TVPRA's limited grant of extraterritorial jurisdiction for criminal prosecutions. (*See* 18 U.S.C. §1596.)

(2) Pursuant to FRCP Rule 12(b)(6), the Complaint fails to sufficiently allege violations of the TVPRA by these Defendants.

COUNT II Against Defendants Rubicon and Wales (¶¶123-131)

(3) Pursuant to FRCP Rule 12(b)(1), this Court does not have subject matter jurisdiction over Count II brought against these Defendants under the TVPRA, 18 U.S.C. §1595, for knowingly benefitting from peonage, involuntary servitude, forced labor, trafficking, and document servitude because the underlying violations of the TVPRA occurred outside the United States and the Complaint does not fall

within the TVPRA's limited grant of extraterritorial jurisdiction for criminal prosecutions. (*See* 18 U.S.C. §1596.)

(4) Pursuant to FRCP Rule 12(b)(6), the Complaint fails to sufficiently allege violation of the TVPRA by these Defendants because the underlying violations of the TVPRA and scienter are not sufficiently alleged.

COUNT III Against All Defendants (¶¶132-140)

(5) Pursuant to FRCP Rule 12(b)(1), this Court does not have subject matter jurisdiction over Count III brought against all Defendants under the Alien Tort Statute ("ATS"), 28 U.S.C. §1350, because it is pre-empted by the TVPRA. (*See Sosa v. Alvarez-Machain*, 542 U.S. 692, 124 S.Ct. 2739, 159 L.E.2d 718 (2004).)

(6) Pursuant to FRCP Rule 12(b)(1), this Court does not have subject matter jurisdiction under the ATS because the presumption against extraterritoriality applies to ATS claims and "all the relevant conduct took place outside the United States." (*See Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659, 185 L.E.2d 671 (2013).)

(7) Pursuant to FRCP Rule 12(b)(1), this Court does not have subject matter jurisdiction over Plaintiffs' ATS claims because the Complaint does not allege any violation of the law of nations or customary international law by the Defendants, which is a predicate for ATS jurisdiction; in the alternative, pursuant to Rule 12(b)(6), the Complaint does not sufficiently allege any violation of the law of nations or customary international law. (*See Abagninin v. AMVAC Chem. Corp.*, 545 F.3d 733 (9th Cir. 2008); *Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 744 (9th Cir. 2011) (en banc), *vacated on other grounds by* --- U.S. ---, 133 S.Ct. 1995 (2013); *Doe I v. Nestle USA, Inc.*, 766 F.3d 1013 (9th Cir. 2014); *In re Estate of Marcos Human Rights Litigation*, 25 F.3d 1467 (9th Cir. 1994).)

(8) Pursuant to FRCP Rule 12(b)(1), this Court does not have subject matter jurisdiction over Plaintiffs' ATS claims because international law does not extend the scope of liability to private actors such as corporations for the type of conduct

alleged; in the alternative, pursuant to Rule 12(b)(6), the Complaint does not sufficiently allege any violation of international law for which private actors such as corporations can be liable. (*See Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659, 185 L.E.2d 671 (2013); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 124 S.Ct. 2739, 159 L.E.2d 718 (2004).)

This Motion is based on this Notice of Motion and Motion, the attached Memorandum of Points and Authorities, the concurrently filed Request for Judicial Notice, all other pleadings and papers on file in this action, any oral argument at the hearing on the Motion, and any further matters of which this Court may take judicial notice.

This Motion is made following the conference of counsel pursuant to Local Rule 7-3, which took place on August 3, 2016.

Dated: August 10, 2016

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

By */s/ Bryan D. Daly*
BRYAN D. DALY
Attorneys for Defendants Phatthana Seafood Co., Ltd.; S.S. Frozen Food Co., Ltd.; Rubicon Resources, LLC; and Wales & Co. Universe Ltd.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This lawsuit paints a dire picture of worldwide human trafficking, and then sensationalizes reports of abuses of workers in the seafood industry in Thailand. (Compl. ¶¶30-57) The alleged plight of the seven Plaintiffs—all rural Cambodians seeking a better life—may engender sympathy, but then so do the living and working conditions of hundreds of millions of workers around the world. The critical questions are whether: (1) this civil lawsuit brought by foreign nationals—as opposed to government action—is the appropriate means of policing conditions in the seafood industry in Thailand; and (2) the four defendants—two seafood processors, an importer, and a marketing and distribution company—should be put in the position of having to, in effect, defend an entire industry operating in foreign territory. We submit that the answer to these questions is "No."

Rather than pursuing their claims in the forum where the alleged abuses took place and relevant witnesses and documents are more readily available, Plaintiffs seek to enlist this Court's assistance to regulate the labor practices of foreign companies with respect to foreign workers and second-guess decisions made by the Thai government regarding those practices.[1] This is precisely why United States courts must exercise caution when litigants seek jurisdiction over foreign labor disputes. As cogently stated by one court in dismissing "forced labor" claims brought under the ATS:

> The court is confident that improvements in … wages and working conditions for many millions of people would make the world a better place. Yet federal courts in the United States must also keep in mind the [Supreme] Court's caution against having American courts decide and enforce limits on the power of foreign governments over their own citizens. How much more intrusive would American law be if American courts took it upon themselves to determine the minimum

[1] The Thai government has certified that the factory at issue was an "excellent" or "outstanding" establishment with respect to labor practices during the entire time Plaintiffs allege they were victimized. Official copies of these certifications are being obtained for submission with the Reply Memorandum.

> requirements for wages and working conditions throughout the world? And to enforce those requirements here against any international business with property that could be found in the United States? Beyond situations presenting clear violations of specific, universal, and obligatory international law norms, these are matters left to diplomacy, legislation, publicity, and economic pressure from consumers, and not to the instincts of judges who would love to issue a writ to make the world a better place for some of the poorest and least fortunate members of the human family.

(*John Roe I v. Bridgestone Corp.*, 492 F.Supp.2d 988, 1020 (S.D. Ind. 2007).)

In an attempt to obtain federal jurisdiction, the Complaint alleges that Thai seafood is imported into the United States. But all of the alleged trafficking and forced labor occurred in Cambodia and Thailand. Thus, Plaintiffs' claims do not satisfy the limited grant of extraterritorial jurisdiction under the TVPRA and the presumption against extraterritorial jurisdiction applicable to claims under the ATS. Plaintiffs' ATS claims are also preempted by the TVPRA, since they are premised on alleged trafficking. In addition to the extraterritorial bar and preemption, the Complaint fails to sufficiently allege actionable conduct. The TVPRA is a criminal statute that provides a civil remedy for victims of trafficking. Plaintiffs were allegedly misled by employment recruiters into taking jobs at a seafood factory that involved less pay and more expenses and worse working and housing conditions than Plaintiffs expected. However, alleged deceptive practices by employment recruiters and difficult working conditions simply do not rise to the level of the predicate criminal conduct required. The ATS provides jurisdiction over violations of the law of nations or customary international law, such as genocide, war crimes, torture, and slavery. The conduct alleged does not rise to this level, particularly with respect to private actors such as corporations.

