No. 18-

IN THE

# Supreme Court of the United States

HMONG 1, HMONG 2, HMONG 3, HMONG 4, AND HMONG 5, FICTITIOUSLY NAMED INDIVIDUALS,

*Petitioners,*

*v.*

LAO PEOPLE'S DEMOCRATIC REPUBLIC; CHOUMMALY SAYASONE, PRESIDENT OF LAOS; THONGSING THAMMAVONG PRIME MINISTER OF LAOS; DR. BOUNKERT SANGSOMSACK, MINISTER OF JUSTICE OF LAOS; LIEUTENANT GENERAL SENGNUAN XAYALATH, MINISTER OF DEFENSE; THONGBANH SENGAPHONE, MINISTER OF PUBLIC SECURITY; LAO GENERAL BOUNCHANH,

*Respondents.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

Petitioners Hmongs 1 – 5 attempted to bring this action under the Alien Tort Statute, 28 U.S.C. § 1350 ("ATS"), for atrocities allegedly committed by Defendants in Laos as part of a campaign to destroy the Hmong people to the root. The Ninth Circuit affirmed the District Court's Judgment of Dismissal for lack of subject-matter jurisdiction.

Two questions are presented:

1. Whether petitioners/survivors of the atrocities committed by the Laos communist government met their pleading burden under the Alien Tort Claims Act by alleging that the USA conducted a secret war in Laos; made a verbal request and agreement with the King of Laos to hire Hmong people in Laos to fight the secret war in Laos; made a solemn promise from USA President to King of Laos to protect the Hmong no matter who won or lost the war; brought over substantial stockpiles of highest grade (CIA grade) level guns, ammunition, air planes, barrels of poison; all of which was conducted planned out of CIA, Langley, Virginia as official acts of the US government, and then later brokered a peace treaty forced upon the Laos Royals that was immediately thereafter breached by the Laos Communist; resulting in the communist taking possession of all the US CIA weapons, and turning those very weapons into weapons of a genocide against the Hmong people of Laos.

2. Whether the immunities afforded to heads of state invoked by the Suggestion of Immunity submitted by the United States of America pursuant to 28 USC section 517 for the Laos President and Prime Minister are inapplicable to this case because it involves claims of war crimes involving genocide, sex crimes, torture, evisceration, and other mayhem committed openly against the Hmong people in Laos.

## LIST OF PARTIES

The parties below are listed in the caption.

Petitioners Hmong 1, 2, 3, 4, and 5 are survivors of the atrocities committed by the communist government of Laos, and have lost the rest of their family members as a result of those atrocities. Petitioners are suing under fictitious names to avoid retaliation by the Laos government. Hmong 1 resides in Laos, but Hmong 2 – 5 reside within the Eastern District of California.

Defendants are the Laos Communist regime's President, Prime minister, Minster of Justice, Minister of Public Security, Minister of Defense, and a General, claimed to be the architects of this genocide and torture of the Hmong people in Laos.

In addition, the United States filed a Suggestion of Immunity in the District Court. Neither the Respondents, the United States, nor any other third party filed any briefs with the Ninth Circuit Court of Appeals.

## CORPORATE DISCLOSURE STATEMENT

The People's Republic of Laos is a sovereign nation.

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## OPINION BELOW

The January 14, 2019 opinion of the United States Court of Appeals for the Ninth Circuit was ordered not for publication. The Ninth Circuit affirmed the August 18, 2017 Decision and Judgment of the United States District Court for the Eastern District of California. See appendices A and B, respectively.

## STATEMENT OF JURISDISCTION

This Court's jurisdiction is invoked under 28 U.S.C. section 1254(1).

Petitioners are party plaintiffs in this action, and brings this Petition seeking review of the Decision of the United States Court of Appeals for the Ninth Circuit, AFFIRMING the District Court's dismissal of the action.

The Ninth Circuit's opinion was rendered on January 14, 2019 (See Appendix A).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

**Alien Torts Claims Act, Title 28 United States Code, section 1350.**

**Alien's action for tort.**

"The district courts shall 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."

**Foreign Sovereign Immunity Act, Title 28 United States Code, section 1604.**

**Immunity of a foreign state from jurisdiction**

"Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter."

**Interests of United States in pending suits, Title 28 United States Code, section 517.**

**"**The Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States."

## STATEMENT OF THE CASE

Petitioner Hmong 1 brought suit against the Laos People's Democratic Republic of Laos, and several of its government officials for violations of the Alien Tort Claims Act, 28 United States Code, section 1350.

During the period before and during the Vietnam War era, The United States of America entered into a verbal treaty with the King of Laos. The Ho Chi Min trail was a supply line to the Communists in Vietnam, and wound through a part of Laos. The USA requested the King of Laos to agree to allow the Hmong villagers throughout

Laos to join the ranks of the United States CIA army, fighting what was officially called The Secret War in Laos. The Hmong people agreed to be inducted into the US CIA military as uniformed soldiers with orders to destroy the Ho Chi Min supply lines. In return for this service, the United States supplied the Hmong and the King of Laos with a substantial weapons arsenal. This arsenal was ably put to use by the Hmong fighters, who were able to intercept and destroy many of the shipments to Viet Cong forces.

There was a peace treaty entered into during 1973, entitled the 1973 Vientiane Ceasefire Agreement. Under the treaty, Laos was be at peace; would be neutral, meaning neither communist nor royal, and would have democratic elections. Instead, when the USA diplomats left, the communists took over Laos, imprisoned the King and all those associated with the Royal Government, and commenced an attack against all Hmong people who helped the USA's Secret War in Laos.

In this campaign, Hmong people were hunted down and murdered *en masse* by Laos military forces on official duty. Hmong girls were regularly raped, mutilated, and killed. The photos of the aftermath are horrific, and show a nation of war criminals who were ordered to shoot, rape, and torture Hmong people in Laos.

The best evidence of the allegations of the Hmong's complaint is found in the chillingly accurately entitled documentary, *Hunted Like Animals*, a copy of which was attached to the Complaint for violation of the Alien Tort Claims Act. The documentary has been broken up into a series of short videos that can be found together on www.youtube.com and searching "Hunted Like Animals".

The Hmong people fleeing into the Laos jungle couldn't take photographs, but they could and did draw on tree bark haunting depictions of Laos military machines gunning Hmong people. Those drawings are shown in the introduction section of *Hunted Like Animals*, and easily tell the horrific story of official Laos war crimes of genocide, rape, torture and the poisoning of the Hmong's jungle environment.