Plaintiffs already have possession of all of the relevant facts and could be expected to have painted the worst picture possible of how they were treated. Yet

they still come up short. The Complaint should be dismissed without leave to amend.[2]

II. BACKGROUND ALLEGATIONS

The Plaintiffs are Cambodian nationals. (Compl. ¶¶7-13.) In 2010 and 2011, while Plaintiffs were living in rural Cambodia, employment recruiters offered them jobs in the seafood industry in Thailand. (*Id.*) Some were told what the pay would be (*id.* ¶¶7, 8 & 13); others were not (*id.* ¶¶10 & 12). Some were told that they would have "free" accommodation (*id.* ¶¶7, 8, 12); others were not (*id.* ¶¶10 & 13). The Plaintiffs went into debt to pay recruitment fees—money was owed to the recruiters (*id.* ¶¶7) or third party lenders (*id.* ¶¶8, 10, 12 &13). Some Plaintiffs obtained passports with the assistance of recruiters (*id.* ¶¶7, 8 & 12); some did not have passports and appear not to have entered Thailand legally (*id.* ¶¶10 & 13). The recruiters transported the Plaintiffs to Thailand. (*Id.* ¶¶7-13.) The recruiters held the passports of the Plaintiffs who had them. (*Id.* ¶¶7, 8 & 12.) Two Plaintiffs who were traveling together (Ban and Nakry) were aware that others traveling with them were allegedly beaten, apparently to avoid detection at or near the border. (*Id.* ¶10.) None of the Plaintiffs alleges that he or she was beaten en route to the factory.

Once Plaintiffs arrived at the factory—alleged to belong to Phatthana Seafood Co., Ltd. ("Phatthana")—factory employees held the passports of Plaintiffs who had them. (Compl. ¶¶7 8 & 12.)[3] The Complaint does not allege misrepresentation about actual working conditions, *e.g.*, an eight-hour work day. (*Id.* ¶¶7, 8, 10 & 13.)

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[2] Because Plaintiffs' corporate liability theory (whether agency, joint venture, single enterprise, or alter ego) is not clearly articulated—frankly, it is muddled. This Motion focuses on subject matter jurisdiction and the sufficiency of substantive allegations. Should the Complaint survive the pleading stage, Defendants will challenge these theories in the context of summary judgment.

[3] Phatthana is alleged to have control of the factory. (Compl. ¶15.) S.S. Frozen Food Co., Ltd. ("S.S. Frozen") is alleged to "share[] facilities, resources, and management" with Phatthana. (*Id*, ¶16.) Rubicon Resources, LLC ("Rubicon") is alleged to market and distribute Thai seafood products in the United States. (*Id.* ¶19.) Wales & Co. Universe Ltd. ("Wales") is alleged to be involved in the importation of Thai seafood products into the United States. (*Id.*, ¶22.)

Although some Plaintiffs were paid less than the recruiters represented and Plaintiffs had to pay for living expenses and work supplies, their monthly pay was still substantially more than the average annual per capita income of a rural Cambodian (*e.g.*, Plaintiff Ratha was paid $135 per month—more than four times the average). (*Id.* ¶7.) The Complaint paints a relatively harsh picture by Western standards, *e.g.*, sleeping on concrete floors (*id.* ¶¶7, 8), not always enough to eat (*id.* ¶¶7, 8, 10), "inadequate" or less than "effective" "protective equipment" or "gear" (*id.* ¶¶7 & 12). Some Plaintiffs were "worried" or "afraid"—about how their families back in Cambodia were doing (*id.* ¶8) or that they would be arrested or deported (*id.* ¶¶13). Some Plaintiffs used their family real estate as collateral for third party loans. (*Id.* ¶¶8, 12, & 13.) But the Complaint does not allege that any of the Defendants knew of Plaintiffs' family situations or threatened Plaintiffs' families, knew of the third-party loans Plaintiffs had taken out, or actually threatened to have any of the Plaintiffs arrested or deported. "Several" unnamed Plaintiffs "heard or saw" other workers being physically "punished"—whether one or more times is not stated. (*Id.* ¶84.) But none of the Plaintiffs alleges that he or she was beaten or physically restrained during their stay in Thailand. Between January and October 2012, all of the Plaintiffs returned to Cambodia. (*Id.* ¶¶7-13.)

III. ARGUMENT

A. Legal Standard

We presume this Court is thoroughly familiar with the standards applicable to Rule 12(b)(6) motions. It is worth distinguishing, the grounds for dismissal based on extraterritoriality, preemption, and ATS jurisdiction, which concern subject matter jurisdiction. On a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), the plaintiff bears the burden of establishing that the court has jurisdiction. (*Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377, 114 S.Ct. 1675 (1994); *In re Wilshire Courtyard*, 729 F3d 1279, 1284 (9th Cir. 2013).) A federal court generally may not rule on the merits of a case without first

determining that it has jurisdiction. (*Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 93-102, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998).) "Because subject-matter jurisdiction focuses on the court's power to hear the plaintiff's claim, a Rule 12(b)(1) motion imposes on the court an affirmative obligation to ensure that it is acting within the scope of its jurisdictional authority." (*Grand Lodge of the Fraternal Order of Police v. Ashcroft*, 185 F.Supp.2d 9, 13 (D.D.C. 2001).) "For this reason, 'the [p]laintiff's factual allegations in the complaint ... will bear closer scrutiny in resolving a 12(b)(1) motion' than in resolving a 12(b)(6) motion for failure to state a claim." (*Id.*, at 13-14, quoting 5A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* §1350 (2d ed. 1987).)

B. The Complaint Does Not Allege A Basis For Extraterritorial Jurisdiction For Civil Actions Under The TVPRA

The civil remedy provision of the TVPRA, provides:

> (a) An individual who is a victim ***of a violation*** of this chapter may bring a civil action against the perpetrator (or whoever knowingly benefits, financially or by receiving anything of value from participation in a venture which that person knew or should have known has engaged in ***an act in violation*** of this chapter) in an appropriate district court of the United States and may recover damages and reasonable attorneys fees.