There is the following undeniable direct connection to the USA and the atrocities committed against the Hmong people in Laos: Laos communist officials accomplished these terrible crimes against the Hmong people in Laos, using weapons, planes and barrels of poison made in the USA by and for the USA Government, owned by the USA Government, given by the USA Government to Laos, and delivered by the USA Air America to Laos, for use by the US CIA Hmong-created military in Laos.

The following identification of content from *Hunted Like Animals* were identified in the proposed First Amended Complaint:

(a) History of Laos segment (8:23)

(b) King of Laos at White House (9:58)

(c) King recommendation to have the Hmong people involved (10:12)

(d) General Vang Pao leader of Hmong organizes Hmong troops (10:30)

(e) Laos Government continues from (1975 to 1984) to hunt down and kill in this manner...continued to 2004 (12:05)

(f) Weapons brought by US into Laos (9:25)

(g) Video of those weapons USA left in Laos including CIA Helicopters (13:55) (20:30)

(h) USA brokering peace treaty 1973 via Henry Kissinger and former US Ambassador (11:50)

(i) What happened in Laos after USA left the atrocities committed by government officials including military police and others (12:07).

See proposed FAC, paragraph 19 and Exhibit A-1 thereto, DVD of full documentary *Hunted Like Animals*; and see initial complaint, Exhibit A-1, and paragraphs 12-13].

The proposed First Amended Complaint also quoted portions of a "60-Minutes" interview/ segment confirming the promises the US made to the Hmong people:

> **(3:56-4:37)** Edgar "Pop" Buell worked for USAID, an adjunct of the CIA Secret War;
>
> Buell: They became refugees because we was encouraging them to fight for us; I promised them myself have no fear we will take care of ya; and taking care of you is not in a refugee camp
>
> Mike Wallace: We promised; the United States government; you as a representative of

the United States Government promised the Hmong people; we would take care of them"

Buell: Absolutely

MW: you fight for us; we'll pay you; if we win, fine; if we lose we'll take care of you?

Buell: Absolutely right. I think they still have that faith in us

**(5:00-5:30)** Under the Geneva convention, foreign powers were to pull out troops and military advisors; both sides ignored; Kennedy ordered the CIA to recruit the Hmong. CIA to provide arms, training, and salaries, and Vang Pao would supply the troops which included men, women and children as young as 10.

**(6:18-6:35)** Mike Wallace report, "CIA personnel and Pop" Buell told us they were ordered to keep the Hmong in combat even though Americans on the spot realized it was a lost cause"..

MW: we kept these guys fighting for us

B: That's right

MW: Even after you and a lot of others thought it was pointless

B: That's Right

> **(7:04-8:05)** State Department Officer Lionel Rosenblatt directing effort refugee in Thailand; when asked about attacking Hmong while they left Laos.
>
> MW: Why Kill them on the way out?
>
> Rosenblatt: We can only theorize that there is a real fear on the part of the authorities in Laos and the North Vietnamese, that the Hmong will come back to fight another day. They have a distinguished record of fighting; there's a long history of animosity between the Hmong and the Vietnamese.
>
> MW: Is there any revenge involved because they worked for CIA because they worked for the United States government
>
> R: I would assume there's a great deal of that, that having worked for almost 15 years for the United States, that these people are still seen very much as our accessories. What happened during the war in Laos was that the Vietnamese were stalled very effectively by the Hmong, and that war is now continuing. The full strength of the Vietnamese army is being brought to bear on the Hmong villages of Laos.

See proposed FAC, paragraph 55 and Exhibit O thereto, DVD of "60 Minutes" news clip.

The Laos military was working on an official government program to eliminate all Hmong "and their

root" who helped the United States in its Secret War in Laos. The genocide was accomplished with further war crimes of rape, torture, and the poisoning of the Hmong's jungle environment.

The conduct is still going on today. Hmong people are regularly rounded up, raped, tortured, killed, and left in the jungle.

The Hmong people were hunted by Laos Communist officials because they had earlier assisted the United States in its Secret War in Laos. See proposed FAC, paragraphs 2-4:

> "2. In May 1975, the following statement was made by the Pathet Laos Paper [Communist Party of Laos] following the signing of the Vientiane Ceasefire Agreement in 1973: "[The Hmong] will be exterminated to their last root".
>
> 3. The Pathet Laos then proceeded to do exactly that and sent the full force of their firepower into the jungles of Laos where hundreds of thousands of Hmong veterans of the "Secret War" and their descendants [herein referred to as "Hmong"] were located, killed, maimed, tortured, raped, and poisoned both the Hmong people and the jungle/their environment [including poisoning of the water systems and food systems].
>
> 4. Hmong people who were not in the "Secret Army" nor descended from a person in the

> Secret Army have safely resided throughout Laos. It is the Hmong that have a connection to the US Secret Army that became the target of extermination to the root."

The complaint alleged that the Laos Communist Officials violated the following treaties in committing a series of atrocities against the Hmong:

1. The 1973 Vientiane Ceasefire Agreement provides the following provisions which Petitioners claims were violated by the Defendants atrocities committed against the Hmong people, including Petitioners herein:

    a. Article 1 para B:
    "The 9 July 1962 communique on the neutrality of Laos and the 1962 Geneva Agreement on Laos are the correct basis of the policy of peace, independence and neutrality of the Kingdom of Laos."

    b. Article 2:
    "Beginning at 1200 (0500 GMT-FBIS) on 22 February 1973, a cease-fire in place will be observed simultaneously throughout the territory of Laos."

    c. Article 5:
    "The two Laos sides will repatriate all persons, regardless of nationality, who were captured or detained because they collaborated with one side or the other in the war

d. Article 6:
"General free and democratic elections are to be carried out to establish the national assembly and permanent national coalition government, which are to be the genuine representatives of the people of all nationalities in Laos."

See also the Geneva Agreements of 1962 on Laos; and the 1966 United Nations International Covenant on Civil and Political Rights [See Complaint, paragraph 16 and FAC para. 21-22].

The case of *Kiobel v. Royal Dutch Petroleum Company* (2013) 569 U.S. 108, 112, requires plaintiffs in an Alien Tort Claims Act case to plead a connection between the claimed events and the territory of the United States or involvement of the United States government. The required showing is specified as follows:

> "On these facts, all the relevant conduct took place outside the United States. 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 application. See Morrison, 561 U. S. ___ (slip op. at 17–24). Corporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices. If Congress were to determine otherwise, a statute more specific than the ATS would be required."