(18 U.S.C. §1595(a) [emphasis added].) §1595 thus requires an "underlying violation" of one of the TVPRA's criminal provisions. (*St. Louis v. Perlitz* (D. Conn. Apr. 8, 2016, No. 3:13-CV-1132) 2016 WL 1408076, at *3.) Given that the alleged underlying violations here occurred in Cambodia and Thailand, an insurmountable obstacle is the Complaint's failure to allege a basis for TVPRA extraterritorial jurisdiction. "[U]nless there is the affirmative intention of the Congress clearly expressed to give a statute extraterritorial effect, … it has none." (*Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 255, 130 S.Ct. 2869, 2873, 177 L.Ed.2d 535 (2010).) As explained below, the TVPRA's limited extraterritorial jurisdiction does not apply to Plaintiffs' civil remedy action based on conduct by foreign companies that allegedly victimized Plaintiffs in Cambodia and Thailand.

1. The Alleged Underlying Violations Occurred Outside the United States

"[T]he focus and the touchstone of the territoriality inquiry of the TVPA is where the forced labor occurred and to where the victims were trafficked." (*Tanedo v. East Baton Rouge Parish School Bd.* (C.D. Cal. Aug, 27, 2012, No. SA CV10-01172) 2012 WL 5378742, at *6.)[4] "Thus, the TVPA is not applied extraterritorially when it addresses trafficking people *into* the United States to perform forced labor here, even if done by means of threats of serious harm in part made elsewhere." (*Id.*) Thus, even where alleged forced labor in foreign countries ***benefits*** parties in the United States, application of the TVPRA will still be extraterritorial. (*Id.* ("application of the TVPA to laborers who worked entirely in Liberia, even for an American employer, was deemed an extraterritorial application of the TVPA"), citing *Bridgestone, supra*, 492 F.Supp.2d at 999-1004.)

Plaintiffs therefore cannot overcome the impediment of extraterritorial jurisdiction just by alleging that Defendants benefited from the sale of seafood in the United States. Regardless of whether alleged trafficking and forced labor in Cambodia and Thailand produced products sold in the United States, the underlying violations are extraterritorial and must overcome the presumption against extraterritoriality.

2. The Complaint Does Not Satisfy the TVPRA's Limited Extraterritorial Jurisdiction For Criminal Prosecutions

In 2008, the TVPRA was amended to add extraterritorial jurisdiction:

> (a) In general.—In addition to any domestic or extra-territorial jurisdiction otherwise provided by law, the courts of the United States have extra-territorial jurisdiction over any offense (or any attempt or conspiracy to commit an offense) under section 1581, 1583, 1584, 1589, 1590, or 1591 if –
>
> (1) an alleged offender is a national of the United States or an alien lawfully admitted for permanent residence (as those terms are defined

[4] Prior to its 2008 amendment, the TVPRA was known as the Trafficking Victims Protection Act ("TVPA"). TVPRA is used here unless a quotation uses TVPA

> in section 191 of the Immigration and Nationality Act (8 U.S.C. 1101)); or
>
> (2) an alleged offender is present in the United States, irrespective of the nationality of the alleged offender.

(18 U.S.C. §1596(a)(1) & (2).) For the following reasons, the Complaint does not come within §1596's limited extraterritorial jurisdiction.

a. §1596 Should Be Limited To Criminal Actions

§1596 expressly allows the United States to prosecute criminal offenses under the TVPRA that occur outside the United States under certain conditions. (*See* 18 U.S.C. §1596(b).) §1596 does not, however, mention extraterritorial jurisdiction with respect to the TVPRA's civil remedy provision, which had been in effect for five years by the time §1596 was enacted. Even where a statute "provides for some extraterritorial application, the presumption against extraterritoriality operates to limit that provision to its terms." (*Morrison, supra*, 561 U.S. at 265, 130 S.Ct. at 2883.) Since neither §1595—the civil remedy provision—nor §1596—the extraterritorial provision—address extraterritorial jurisdictional with respect to private civil actions, *Morrison* should foreclose any attempt to read extraterritorial jurisdiction into them. The exclusion of the ***crime*** of financially benefitting from substantive trafficking offenses (§1593A) from extraterritorial jurisdiction further supports the conclusion that extraterritorial jurisdiction does not apply to ***civil actions*** against those who financially benefit from substantive trafficking offenses.

b. §1596 Excludes Two Provisions Plaintiffs Rely On

Count I against Phatthana and S.S. Frozen and Count II against Rubicon and Wales refer to §§1592 and 1593A. (Compl. ¶¶103 & 124.) §1592—unlawful conduct with respect to documents in furtherance of trafficking, peonage, slavery, involuntary servitude, or forced labor ("document servitude")—and §1593A—benefiting financially from peonage, slavery, and trafficking in persons—are excluded from the limited grant of extraterritorial jurisdiction in §1596(a).

c. §1596 Should Apply Only to Individuals

The text of §1596(a) indicates that extraterritorial jurisdiction extends to natural persons, not corporations or other legal entities. Subsection (a)(1) uses the terms "national of the United States or an alien lawfully admitted for permanent residence" as defined in the Immigration and Nationality Act; these definitions simply do not apply to corporations or other legal entities.[5] Given this context, subsection (a)(2) should also cover natural persons only.

Moreover, federal statutes distinguish U.S. nationals from corporations and other legal entities. (*See* 18 U.S.C. §§2280(b)(1)(A)(iii) & 2280a(b)(1)(A)(iii) (for purposes of jurisdiction, separately referring to "a national of the United States" and "a United States corporation or legal entity"); 16 U.S.C. §5502(7) (defining "person" to include "any individual (whether or not a citizen or national of the United States)" and "any corporation, partnership, association, or other entity (whether or not organized or existing under the laws of any State)").)

Finally, if there is any ambiguity in the text of §1596, that ambiguity should be resolved in accordance with the rule of lenity, since a statute that "has both criminal and noncriminal applications … must [be] interpret[ed] … consistently, whether … encounter[ed] … in a criminal or noncriminal context." (*Leocal v. Ashcroft*, 543 U.S. 1, 11 n. 8, 125 S.Ct. 377, 384, 160 L.Ed.2d 271 (2004); *see St. Louis v. Perlitz, supra*, 2016 WL 1408076, at *4 n. 3 (applying rule of lenity to adopt a "narrower construction" of the TVPRA in a civil case brought under §1595).)

[5] "'[N]ational' means a person owing permanent allegiance to a state" and "'national of the United States' means (A) a citizen of the United States, or (B) a person who, though not a citizen of the United States, owes permanent allegiance to the United States"; and (3) "'lawfully admitted for permanent residence' means the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed." (8 U.S.C. §1101(a)(20, 21, 22).)

d. In Any Event, The Alleged Underlying Violations Were Committed By Foreign Companies Not "Present in the United States"

Even if subsection (a) were interpreted to cover corporations and other legal entities, the underlying violations to which extraterritorial jurisdiction can extend—§§1581, 1584, 1589, and 1590—were allegedly committed by foreign companies—Phatthana and S.S. Frozen—not "present in the United States."