In compliance with the *Kiobel* pleading requirements, petitioner's first amended Complaint included a New section II entitled "Atrocities Committed by Laos and its Top Officials Occurred in and by the USA [Proposed FAC, pages 6-20, paragraphs 21-80.]. See especially the following recitation of evidence showing the touching and concerning of the United States on the atrocities in Laos [proposed FAC, paras. 36 – 40]:

> "36. In particular, we bring to the court's attention the following:
>
> A. Exhibit B-1, 1973 Vientiane Ceasefire Agreement:
> "The parties concerned in Laos, the United States, Thailand, and other foreign countries must strictly respect and implement this agreement."
>
> B. Exhibit D, January 27, 1973 Multi Lateral peace Agreement in Vietnam provides the following:
>
> "The United States anticipates that this agreement will usher in an era of reconciliation with the Democratic Republic of Viet-nam as will all the people of Indochina. In pursuance of its traditional policy, the United states will contribute to healing the wounds of war and to postwar reconstruction of the Democratic Republic of Vietnam and throughout Indochina."

C. Exhibit E, Prepared Statement of William H. Sullivan, former US Ambassador to Laos. Mr. Sullivan states on BS 84:

"My qualifications as a witness on the subject of Laos, stems from the fact that I played an active role as a negotiator for the United States Government in the 1962 Geneva Agreements on Laos and in the 1973 Paris Agreement on Indochina. Moreover, I was the United States Ambassador or the Kingdom of Laos from November 1964 to March 1969."

D. Exhibit F, a smoking gun document in which Laos military makes general statements to carry out orders with the [See Lao Translation of Laos military documents showing genocide of Hmong people and directly referring to American and CIA. Exhibit F hereto]:

"The opinion sharing and evaluation in this meeting had special focus on the problem of exterminating your Hmong ethnicity. The years 2007 - 2009 were for the exterminating of that portion hiding in the jungles and forests of the mountains, to be completely wiped out. The years 2010 — 2015 were for the complete extermination of the portion of C.I.A. soldiers and the C.I.A. children and grandchildren of the General Vang Pao from Laos.

By the year 2020, the war would end, the Meo would be eliminated with not a single person of them remaining in Laos."

Please note this has been translated by Judicial Council of California registered Lao translator John Johnston.

E. Exhibit G, the translation of a similar document from the Department of Defense of Laos, and also stating to [See Lao Translation of Laos military documents showing genocide of Hmong people and directly referring to American and CIA. Exhibit G hereto]:

"There is an order sent to all Divisions, and military units throughout the Province to jointly execute and carry out a high level resolution, in the years 2005 – 2015, to completely exterminate all American Vang Pao reactionaries hiding in the jungles and forests, in the years 2015 - 2020 to completely exterminate all reactionaries within the country who are soldiers of the C.I.A., and all of their remaining children and grandchildren. Starting in the year 2020 going forward, the war is to be at an end in Laos."

F. Exhibit H, a collection of images of the kinds of USA weapons that were brought to Laos by the US CIA, and left in Laos when the USA pulled out. Please note:

(a) BS 545-546 show grenade launchers supplied by the US Government;

(b) BS 547, 552, 553, 554, 556, 557, 558, 559, 561, 562, 563, 564, 566, 567 show various American Air Force helicopters/aircraft [Note page 553 is the kind of plane that has been used to drop poison];

(c) BS 548, 549 show heavy guns/ cannon [Note page 549 these were the cannons used to shoot poison in the jungle].

(d) BS 550-551 show grenades;

(e) BS 555 show American M-16s;

(f) BS 562 show aerial bombs;

(g) BS 564 show USA soldiers with Hmong soldiers;

(h) BS 567 shows USA CIA in Laos on a USA airplane which has a weapon on the wing.

(i) All of these weapons came from the USA; and were brought by the USA into Laos; these were he very weapons used by Pathet Laos military to kill the Hmong and poison their jungle.

37. All of these weapons were left in Laos by the USA. This was all done as part of the Pathet Lao regime's treaty discussions brokered by the USA through Mr. Henry Kissinger. The court should also note that the US Secret Army lasted inside Laos for approximately a decade before the peace treaties. That operation of a secret army was managed and operated by the CIA out of Langley, Virginia.

38. The evidence shows that there is a sufficient connection to events happening on US soil and by US officials, to displace the presumption against extraterritorial application.

39. Plaintiff has a direct eye witness to the following facts, which show further events that occurred inside the territory during the period 1965 to 1972 the USA Military received elite officers of the Laos Royal Military for extensive training in the State of Texas. The training concerned Military Officer Leadership Training, USA style. The USA used its own planes to fly these Laos Royal Officers to the United States, and later after the training back to Laos. Approximately 8 or nine Groups of 35 top Laos military officers were sent in a series to training programs over this period.

40. Our witness was one of these top Laos Military officers, who later was hired on by the USA to become a trainer himself. He lived in the USA while he provided USA style military training to other top Laos military officers. The officers were later returned to Laos after the training."

See also Exhibit I to the proposed First Amended Complaint, letter from William Bourarouy to [former] President Barack Obama.

Petitioner requested relief in the form of a motion for default judgment based on their initial complaint. The trial court DENIED that motion. Petitioner then sought to amend the complaint, adding Hmongs 2 – 5 as plaintiffs. The trial court DENIED that motion and issued an order dismissing the action. The trial court based its dismissal of the action on the following:

Following objections filed by plaintiffs, the magistrate judge issued amended findings and recommendations. Those amended findings and recommendations [Trial Court docket item 34, dated 5/17/2016] states as follows at pages 11, line 8 – page 12, line 20:

> "At oral argument, plaintiff's counsel asserted for the first time that all the conduct alleged in the complaint occurred because of the breach of an "oral treaty," and that this breach occurred in the United States. According to counsel, an unidentified President of the United States (since identified in a post-hearing submission as Dwight D. Eisenhower, see ECF No. 28 at 2), entered into an "oral treaty" with the "King of Laos." Under this treaty, the Hmong people would assist the United States in fighting the Pathet Lao, and the United States would protect the Hmong after the war. However, counsel asserted, the United States had no intention of honoring the treaty, even at the moment that agreement was reached. In addition,

> according to counsel, the United States left behind weapons that were then used by Laos in the atrocities against the Hmong people. It is not at all clear that such allegations, even if they appeared in the complaint, would suffice to allow this court to exercise jurisdiction over this case. However, since these allegations do not even appear in the complaint, they cannot be used to justify the entry of a default judgment."

Petitioner Hmong 1 attempted to solve the pleading problem by filing a motion for leave to amend under FRCP Rule 15 in which the above-described events were specified, the names of the involved President were specified [Presidents Eisenhower and Kennedy]; the events occurring at the direction of US CIA to hire Hmong Royal Lao soldiers were specified; and Hmongs 2-5 were added as plaintiffs.