There can be no dispute that Phatthana and S.S. Frozen do not satisfy subsection (a)(1)—they cannot be "nationals of the United States" or permanent resident aliens. Neither do they satisfy subsection (a)(2), since they are not alleged to have offices in the United States and the term "present in the United States" has been held to mean "physical presence." (*Adhikari v. Daoud & Partners* (S.D. Tex. Aug. 23, 2013, No. 4:09-cv-01237) 2013 WL 4511354, at **8-9.)[6]

Although the Complaint alleges that Rubicon and Wales have a physical presence in the United States—offices in California—Rubicon and Wales are alleged to have engaged in the importation, marketing, and sale of seafood in the United States—not the alleged trafficking and forced labor in Cambodia and Thailand. (Compl. ¶¶19 & 21.) In this regard, it is important to keep in mind that the crime of financially benefitting from trafficking (§1593A) is excluded from extraterritorial jurisdiction under §1596. Thus, any financial benefit obtained by Rubicon and Wales is not relevant to extraterritorial jurisdiction. In *St. Louis v. Perlitz, supra*, a civil action under §1595, is instructive on this point. Two defendants allegedly violated §1591(a)(2) by knowingly benefiting from sex trafficking by another defendant in Haiti in violation of §1591(a)(1). The district court concluded that for there to be a violation of §1591(a)(2), there must be "an

[6] The district court's ruling on the meaning of "present in the United States" was made with respect to Daoud & Partners' motion for summary judgment. The subsequent history of the district court's opinion and the pending appeal (*on reconsideration*, 994 F.Supp.2d 831 (S.D. Tex. 2014), *rehearing denied*, 95 F.Supp.3d 1013 (S.D. Tex. 2015), *appeal pending*, No. 15-20225 (5th Cir., filed Apr. 21, 2015)) concern other issues raised by other defendants.

allegation of conduct cognizable as a violation of § 1591(a)(1)," which must overcome the "presumption against extraterritoriality." (2016 WL 1408076, at **2-3.) Because *St. Louis v. Perlitz* concerned conduct pre-dating §1596, there was no extraterritorial jurisdiction at all. For conduct post-dating §1596, *St. Louis v. Perlitz* teaches that underlying violations must satisfy the limited grant of extraterritorial jurisdiction in §1596 for a "knowingly benefiting" violation to be stated. In sum, the alleged ***conduct*** over which there is extraterritorial jurisdiction was not engaged in by ***parties*** subject to extraterritorial jurisdiction under §1596.[7]

C. The Complaint Does Not Sufficiently Allege Violations Of The TVPRA As To Phatthana And S.S. Frozen

The gist of Plaintiffs' Complaint is that they were allegedly misled by recruiters regarding pay and accommodations, and thus regretted having left Cambodia to work in a seafood factory in Thailand under conditions that they hoped would be better than they turned out to be. But "[n]o matter how unpleasant the work, or the conditions under which services are provided, the critical inquiry for the purposes of the TVPRA is whether a person provides those services free from a defendant's physical or psychological coercion that as a practical matter eliminates the ability to exercise free will or choice." (*Muchira v. Al-Rawaf* (E.D. Va. Apr. 15, 2015, No. 1:14-cv-770) 2015 WL 1787144, at *7.) The TVPRA does not regulate labor practices, redress employment disputes, or provide a remedy for fraud—it is a criminal statute enacted to combat serious human trafficking under which 20-year prison sentences can be imposed under provisions on which Plaintiffs rely.[8]

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[7] The Complaint's loose and conclusory allegations of the Defendants' corporate affiliations and relationships are not enough to overcome this limitation.

[8] When the crime of forced labor was added to the TVPRA, Congress deliberately excluded a provision "addressing fraud or deception to obtain labor or services of minors, mentally incompetent persons, or persons otherwise particularly susceptible" to avoid "criminaliz[ing] conduct that is currently regulated by labor law." (H. R. Rep. No. 106-939, at 100-01, *reprinted at* 2000 U.S. Code Cong. & Admin. News 1380, 1392-93.)

As shown below, Count I, which alleges that Phatthana and S.S. Frozen actually engaged in trafficking, forced labor, etc. (as opposed to merely benefitting) (Compl. ¶¶102-122) should be dismissed without leave to amend.

1. §§1581 and 1584– Peonage and Involuntary Servitude

§1581(a) provides, inter alia, that "[w]hoever holds or returns any person to a condition of peonage" is guilty of a crime. §1584(a) provides, inter alia, that "[w]hoever knowingly and willfully holds to involuntary servitude … any other person for any term" is guilty of a crime. Peonage and involuntary servitude share the same first three elements: (1) "that the defendant held [the victim] in involuntary servitude"; (2) "that such servitude lasted for some period of time"; and (3) "that the defendant acted knowingly and willfully." (2-47A Modern Federal Jury Instructions-Criminal ¶ 47A.01, Instruction 47A-2 Elements of the Offense.) Significantly, the first element of both crimes—involuntary servitude—"necessarily means a condition of servitude in which the victim is forced to work for the defendant by the use or threat of physical restraint or physical injury, or by the use or threat of coercion through law or the legal process"—"psychological coercion" is not sufficient. (*U.S. v. Kozminski*, 487 U.S. 931, 935-36, 952-53, 108 S.Ct. 2751, 2756, 2765; *see also U.S. v. Veerapol*, 312 F.3d 1128, 1132 (9th Cir. 2002).) The additional fourth element of peonage is "that the defendant held the victim in involuntary servitude for the purpose of repaying a debt." (Jury Instruction 47A-2, *supra*.) Peonage is "a condition in which the victim is coerced by threat of legal sanction to work off a debt ***to a master***." (*Kozminski, supra*, 487 U.S. at 943, 108 S.Ct. at 2760 [emphasis added]; accord *Ellerbe v. Howard* (W.D.N.Y. June 13, 1989, No. Civ. 86–957E) 1989 WL 64156, at *3 (peonage is "'a status or condition of compulsory service, based upon the indebtedness of the peon to the master'"), quoting *Clyatt v. U.S.*, 197 U.S. 207, 215, 218 (1905) [internal quotation marks omitted].)

Here, the Complaint does not allege that any of the Plaintiffs were physically restrained or injured or threatened with such.[9] The Complaint also does not allege the use or threat of legal coercion, i.e., it does not allege that Phatthana or S.S. Frozen had or threatened to have any of the Plaintiffs arrested or deported.[10] Thus, the first element of peonage and involuntary servitude are not satisfied. The fourth element of peonage is also not satisfied, since the Complaint alleges that Plaintiffs' debts—loans and recruitment fees—were owed to third parties—private lenders or recruiters—and not to their employer (*i.e.*, master).