The trial court DENIED the motion for leave to amend, based on futility [Order Denying Motion to Amend etc., trial court document item 55, Appendix B hereto, page 17a]:

> "The Court will not grant Plaintiffs leave to amend their complaint because amendment would be futile. Plaintiffs have not shown this Court has jurisdiction over their complaint, though they have had multiple opportunities to do so. The Court has reviewed and evaluated the initial complaint (ECF No. 1), the motion to amend (ECF No. 41) and proposed amended complaint (ECF No. 43-1), as well as Plaintiffs' response to the Court's order to show cause

> (ECF No. 46). Plaintiffs' motion to amend, proposed amended complaint, and response to the Court's order to show cause, were all filed after the magistrate judge issued findings and recommendations (ECF No. 39) detailing the deficiencies in Plaintiff's initial complaint. Yet Plaintiffs have not corrected those deficiencies sufficient to show that this Court has jurisdiction."

Also at issue is the Trial Court's allowance of a functional immunity granted to the President and Prime Minister of Laos. The Trial Court ruled in its Order and Amended Findings and Recommendations [Trial Court docket item 34, dated 5/17/2016, pages 16-17]:

> "Plaintiff argues that "claims of immunity" do not lie when war crimes are alleged. This argument ignores the distinction between a Suggestion of Immunity, which is made by the United States, and a claim of immunity, which is made by a defendant. The distinction is critical, because in the cases cited by plaintiff, the claims of immunity were examined by the court on the merits of the immunity claim, whereas, as discussed above, a Suggestion of Immunity is entitled to deference without any examination of the merits of the immunity claim. Indeed, only one case that plaintiff cites in support of its argument actually involved a Suggestion of Immunity, and in that case, the court honored the Suggestion, dismissing all the claims against the sitting President and Foreign Minister of Zimbabwe. See Tachiona

> ex rel. Tachiona v. Mugabe, 186 F. Supp. 2d 383, 384 (S.D.N.Y. 2002) ("this Court honored a 'Suggestion of Immunity' . . . [and] [o]n this basis . . . dismissed claims . . . of torture, terrorism, summary executions and related violations of international law allegedly committed by these officials and other defendants"). The remaining cases plaintiff cites in support of its argument all involved former heads of state or government, for whom the United States did not submit a Suggestion of Immunity. …

This court is required to defer to the Suggestion of Immunity filed the United States in this matter. Accordingly, the sitting President and Prime Minister of Laos are immune from this suit, warranting an Order To Show Cause why the action against them should not be dismissed with prejudice."

See also Suggestion of Immunity, trial court docket items no. 23.

A judgment of dismissal was entered on August 18, 2017. Petitioners filed a timely notice of appeal therefrom to the United States Court of Appeals for the Ninth Circuit.

The Ninth Circuit AFFIRMED the Trial Court's dismissal. The Court of Appeals held [Appendix A at pages 3a-4a]:

> "The district court did not err in concluding that the allegations in the original complaint failed to establish subject-matter jurisdiction

> under the ATS because Plaintiff did not allege any domestic conduct in the initial complaint. See Kiobel, 569 U.S. at 124–25; see also Mujica v. AirScan Inc., 771 F.3d 580, 594 (9th Cir. 2014) (noting "[i]f all the relevant conduct occurred abroad, that is simply the end of the matter under Kiobel") (citation omitted). Because Plaintiff does not allege facts sufficient to establish federal jurisdiction, the district court could not have granted her default judgment. See Arbaugh v. Y&H Corp., 546 U.S. 500, 514 (2006) ("[W]hen a federal court concludes that it lacks subject-matter jurisdiction, the court must dismiss the complaint in its entirety."). Therefore, the district court did not err in denying Plaintiff's motion for entry of default judgment."

The Court of Appeals stated as follows:

> *"Doe v. Nestle, S.A.,* 906 F.3d 1120, 1125 (9th Cir. 2018) states: "First, we determine 'whether the [ATS] gives a clear, affirmative indication that it applies extraterritorially.'" (quoting RJR Nabisco, Inc. v. European Cmty., 136 S. Ct. 2090, 2101 (2016)). The Supreme Court "already answered that the 'presumption against extraterritoriality applies to claims under the ATS, and that nothing in the statute rebuts that presumption.'" Id. (quoting Kiobel, 569 U.S. at 124).
>
> "Because the ATS is not extraterritorial, then at the second step, we must ask whether this case

> involves a domestic application of the statute, by looking to the statute's focus." Id. (internal quotation marks and citation omitted). As part of this analysis, we "determine whether there is any domestic conduct relevant to plaintiffs' claims under the ATS." Id. (internal quotation marks and citation omitted).
>
> The district court did not err in concluding that the allegations in the original complaint failed to establish subject-matter jurisdiction under the ATS because Plaintiff did not allege any domestic conduct in the initial complaint. See Kiobel, 569 U.S. at 124–25; see also Mujica v. AirScan Inc., 771 F.3d 580, 594 (9th Cir. 2014) (noting "[i]f all the relevant conduct occurred abroad, that is simply the end of the matter under Kiobel") (citation omitted)."

As to the issue of the head of state immunity, the Court of Appeals made no express findings.

We now request the United States Supreme Court to grant review in this matter to determine an important issue as to the "touching and concerning" the USA pleadings requirements under the ATS; and the applicability of head of state functional immunities to this case because this case involves provable allegations of war crimes.

## REASON THE WRIT SHOULD BE ISSUED

Petitioners submit that the questions presented qualify for review under Supreme Court Rule 10 (c):

> "(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court. A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."

In *Mujica v. AirScan Inc.*, 771 F.3d 580, 594 (9th Cir. 2014), the Court of Appeals states:

> "Admittedly, *Kiobel* (quite purposely) did not enumerate the specific kinds of connections to the United States that could establish that ATS claims "touch and concern" this country. *See Kiobel,* 133 S.Ct. at 1669 (Kennedy, J., concurring)."

The *Kiobel* decision uses the phrase "touches and concerns". The Courts of Appeals are using the term relevance instead. *Kiobel* has provably created murkiness in the District Courts and Court of Appeals as to the precise nature of the domestic conduct required under *Kiobel*. Petitioner notes the outcome of the *Doe vs Nestle* case, in which a case was dismissed and reversed on appeal, and the *Mujica* case, involving another dismissal reversed on appeal, as direct evidence of this murkiness. The express statement of the Court of Appeals in the *Mujica* case can be fairly seen as judicial frustration searching for an answer to the pleading requirements.

The present case presents an opportunity for the United States Supreme Court to clear up the touches and concerns pleading requirements for an ATC case. This case accordingly raises an extremely important legal issue that that warrants the granting of the present Petition for Writ of Certiorari.

In the present case, Petitioners motion for default judgment was improperly denied. The touches and concerns allegations are in the form of the facts alleged in the initial complaint, which included and referenced the facts stated in the documentary *Hunted Like Animals*. The District Court improperly denied leave to amend based on futility, finding instead that the specification of the touches and concerns facts given by Petitioners, did not show relevant domestic conduct.

The Petition for Writ of Certiorari should be granted. The Court of Appeals' decision should be vacated and ordered reversed, with instructions to the District Court to permit the Petitioner's Alien Tort Claims Act claims to proceed to a default damage prove up proceeding or trial on damages.

The District Court's Judgment of Dismissal, and the Court Appeals affirmance, are contrary to the United States Supreme Court's touch and concern pleadings requirements for an Alien Tort Claims Act case, as stated in the *Kiobel* decision.

As to the immunity claim, the District Court followed existing United States Supreme Court law requiring deference to the executive branch upon submission of a suggestion of immunity. See *Samantar v. Yousuf*, 560 U.S. 305, 311 (2010):

> "Following *Schooner Exchange,* a two-step procedure developed for resolving a foreign state's claim of sovereign immunity, typically asserted on behalf of seized vessels. See, *e.g., Republic of Mexico v. Hoffman,* 324 U.S. 30, 34-36, 65 S.Ct. 530, 89 L.Ed. 729 (1945); *Ex parte Peru,* 318 U.S. 578, 587-589, 63 S.Ct. 793, 87 L.Ed. 1014 (1943); *Compania Espanola de Navegacion Maritima, S.A. v. The Navemar,* 303 U.S. 68, 74-75, 58 S.Ct. 432, 82 L.Ed. 667 (1938). Under that procedure, the diplomatic representative of the sovereign could request a "suggestion of immunity" from the State Department. *Ex parte Peru,* 318 U.S., at 581, 63 S.Ct. 793. If the request was granted, the district court surrendered its jurisdiction. *Id.,* at 588, 63 S.Ct. 793; see also *Hoffman,* 324 U.S., at 34, 65 S.Ct. 530. But "in the absence of recognition of the immunity by the Department of State," a district court "had authority to decide for itself whether all the requisites for such immunity existed." *Ex parte Peru,* 318 U.S., at 587, 61 S.Ct. 1113; see also *Compania Espanola,* 303 U.S., at 75, 58 S.Ct. 432 (approving judicial inquiry into sovereign immunity when the "Department of State ... declined to act"); *Heaney v. Government of Spain,* 445 F.2d 501, 503, and n. 2 (C.A.2 1971) (evaluating sovereign immunity when the State Department had not responded to a request for its views)."

As a matter of law with a practical effect, any modernization of the USA's head of state immunity law

would be rendered more or less useless if it could be trumped by a suggestion of immunity. It should never be the business of the United States of America to immunize war crimes, whether through a claim of immunity or a suggestion of immunity.

This case qualifies under Rule 10 on the basis that it presents an extremely important issue of federal law not settled by this Court as to whether Head of State functional immunities should be disallowed for conduct constituting a war crime.

The Court of Appeals decision did not analyze the functional immunity issue, but did affirm the District Court's order denying leave to amend and the granting of Head of State functional immunity as to the President and Prime Minister of Laos. The District Court ruled as follows:

> "This court is required to defer to the Suggestion of Immunity filed the United States in this matter. Accordingly, the sitting President and Prime Minister of Laos are immune from this suit, warranting an Order to Show Cause why the action against them should not be dismissed with prejudice.

There is a substantial body of international law showing a modern trend of disallowing head of state immunity on conduct that constitutes a war crime. This modern trend was cited to the District Court and Court of Appeals, and went without mention in the Court of Appeals' decision.

The District Court noted United States Supreme Court authority that under the doctrine of separation of powers, the District Court's our legally bound by the decision of the executive branch through United States Department of State to allow such an immunity. If the Executive Branch determines that the immunity should apply, its decision is the last word on the matter, and the immunity must be permitted.

Petitioner's request this court to now step into the modern trend in the law and announce that where war crimes are involved, head of state functional immunities does not apply. The United States Supreme Court has not spoken on whether a war crimes exception to the immunities applies or not. This case thus gives the Court an opportunity to make a decision on an extremely important point of international law, warranting the grant of the present petition for writ of certiorari.

## I. REVIEW IS WARRANTED TO RESOLVE AN IMPORTANT FEDERAL QUESTION OF WHETHER PETITIONERS/SURVIVORS OF THE ATROCITIES COMMITTED BY THE LAOS COMMUNIST GOVERNMENT MET THEIR PLEADING BURDEN UNDER THE ALIEN TORT CLAIMS ACT BY ALLEGING THAT THE USA CONDUCTED A SECRET WAR IN LAOS; MADE A VERBAL REQUEST AND AGREEMENT WITH THE KING OF LAOS TO HIRE HMONG PEOPLE IN LAOS TO FIGHT THE SECRET WAR IN LAOS; MADE A SOLEMN PROMISE FROM USA PRESIDENT TO KING OF LAOS TO PROTECT THE HMONG NO MATTER WHO WON OR LOST THE WAR; BROUGHT OVER SUBSTANTIAL STOCKPILES OF HIGHEST GRADE (CIA GRADE) LEVEL GUNS, AMMUNITION, AIR PLANES, BARRELS OF POISON; ALL OF WHICH WAS CONDUCTED AND PLANNED OUT OF CIA, LANGLEY, VIRGINIA AS OFFICIAL ACTS OF THE US GOVERNMENT, AND THEN LATER BROKERED A PEACE TREATY FORCED UPON THE LAOS ROYALS THAT WAS IMMEDIATELY THEREAFTER BREACHED BY THE LAOS COMMUNISTS; RESULTING IN THE COMMUNISTS TAKING POSSESSION OF ALL THE US CIA WEAPONS, AND TURNING THOSE VERY WEAPONS INTO WEAPONS OF A GENOCIDE AGAINST THE HMONG PEOPLE OF LAOS.

It is an historical fact and allegation of the proposed second amended complaint that the United States managed a Secret War in Laos, in which a President-

to-King agreement was reached to directly hire Hmong Laotians into the CIA's own military operations in Laos. The main point of the war in Laos was to disrupt a portion of the Ho Chi Minh trail that wound through the borders of Vietnam and Laos. The Hmong were willing participants in this jungle battle, and were sometimes referred to as Sky Soldiers for their work in the trees.

The USA supplied the CIA, through Air America drop off, with a substantial cache of top-grade military weaponry for this Secret War in Laos.