2. §1589 – Forced Labor

Congress enacted §1589 in response to *Kozminski, supra*, to address cases "where traffickers threaten harm to third persons, restrain their victims without physical violence or injury, or threaten dire consequences by means other than overt violence." (H.R.Rep. No. 106–939, at 101 (Conf. Rep.), 2000 U.S.C.C.A.N. at 1392–93.) §1589(a) provides that a person can be guilty of a crime by "knowingly provid[ing] or obtain[ing] the labor or services of a person":

> (1) by means of force, threats of force, physical restraint, or threats of physical restraint to that person or another person.
>
> (2) by means of serious harm or threats of serious harm to that person or another person;
>
> (3) by means of the abuse or threatened abuse of law or legal process; or

[9] The description of Plaintiffs Ban & Nakry's experience, i.e., that an unknown number of other "workers" were "beaten" by someone when they "asked to return home" while staying at a farm near the Cambodia-Thailand border (Compl. ¶10), does not show that Ban & Nakry were held in involuntary servitude at the Phatthana factory. The Complaint's only other reference to physical injury is the allegation that "[s]everal Plaintiffs saw or heard workers punished by being ordered" to "crawl" on concrete. (*Id.* ¶84.) The failure to identify which Plaintiffs supposedly "saw or heard" this and to specify whether this happened once at the hands of a rogue employee or was a regular practice renders it insufficient to establish involuntary servitude.

[10] The single allegation that "[t]he company threated [sic] to call the police" (Compl. ¶84) not only fails to state who the alleged threat was made to, but is simply too vague to constitute the type of threat sufficient to satisfy a criminal statutory provision.

> (4) by any means of any scheme, plan, or pattern intended to cause the person to believe that, if that person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint.

(18 U.S.C. §1589(a)(1)- (4).) "[A]buse or threatened abuse of law or legal process" is "the use or threatened use of a law or legal process, whether administrative, civil, or criminal, in any manner or for any purpose for which the law was not designed, in order to exert pressure on another person to cause that person to take some action or refrain from taking some action." (18 U.S.C. §1589(c)(1).) "[S]erious harm" is:

> any harm, whether physical or nonphysical, including psychological, financial, or reputational harm, that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue performing labor or services in order to avoid incurring that harm.

(18 U.S.C. §1589(c)(2).)[11]

Certainly, "not all bad employer-employee relationships … will constitute forced labor." (*U.S. v. Dann*, 652 F.3d 1160, 1170 (9th Cir. 2011).) The typical forced labor case involves an individual illegally brought to the United States and kept in isolation by the employer under explicit and repeated threats of deportation. (*See, e.g., U.S. v. Calimlim*, 538 F.3d 706, 713 (7th Cir. 2008).)

In TVPRA cases in the Ninth Circuit where allegations or undisputed evidence was sufficient to establish forced labor, defendants typically made multiple threats of deportation, often accompanied by other harm or threats of other harm. (*See, e.g., Shuvalova v. Cunningham* (N.D.Cal. Dec. 22, 2010, No. C 10–2159 RS) 2010 WL 5387770, at **1-24, 7) (complaint alleged that defendant "began

[11] Congress provided examples of the type of non-violent physical coercion envisioned: (1) "when a nanny is led to believe that children in her care will be harmed if she leaves the home"; (2) "intentionally causing the victim to believe that her family will face harms such as banishment, starvation, or bankruptcy in their home country"; (3) "where children are brought to the United States and face extreme nonviolent and psychological coercion (e.g. isolation, denial of sleep, and other punishments)"; and (4) "[a] claim by an adult of a false legal relationship with a child in order to put the child in a condition of servitude." (H. Rep. No. 106-939, at 101 (Conf. Rep.), *reprinted at* 2000 U.S. Code Cong. & Admin. News 1380, 1392-93.)

physically and verbally threatening" plaintiffs within weeks of their arrival from Russia, "threatened plaintiffs with physical violence," and "isolated plaintiffs from outside contact"); *Ruiz v. Fernandez*, 949 F.Supp.2d 1055, 1076–77 (E.D.Wash. 2013) (plaintiffs testified that defendant made "constant and continuous" "threats that he would call the police or immigration authorities" to "intimidate" them); *Canal v. Dann* (N.D. Cal. Sept. 2, 2010, No. 09–3366 CW) 2010 WL 3491136, at **1-2 (complaint alleged that for almost two years plaintiff worked for defendant fifteen hours a day, seven days a week as a housekeeper/nanny and was paid $100 "only once"; defendant "repeatedly insulted and berated" plaintiff and "attempted to control every aspect of [plaintiff's] life"; defendant "held [plaintiff's] visa, passport and Peruvian identification card," taking them with her when she left the home; defendant "threatened [plaintiff] with deportation and arrest"; defendant "restricted [plaintiff's] communication and movement" and "isolated [her] from individuals that might assist her").)

These cases are a far cry from Plaintiffs' situation as factory workers who are not isolated, but instead are in proximity to many co-workers, including from their home country, who are paid regular wages for working an eight-hour day, and who are not repeatedly threatened by their employer. The Complaint alleges that various Plaintiffs were "afraid" for themselves or "worried" about their families in Cambodia. (Compl. ¶¶8 & 13.) However, no facts are alleged to show that Phatthana or S.S. Frozen threatened Plaintiffs or even knew that Plaintiffs had families to worry about. The Complaint does not allege conduct rising to the level of psychological coercion sufficient to constitute a crime under the TVPRA.

3. §1590 – Trafficking

§1590(a) provides that "[w]hoever knowingly recruits, harbors, transports, provides, or obtains by any means, any person for labor or services in violation [of the TVPRA]" is guilty of a crime. Here, a violation of §1590 requires a violation of the peonage (§1581), involuntary servitude (§1584) and/or forced labor (§1589)

provisions of the TVPRA. Since the Complaint insufficiently alleges violations of those provisions, to the extent Count I relies on §1590, it fails. In addition, the Complaint fails to allege facts showing that any of the Defendants engaged in trafficking. Instead, the Complaint alleges that independent employment recruiters engaged in the trafficking (Compl. ¶¶7, 8 & 12) or contains wholly conclusory allegations that recruiters were "agents" of Phatthana (*id.* ¶¶10 & 13). The allegations, however, do not allege facts sufficient to establish an agency relationship between any of the Defendants and the alleged recruiters. For example, Plaintiff Ratha was "recruited by an agent of CDM Trading Manpower Co., Ltd. ("CDM") for work in Thailand" (Compl. ¶7), but there are no facts alleged to show that CDM was acting as an agent for any of the Defendants. CDM may well have been acting independently to offer workers to various employers in Thailand without being in an agency relationship.

4. §1592 – Document Servitude

§1592(a) makes it a crime to "knowingly destroy[], conceal[], remove[], confiscate[], or possess[ ] any actual or purported passport or other immigration document, or any other actual or purported government identification document, of another person" in the course of violating, attempting to violate, or with intent to violate the TVPRA's peonage, slavery, involuntary servitude, forced labor, or trafficking provisions. (18 U.S.C. §1592(a)(1) & (2).)

Here, violation of §1592 is predicated on peonage, involuntary servitude, forced labor, and trafficking, which the Complaint fails to allege. (*See* Part III.C.1.-3., *supra*.) This requires dismissal of Count I against Phatthana and S.S. Frozen to the extent it relies on alleged underlying violations of §1592. (*See Muchira v. Al-Rawaf, supra*, 2015 WL 1787144, at *8 & n. 27 (concluding that §§1592 and 1593A claims "must necessarily be dismissed" because of insufficient evidence of violation of §§1584 or 1589 "or any other predicate offense under the TVPA").)

The facts alleged also do not establish that any of the Defendants improperly held passports or immigration or government identification documents belonging to any of the Plaintiffs. The typical document servitude case involves an individual or family who employs a household worker in the United States illegally and retains possession of his or her passport in furtherance of forced labor. (*See, e.g., U.S. v. Dann, supra,* 652 F.3d 1160; *U.S. v. Sabhnani*, 599 F.3d 215 (2d Cir. 2010); *U.S. v. Nnaji*, 447 Fed. Appx. 558 (5th Cir. 2011).) In those cases, the employer does not have any legitimate reason to hold the passport. In contrast, the Complaint alleges that Phatthana factory employees had possession of Plaintiffs' passports and that Plaintiffs lived in crowded housing with other workers that flooded in the rainy season. (Compl. ¶¶7, 8, 10, 12 & 74.) Under such circumstances, holding passports serves two legitimate purposes: (1) safekeeping; and (2) facilitating inspection by immigration authorities, which a large employer of foreign workers would be subject to periodically.

In addition, the Complaint does not allege that Phatthana or S.S. Frozen demanded that Plaintiffs turn over or surrender their passports—just that the recruiters gave them to Phatthana employees. The Complaint alleges that only one of the Plaintiffs (Sophea) actually asked for his passport, soon after arriving so that he could go to his mother's funeral—not so that he could leave employment at the factory. (Compl. ¶12.)[12] That someone at the Phatthana factory allegedly refused this single request does not constitute the crime of document servitude. For three of the Plaintiffs (Ban, Nakry, and Sang), the Complaint does not even allege that they had passports or other documents specified in §1592.

[12] The Complaint does not expressly allege that Plaintiff Ratha asked for his passport—just that he was "told" by someone that he could not get it back. (Compl. ¶7.)

D. The Complaint Does Not Sufficiently Allege Any Violation Of §1593A As To Rubicon And Wales

Count II against Rubicon and Wales appears to be based solely on §1593A of the TVPRA. (Compl. ¶¶123-131.) §1593A makes it a crime to "knowingly benefit[] financially or by receiving anything of value, from participation in a venture which has engaged in any act in violation of section 1581(a), 1592, or 1595(a), knowing or in reckless disregard of the fact that the venture has engaged in such violation." (18 U.S.C.A. §1593A.) The alleged violation of §1593A is predicated on peonage, involuntary servitude, forced labor, and trafficking, which the Complaint fails to allege. (*See* Part III.C.1.-4., *supra*.) The failure to sufficiently allege a "predicate offense" requires dismissal. (*See Muchira v. Al-Rawaf, supra*, 2015 WL 1787144, at *8 & n. 27.)

Moreover, even if the requirements of extraterritorial jurisdiction were satisfied and one or more underlying violations of the TVPRA were sufficiently alleged against Phatthana and/or S.S. Frozen, the Complaint still does not allege ***facts*** from which it can be reasonably inferred that Rubicon and Wales "knowingly" benefitted from those underlying violations. The Complaint does not allege what Rubicon and Wales knew or did not know about the labor practices at the seafood factory in Thailand or, more specifically, about how the Plaintiffs were treated. Furthermore, the Complaint does not allege facts permitting knowledge of labor practices in Thailand to be imputed to Rubicon and Wales. Although the knowledge of an agent can generally be imputed to a principal, the Complaint does not allege that Rubicon and Wales are principals for whom Phatthana and S.S. Frozen acted as agents. The Complaint alleges the converse—Phatthana is the principal for whom Rubicon and Wales acted as agents—not for the provision of labor, but for the importation, marketing, and distribution of seafood in the United States. (Compl.

¶¶19-21.) In fact, Rubicon and Wales are not alleged to have anything whatsoever to do with labor practices in Thailand.[13]

E. There Is No Subject Matter Jurisdiction Over The ATS Count Due To Preemption And The Presumption Against Extraterritoriality

The ATS does not create any causes of action. All it does is provide that federal district courts have "original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." (28 U.S.C. §1350.) Although ATS jurisprudence is relatively sparse, recent Supreme Court decisions provide guidance on the limits of ATS jurisdiction that weighs against ATS jurisdiction over Plaintiffs' claims under principles of preemption and extraterritorial jurisdiction. In addition to these jurisdictional impediments, the conduct alleged does not rise to the level of triggering ATS jurisdiction and whether ATS claims can be brought against corporations or other legal entities, particularly without state action, is unsettled. For all of these reasons, Plaintiffs' ATS count should be dismissed without leave to amend.

1. The TVPRA Preempts Claims Under the ATS

The ATS is "strictly jurisdictional" and "was meant to underwrite litigation of a narrow set of common law actions derived from the law of nations" at the time of its enactment in 1789. (*Sosa v. Alvarez-Machain*, 542 U.S. 692, 713, 721, 124 S.Ct. at 2755, 2759, 159 L.Ed.2d 718 (2004).) The Supreme Court explained why "great caution" must be used in "adapting the law of nations to private rights," including that "a decision to create a private right of action is one better left to legislative judgment in the great majority of cases" and the "risks of adverse foreign policy

[13] The Complaint alleges that the "CSF Group"—which includes Phatthana—"manufactures frozen seafood products for export." (Compl. ¶15.) The Complaint then conclusorily alleges the existence of a joint venture among "multiple Thai seafood manufacturers and sellers"—including the CSF Group—"to market and distribute products in the United States through a commonly owned affiliate," *i.e.*, Rubicon. (*Id*. ¶¶15.) Although the Complaint uses the term "vertically integrated enterprise" (*Id.* ¶¶4 & 19), it does not allege facts showing that the corporate forms of the Defendants should be disregarded for purposes of imputing Phatthana or S.S. Frozen's knowledge of labor practices to Rubicon or Wales.

consequences." (542 U.S. at 727-28, 124 S.Ct. at 2762-64.) The Supreme Court further recognized that Congress may "shut the door to the law of nations entirely … at any time (explicitly, or implicitly by treaties or statutes that occupy the field)." (542 U.S. at 731, 124 S.Ct. at 2765.)