These weapons were set forth above, and are described in the Proposed First Amended Complaint, Paras. 29-31 and see Exhibits A-1, *Hunted Like Animals*, showing actual footage of USA weapons in Laos.

The First Amended Complaint recites the following parts of this documentary as both the allegation and the proof of the allegation:

(a) History of Laos segment (8:23)

(b) King of Laos at White House (9:58)

(c) King recommendation to have the Hmong people involved (10:12)

(d) General Vang Pao leader of Hmong organizes Hmong troops (10:30)

(e) Laos Government continues from (1975 to 1984) to hunt down and kill in this manner...continued to 2004 (12:05)

(f) Weapons brought by US into Laos (9:25)

(g) Video of those weapons USA left in Laos including CIA Helicopters (13:55) (20:30)

(h) USA brokering peace treaty 1973 via Henry Kissinger and former US Ambassador (11:50)

(i) What happened in Laos after USA left the atrocities committed by government officials including military police and others (12:07).

The film includes artwork done by Hmong people in the jungles depicting the Laos soldiers with substantial weaponry firing at will against Hmong people.

To these undeniable assertions, the District Court and the Court of Appeals have found not relevant to the Alien Tort Claims Act claims.

Petitioner notes that under standard criminal law concepts, one who supplies a weapon to another with reason to believe the other will use it for criminal purposes, is liable for the full crime committed by the other.

The USA was the direct giver of the guns, ammunition, poisons, airplanes, along with an agreement whereby the Hmong and all Royal Laos were agreed to lay down their weapons. These were the very weapons picked up by the ensuing communist regime to literally hunt out the Hmong like animals.

The reason the Laos Communists were committed to a campaign of rape, murder, torture and dismemberment

was retaliation by the victors over those who served the defeated, pure and simple.

The Hmong fought fearlessly and voluntarily as direct hires of the USA. For this they have paid dearly.

*Doe v. Nestle, S.A.*, 906 F.3d 1120, 1125-1126 (9th Cir. 2018) states:

> "The focus of the ATS is not limited to principal offenses. In *Mastafa v. Chevron Corp.,* the Second Circuit held that "the `focus' of the ATS is on . . . conduct of the defendant which is alleged by plaintiff to be either a direct violation of the law of nations or . . . *conduct that constitutes aiding and abetting* another's violation of the law of nations." 770 F.3d 170, 185 (2nd Cir. 2014) (emphasis added); *see also Adhikari v. Kellogg Brown & Root, Inc.,* 845 F.3d 184, 199 (5th Cir. 2017) (stating that aiding and abetting conduct comes within the focus of the ATS). We also hold that aiding and abetting comes within the ATS's focus on "tort[s] . . . committed in violation of the law of nations." 28 U.S.C. § 1350.
>
> As part of the step two analysis, we then determine "whether there is any domestic conduct relevant to plaintiffs' claims under the ATS." *Adhikari,* 845 F.3d at 195. Under *RJR Nabisco,* "if the conduct relevant to the statute's focus occurred in the United States, then the case involves a permissible domestic application *even if other conduct occurred abroad.*" *RJR Nabisco,* 136 S.Ct. at 2101 (emphasis added)."

*Doe vs Nestle, S.A.* supports the present action in that *Doe vs Nestle S.A.* reversed the District Court's dismissal of the ATCA case and allowed leave to amend to show that the defendant corporations (Nestle and Cargill) aiding and abetting conduct that took place in the United States is attributable to the domestic corporations; in this action the aiding and abetting conduct of the United States is claimed to have occurred in Langley, Virginia, and is attributable to the CIA.

See also *Mujica v. AirScan Inc.*, 771 F.3d 580, 594(9th Cir. 2014), which states:

> "In the absence of any adequate allegations of conduct in the United States, the only remaining nexus between Plaintiffs' claims and this country is the fact that Defendants are both U.S. corporations. That fact, without more, is not enough to establish that the ATS claims here "touch and concern" the United States with sufficient force.
>
> Admittedly, *Kiobel* (quite purposely) did not enumerate the specific kinds of connections to the United States that could establish that ATS claims "touch and concern" this country. *See Kiobel,* 133 S.Ct. at 1669 (Kennedy, J., concurring). It may well be, therefore, that a defendant's U.S. citizenship or corporate status is one factor that, in conjunction with other factors, can establish a sufficient connection between an ATS claim and the territory of the United States to satisfy *Kiobel.*[9] But the Supreme Court has never suggested that a

> plaintiff can bring an action based solely on extraterritorial conduct *merely because* the defendant is a U.S. national. To the contrary, the Court has repeatedly applied the presumption against extraterritoriality to bar suits meeting that description. *See, e.g., Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 250-51, 269, 130 S.Ct. 2869, 177 L.Ed.2d 535 (2010) (holding that Section 10(b) did not reach claims of securities fraud against "foreign *and American* defendants" based on largely extraterritorial conduct (emphasis added)); *Microsoft Corp. v. AT &T Corp.*, 550 U.S. 437, 455, 127 S.Ct. 1746, 167 L.Ed.2d 737 (2007) (holding that presumption against extraterritoriality barred patent infringement case brought against U.S. corporation but based on conduct abroad); *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 258-59, 111 S.Ct. 1227, 113 L.Ed.2d 274 (1991) (holding that Title VII did not apply to U.S. citizens employed by U.S. employers overseas). Nothing in *Kiobel* suggests that the Court would not adhere to this pattern in an ATS case. *Cf. Balintulo,* 727 F.3d at 190 ("[I]f all the relevant conduct occurred abroad, that is simply the end of the matter under *Kiobel.*").[10"]

The *Kiobel* decision uses the phrase "touches and concerns". The Courts of Appeals are using the term relevance instead. *Kiobel* has provably created murkiness in the District Courts and Court of Appeals as to the precise nature of the domestic conduct required under *Kiobel*. Petitioner notes the outcome of the *Doe vs Nestle* case, in which a case was dismissed and reversed on

appeal, and the *Mujica* case, involving another dismissal reversed on appeal, as direct evidence of this murkiness. The express statement of the Court of Appeals in the *Mujica* case can be fairly seen as judicial frustration searching for an answer to the pleading requirements.

The present case presents an opportunity for the United States Supreme Court to clear up the touches and concerns pleading requirements for an ATS case. This case accordingly raises an extremely important legal issue that that warrants the granting of the present Petition for Writ of Certiorari.

Further, The Court of Appeals also held that the proposed amendments included in the proposed First Amended Complaint were futile as not relevant [January 14, 2019 Opinion, Appendix A hereto, page 4a].

An example of the current state of the law on aiding and abetting a crime involving bringing a gun and responsibility for ensuing criminal conduct is *People v. Chiu* (2014) 59 Cal.4th 155, 259.