In 2003, Congress created a private right of action for any "individual who is a victim of a violation" of the TVPRA. Congress thereby "implicitly" limited ATS jurisdiction by enacting a statute that occupies the field of civil remedies for human trafficking and forced labor. Giving Plaintiffs access to United States federal courts to make claims under various international conventions, covenants, and protocols (Compl., ¶136) outside the comprehensive statutory scheme created under the TVPRA would effectively ignore Congress' intent. It would also be ill-advised from a foreign policy perspective given that the Thai government has found Phatthana to be exemplary with regard to labor practices. (*See* footnote 1, *supra*.)[14]

2. The ATS Claims Do Not Overcome the Presumption Against Extraterritorial Jurisdiction

In *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659, 1669 (2013), the Supreme Court confirmed that "the presumption against extraterritoriality applies to claims under the ATS." This presumption bars jurisdiction where "all the relevant conduct took place outside the United States." (*Id.*) "And even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial jurisdiction." (*Id.*) Although the opinion of the Court did not specify precisely what was necessary to

[14] To date, appellate courts have not decided the TVPRA's preemptive effect on ATS claims and only a few district courts have decided the issue. (*Compare Velez v. Sanchez*, 754 F.Supp.2d 488, 497 (E.D.N.Y 2010) (Congress "limited ATS jurisdiction by enacting [the TVPRA] that occupies the field of civil remedies for human trafficking and force labor"), *rev'd in part on other grounds*, 693 F.3d 308 (2d Cir. 2012), *with Magnifico v. Villanueva*, 783 F.Supp.2d 1217, 1224-26 (S.D. Fla. 2011) (declining to find preemption), *and Adhikari v. Daoud & Partners*, 697 F.Supp.2d 674, 687-88 (S.D. Tex. 2009) (declining to find preemption), *denying motion to certify appeal*, 2010 WL 744237.) The preemption ruling in *Adhikari* is the subject of a pending appeal. (No. 15-20225 (5th Cir., filed Apr. 21, 2015).)

overcome the presumption, it did point out that "mere corporate presence" in the United States does not suffice, absent a "statute more specific" than the ATS. (*Id.*)

In a concurring opinion, Justice Alito put the Court's opinion in context by explaining prior precedent: (1) "'*some* domestic activity'" is not enough; "a cause of action falls outside the scope of the presumption—and thus is not barred by the presumption—only if the event or relationship that was 'the "focus" of congressional concern' under the relevant statute takes place within the United States" (133 S.Ct. at 1670, quoting *Morrison, supra*, 561 U.S. at 266, 130 S.Ct. at 2884); and (2) "'federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when [the ATS] was enacted.'" (*Id.*, quoting *Sosa, supra*, 542 U.S. at 732, 124 S.Ct. at 2765.) Thus, as articulated by Justice Alito:

> [A] putative ATS cause of action will fall within the scope of the presumption against extraterritoriality—and will therefore be barred—unless the domestic conduct is sufficient to violate an international law norm that satisfies *Sosa*'s requirements of definiteness and acceptance among civilized nations.

(133 S.Ct. at 1670.)

Here, the actual conduct that allegedly violates customary international law—peonage, involuntary servitude, forced labor, trafficking—all occurred in Cambodia and Thailand. Thus, the presumption bars ATS jurisdiction. The alleged presence of Rubicon and Wales in the United States and domestic conduct—sale of the seafood in the United States—do not overcome the presumption because they are not the "focus" of congressional concern over forced labor and trafficking. (*See Tanedo, supra*, 2012 WL 5378742, at *6 ("the focus and the touchstone of the territoriality inquiry of the TVPA is where the forced labor occurred and to where the victims were trafficked").)

F. The Complaint Fails To Allege Any Violation Of Customary International Law Sufficient To Support ATS Jurisdiction

If this Court does not find Plaintiffs' ATS claims preempted by the TVPRA or barred by the presumption against extraterritoriality, then it still should decline to find ATS jurisdiction based on the Supreme Court's direction in *Sosa, supra*. The Supreme Court cautioned federal courts to be "vigilant" in the exercise of judicial power to recognize "actionable international norms" in consideration of various factors, including the "risk of adverse foreign policy consequences" and "the practical consequences of making that cause available to litigants in the federal courts." (542 U.S. at 729, 732-33, 124 S.Ct. at 2764, 2766.) The Supreme Court articulated the general principle that "federal courts should not recognize private claims under federal common law for violations of any international norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted." (542 U.S. at 732, 124 S.Ct. at 2765.) The Supreme Court cited with approval the reasoning of prior courts, including the suggestion that the "'limits of section 1350's reach' be defined by 'a handful of heinous actions—each of which violates definable, universal and obligatory norms'" and the recognition that for "purposes of civil liability" the "torturer," the "pirate," and the "slave trader" qualify. (542 U.S. at 732, 124 S.Ct. at 2765-66, citing *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 781 (D.C. Cir. 1984) and *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980).)

1. Plaintiffs' Sources of "International Law" Do Not Support Jurisdiction

Plaintiffs' purported citations to "international law" (Compl., ¶136) do not support ATS jurisdiction here. As the Ninth Circuit has recognized, "the kind of definiteness and acceptance among civilized nations that existed for *Sosa*'s historical paradigms" is not satisfied simply because a substantial number of countries have signed on to an international instrument. (*Abagninin v. AMVAC Chem. Corp.*, 545 F.3d 733, 738-39 (9th Cir. 2008).) The Supreme Court has

explained that one of Plaintiffs' sources, the Universal Declaration of Human Rights, has "little utility" in determining whether an international "norm is sufficiently definite to support a cause of action" because it "does not of its own force impose obligations as a matter of international law." (*Sosa*, *supra*, 542 U.S. at 734-35, 124 S.Ct. at 2767.) The same goes for another of Plaintiffs' sources, the International Covenant on Civil and Political Rights, because the United States "ratified the Covenant on the express understanding that it was not self-executing and so did not itself create obligations enforceable in the federal courts." (*Id.*) [15] Even the United Nations International Labour Organisation recognizes that the international definition of forced labor does not cover "low wages or poor working conditions" and "situations of pure economic necessity" caused by a lack of employment alternatives; instead, forced labor must involve a "severe violation of human rights and restriction of human freedom." (A global alliance against forced labour, p. 5, http://www.ilo.org/public/english/standards/relm/ilc/ilc93/pdf/rep-i-b.pdf, last visited July 29, 2016.)