The amendments are relevant as defined in F.R.Evid. Rule 401.

See *Sexual Minorities Uganda v. Lively,* 960 F. Supp. 2d 304, 323-24 (D. Mass. 2013) (treaty-violating conduct, involving trips from USA to Uganda; lobbying efforts to government officials in Uganda arising from the USA).

See also *Al Shimari v. CACI Premier Tech., Inc.,* 758 F.3d 516, 530-531 (4th Cir. 2014) (upheld a claim based on a treaty-violating prison torture scheme, that was managed

and operated out of USA, but was actually carried out inside a prison in Iraq).

See also *Mastafa v. Chevron Corp.*, 770 F.3d 170, 185-186 (2nd Cir. 2014).

The Petition for Writ of Certiorari should be granted. The Court of Appeals decision should be vacated and ordered reversed, with instructions to the District Court to permit the Petitioner's Alien Tort Claims Act claims to proceed to a default damage prove up proceeding or trial on damages.

## II. REVIEW IS WARRANTED TO RESOLVE AN IMPORTANT FEDERAL QUESTION OF WHETHER THE IMMUNITIES AFFORDED TO HEADS OF STATE INVOKED BY THE SUGGESTION OF IMMUNITY SUBMITTED BY THE UNITED STATES OF AMERICA PURSUANT TO 28 USC SECTION 517 FOR THE LAOS PRESIDENT AND PRIME MINISTER ARE INAPPLICABLE TO THIS CASE, WHICH INVOLVES CLAIMS OF WAR CRIMES INVOLVING GENOCIDE, SEX CRIMES, TORTURE, EVISCERATION, AND OTHER MAYHEM COMMITTED OPENLY AGAINST THE HMONG PEOPLE IN LAOS.

The Court of Appeals' decision did not analyze the sovereign or functional immunity issue, but did affirm the District Court's order denying leave to amend and the granting of Head of State functional immunity as to the President and Prime Minister of Laos. See the Trial Court ruled in its Order and Amended Findings and

Recommendations [Trial Court docket item 34, dated 5/17/2016, pages 16-17, quoted above]; and the August 18, 2017 Order [Appendix B hereto].

As noted above, petitioners do not contend that the district Court's grant of a head of state functional immunity pursuant to a Suggestion of Immunity was contrary to Federal law, or that federal law has not yet been settled. See *Samantar v. Yousuf*, 560 U.S. 305 (2010), quoted above. In *Samantar*, the petitioner was the former prime minster of Somalia, who did not receive a suggestion of immunity as to conduct constituting heinous war crimes. See 560 U.S. at 307 [no suggestion of immunity was given].

*Samantar* shows that it is well-settled that if there is a suggestion of immunity, even as to conduct constituting war crimes, the immunity must still be granted by the Court without conducting any further review. It is a rare example of where a federal judge is required to surrender to the Executive Branch's wishes. But like it or not, that is the rule established by that case.

By this petition, we request the Court to modernize head of state immunity law, in line with a worldwide trend to deny head of state immunities to those who commit war crimes.

There is a substantial body of international law showing a modern trend of disallowing head of state immunity based on conduct that constitutes a war crime. This modern trend was cited to the District Court and Court of Appeals, and went without mention in the Court of Appeals decision. See *Samantar v. Yousuf* 560 U.S. 305, 311 (2010), quoted above.

The Court should have determined the substantive merits of the immunity claim and instead deferred to the Suggestion of Immunity. While this is proper for individual defendants, it is not proper for the country defendant, because a) the statement of immunity did not request immunity as to the Country of Laos, and b) the case of *Samantar v. Yousuf* 560 U.S. 305 (2010) requires a judicial review of the issue of immunity as to a country.

On the merits, the current state of the law is that there is no immunity for war crimes. See *Tachiona ex rel. Tachiona v. Mugabe*, 186 F. Supp. 2d 383, 396 (S.D.N.Y. 2002):

> "The Government's right to be heard here has an additional constitutional underpinning. The United States Constitution does not expressly or exclusively grant authority to conduct foreign relations to any one branch of the Government, but it is beyond dispute that under Article II, section 2 and other statutory and common law provisions, the Executive Branch, acting through its subsidiary agencies, has substantial responsibilities with regard to this country's foreign relations. Taking into account all of these factors, the Court finds that the unique circumstances presented here and the Government's express and implied interests support a basis for intervention."

See also *In re: Estate of Ferdinand E. Marcos Human Rights Litigation Agapita Trajano; Archimedes Trajano v. Ferdinand E. Marcos* 978 F.2d 493 (9th Circuit, 1992) [post default judgment claim of sovereign immunity denied; there was no Suggestion of Immunity given].

See also *Enahoro v. Abubakar*, 408 F.3d 877 (7th Cir. 2005):

> "General Abubakar contends that he has immunity for official conduct taken while he was a Nigerian public official and a member of the ruling council. Underlying his argument is his contention that the FSIA applies to individuals in government, not just foreign governments and agencies.
>
> ***
>
> Affording immunity to foreign officials for legally authorized acts may be more consonant with the tenets of current international law[10]—not to mention this country's own law on immunities for domestic officials[11]—yet under either approach the end result is the same since, even under the more liberal interpretation advanced by the majority of the circuits, officials receive no immunity for acts that violate international jus cogens human rights norms (which by definition are not legally authorized acts). See, e.g., Chuidian, 912 F.2d at 1106 ("Sovereign immunity ... will not shield an official who acts beyond the scope of his authority.")…"

See also the case of *Manoharan v. Rajapaksa* 11 F.3d 178, 179 (DC Cir 2013), relied on by the District Court in this action. See Order and Amended Findings and Recommendations [Trial Court docket item 34, dated 5/17/2016, pages 15]. Manoharan is based on *Samantar v. Yousuf* 560 U.S. 305 (2010).

The following publications show the state of European law on the issue of whether serious international crimes such as war crimes do not receive protection under functional immunities because they can never be considered as being part of government duties. See Andrea Bianchi, "Immunity Versus Human Rights: The Pinochet Case," 10 Eur. J. Int'l L. 237, 262-66 (1999); and Salvatore Zappallà, "Do Heads of State in Office Enjoy Immunity from Jurisdiction for International Crimes? The Ghaddafi Case Before the French Cour de Cassation," 12 Eur. J. Int'l L. 595, 601 (2001).

The clear weight of legal authority is that there are no immunities for war crimes. For example, Hitler wouldn't be immune for his war crimes. The only reason he wasn't at the Nuremberg trials was he had committed suicide during the final days of World War II. Appellant had shown the District Court the several USA legal authorities in support of this position, as well as a s scholarly article showing this to be the trend of modern international law. The Trial Court didn't seem to agree or disagree whether this was the state of the law or not.