[15] Plaintiffs' other sources fare no better. The Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Supplementing the United Nations Convention Against Transnational Organized Crime applies to the "prevention, investigation and prosecution" of "offences" that are "transnational in nature and involve an organized criminal group" and expressly does not "affect the rights, obligations and responsibilities of States and individuals under international law." (*See* Art. 4 & 14.) The Convention Concerning the Abolition of Forced Labor applies to nation states, not private actors. (*See* Art. 1.) The Supplemental Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery focuses on chattel slavery. The Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others specifically concerns prostitution. The United States has not ratified the Convention Concerning Forced or Compulsory Labour. The Convention to Suppress the Slave Trade and Slavery specifically concerns chattel slavery. Finally, the ILO Declaration on Fundamental Principles and Rights at Work is a "political statement"—the United States is only obliged to comply with the Conventions it has ratified. (*See* Issue Analysis, U.S. Ratification of ILO Core Labor Standards, United States Council for International Business (April 2007); *Bridgestone*, *supra*, 492 F.Supp.2d at 1015.)

2. Case Law Does Not Recognize The Alleged Forced Labor As Sufficient To Trigger ATS Jurisdiction

Conduct sufficient to support ATS claims, particularly in the Ninth Circuit, must be extreme. In *Sarei v. Rio Tinto, PLC*, the Ninth Circuit held that "only Plaintiffs' claims of genocide and war crimes fall within the limited federal jurisdiction created by the [ATS], and that crimes against humanity arising from a [food and medicine] blockade and the racial discrimination claims do not." (671 F.3d 736, 744 (9th Cir. 2011) (en banc), *vacated on other grounds by* --- U.S. ---, 133 S.Ct. 1995 (2013).)[16] In *Doe I v. Nestle USA, Inc.*, the Ninth Circuit held that the following facts supported ATS claims given that the "prohibition against slavery is universal":

> The Plaintiffs in this case are three victims of child slavery. They were forced to work on Ivorian cocoa plantations for up to fourteen hours per day six days a week, given only scraps of food to eat, and whipped and beaten by overseers. They were locked in small rooms at night and not permitted to leave the plantations, knowing that children who tried to escape would be beaten or tortured. Plaintiff John Doe II witnessed guards cut open the feet of children who attempted to escape, and John Doe III knew that the guards forced failed escapees to drink urine.

(766 F.3d 1013, 1017, 1022 (9th Cir. 2014).)[17] In *In re Estate of Marcos Human Rights Litig.*, the Ninth Circuit found ATS jurisdiction over claims of "official torture," "summary execution," and "causing disappearance." (25 F.3d 1467, 1475 (9th Cir. 1994).)

Not surprisingly, "[i]n applying the ATS to forced labor claims, courts in the United States have tended to require more than evidence of terrible working conditions and inadequate wages to state a cognizable violation of customary international law." (*Velez v. Sanchez*, 693 F.3d 308, 321 (2d Cir. 2012).) "Decisions in which ATS forced labor claims have been permitted to proceed have typically involved egregious violations of human dignity." (*Id.*, citing *Licea v.*

[16] The Supreme Court remanded *Sarei* for reconsideration in light of its extraterritoriality ruling in *Kiobel.*

[17] The Ninth Circuit remanded the case to permit plaintiffs to amend their complaint in light of the Supreme Court's extraterritorial ruling in *Kiobel.*

Curacao Drydock Co., 584 F.Supp.2d 1355, 1361–63 (S.D.Fla.2008) (plaintiffs were held in captivity; suffered severe injuries due to the nature of their work but were denied medical treatment; and in escaping, risked imprisonment and death and the persecution of their families by the Cuban government); *Doe I v. Reddy* (N.D.Cal. Aug. 4, 2003, No. C 02–05570) 2003 WL 23893010, at *9 (allegations sufficed both to provide jurisdiction and state claims for forced labor, debt bondage, and trafficking under the ATS when they included "coercive conduct through threats, physical beatings, sexual battery, fraud and unlawful substandard working conditions"); *Manliguez v. Joseph*, 226 F.Supp.2d 377, 381–82 (E.D.N.Y. 2002) (plaintiff kept locked in employer's home in which she provided domestic labor 18-1/2 hours a day, 7 days a week and 24-hour care to employer's daughter, prohibited from social interaction, denied medication and basic personal effects, often allowed only one meal per day of leftover food, and verbally abused).)

The conduct Plaintiffs allege here pales in comparison. Phatthana and S.S. Frozen's alleged labor practices simply do not rise to the level of recognized violations of customary international law. And the contrast is even starker with respect to Rubicon and Wales. They are alleged to have "benefitted" from trafficking—but not to have engaged in any of the labor practices at issue.

3. <u>Corporate Liability and State Action</u>

Whether corporations can be liable under the ATS and state action is required are unsettled issues "related" to the issue of "whether a norm is sufficiently definite to support a cause of action." (*Sosa, supra*, 542 U.S. at 732 & n. 20, 124 S.Ct. at 2766.) The Second Circuit has held that there is no corporate liability. (*Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 121-22, 148-49 (2d Cir. 2010), *aff'd on other grounds*, 133 S.Ct. 1659 (2013).) In *Kiobel*, the Supreme Court granted certiorari to consider whether the law of nations recognizes corporate liability, but expressly did not answer that question. (133 S.Ct. at 1663.) In *Doe I v. Nestle USA, Inc.*, 766 F.3d 1013, 1021 (9th Cir. 2014), the Ninth Circuit declined to foreclose

corporate liability, instead "reaffirm[ing] the corporate liability analysis" in *Sarei, supra*: (1) "the analysis proceeds norm-by-norm; there is no categorical rule of corporate immunity or liability"; (2) "corporate liability under an ATS claim does not depend on the existence of international precedent enforcing legal norms against corporations"; and (3) "norms that are 'universal and absolute,' or applicable to 'all actors,' can provide the basis for an ATS claim against a corporation." (Eight judges dissented from denial of rehearing en banc, sharply criticizing the panel for disregarding Supreme Court precedent. 788 F.3d 946 (9th Cir. 2015).) Under this analysis, the Ninth Circuit held that "[t]he prohibition against slavery applies to state actors and non-state actors alike, and there are no rules exempting acts of enslavement carried out on behalf of a corporation." (766 F.3d at 1022.) Given that the conduct alleged does not come close to that in the cases discussed above, Plaintiffs should not be permitted to pursue corporate liability under the ATS absent state action.

IV. CONCLUSION

For the foregoing reasons, the Complaint should be dismissed without leave to amend.

Dated: August 10, 2016

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