The District Court noted United States Supreme Court authority that under the doctrine of separation of powers, the District Courts are legally bound by the decision of the executive branch through United States Department of State to allow such an immunity. If the Executive Branch determines that the immunity should apply, its decision is the last word on the matter, and the immunity must be permitted.

Petitioners request this Court to now step into the modern trend in the law and announce that where war

crimes are involved, Head of State functional immunities do not apply. The United States Supreme Court has not spoken on whether a war crimes exception to the immunities applies or not. This case thus gives the Court an opportunity to make a decision on an extremely important point of international law, warranting the grant of the present petition for writ of certiorari.

As a matter of law with a practical effect, any modernization of the USA's head of state immunity law is rendered in this case useless if it could be trumped by a suggestion of immunity.

It should never be the business of the United States of America to immunize war crimes, whether through a claim of immunity or a suggestion of immunity. See the District Court's Order and Amended Findings and Recommendations [Trial Court docket item 34, dated 5/17/2016, page 16, quoted above].

The Court should consider that in light of its own precedents, a district court and/or court of appeals is without judicial power to consider the merits of a suggestion of immunity in the face of war crimes allegations. The Court should allow district courts to examine the evidence and determine if a war crime was committed, and if so, should deny the requested head of state immunity even when the immunity is raised through a Suggestion of Immunity. Only the United States Supreme Court can fix this lack of harmony in disallowing heads of state immunities due to war crimes in some cases, and not in others. The rule ought to be that there is no judicial pass when heads of state commit war crimes. Only this Court can make this ruling, and is asked to do so here.

Accordingly, the writ of certiorari should be granted.

## CONCLUSION

Based on the foregoing, the petition for writ of certiorari should be granted as to the questions presented or such other questions as the Court may permit.

Respectfully Submitted,

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# APPENDIX

**APPENDIX A — MEMORANDUM OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED JANUARY 14, 2019**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 17-16828

D.C. No. 2:15-cv-02349-TLN-AC

HMONG I, A FICTITIOUS NAME, ON BEHALF OF HERSELF AND AS REPRESENTATIVE OF MEMBERS OF A CLASS OF SIMILARLY SITUATED CLAIMANTS,

*Plaintiff-Appellant,*

v.

LAO PEOPLE'S DEMOCRATIC REPUBLIC; *et al.*,

*Defendants-Appellees,*

v.

UNITED STATES OF AMERICA
and CENTRAL INTELLIGENCE AGENCY,

*Movants.*

*Appendix A*

**MEMORANDUM**[*]

Appeal from the United States District Court
for the Eastern District of California
Troy L. Nunley, District Judge, Presiding

Submitted December 19, 2018[**]
San Francisco, California

Before: BOGGS,[***] PAEZ, and OWENS, Circuit Judges.

Plaintiff brought this action under the Alien Tort Statute, 28 U.S.C. § 1350 ("ATS"), for atrocities allegedly committed by Defendants in Laos as part of a campaign to destroy the Hmong people. Plaintiff appeals the district court's order dismissing her complaint for lack of subject-matter jurisdiction.[1] She challenges the denial of her motion for entry of default judgment and her motion for leave to amend. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

*** The Honorable Danny J. Boggs, United States Circuit Judge for the U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

1. We construe the district court's order filed on August 18, 2017, and the August 18, 2017 Judgment as a dismissal for failure to demonstrate federal jurisdiction under the ATS.

*Appendix A*

We review de novo a district court's dismissal for lack of subject-matter jurisdiction. *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 979 (9th Cir. 2007). We review for abuse of discretion a district court's denial of a motion for leave to amend. *Cafasso, v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1058 (9th Cir. 2011).

The ATS "provides district courts with jurisdiction to hear certain claims, but does not expressly provide any causes of action." *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 115 (2013). We use a two-step framework to analyze ATS claims. *Doe v. Nestle, S.A.*, 906 F.3d 1120, 1125 (9th Cir. 2018). "First, we determine 'whether the [ATS] gives a clear, affirmative indication that it applies extraterritorially.'" *Id.* (quoting *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2101 (2016)). The Supreme Court "already answered that the 'presumption against extraterritoriality applies to claims under the ATS, and that nothing in the statute rebuts that presumption.'" *Id.* (quoting *Kiobel,* 569 U.S. at 124).

"Because the ATS is not extraterritorial, then at the second step, we must ask whether this case involves a domestic application of the statute, by looking to the statute's focus." *Id.* (internal quotation marks and citation omitted). As part of this analysis, we "determine whether there is any domestic conduct relevant to plaintiffs' claims under the ATS." *Id.* (internal quotation marks and citation omitted).

The district court did not err in concluding that the allegations in the original complaint failed to establish

subject-matter jurisdiction under the ATS because Plaintiff did not allege any domestic conduct in the initial complaint. *See Kiobel*, 569 U.S. at 124–25; *see also Mujica v. AirScan Inc.*, 771 F.3d 580, 594 (9th Cir. 2014) (noting "[i]f all the relevant conduct occurred abroad, that is simply the end of the matter under *Kiobel*") (citation omitted). Because Plaintiff does not allege facts sufficient to establish federal jurisdiction, the district court could not have granted her default judgment. *See Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006) ("[W]hen a federal court concludes that it lacks subject-matter jurisdiction, the court must dismiss the complaint in its entirety."). Therefore, the district court did not err in denying Plaintiff's motion for entry of default judgment.

The district court did not abuse its discretion in denying leave to file an amended complaint because the additional allegations in the proposed amended complaint are insufficient to establish jurisdiction under the ATS. While the proposed amended complaint includes allegations of domestic conduct, these allegations are not relevant to the alleged claims under the ATS.[2] *See Doe,* 906 F.3d at 1125–26.

AFFIRMED

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2. We grant Plaintiff's request for judicial notice of U.S. House of Representatives Bill H.R.4716-Hmong Veterans' Service Recognition Act and US Senate Bill S.1179-Hmong Veterans' Service Recognition Act so far as it pertains to taking judicial notice of the existence of the bills. *See* Fed. R. Evid. 201; *Lee v. City of Los Angeles*, 250 F.3d 668, 688–89 (9th Cir. 2001).

## APPENDIX B — ORDER OF THE UNITED STATES COURT DISTRICT FOR THE EASTERN DISTRICT OF CALIFORNIA, FILED AUGUST 17, 2017

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

No. 2:15-cv-02349-TLN-AC

HMONG 1, A FICTITIOUS NAME,
ON BEHALF OF HERSELF AND AS
REPRESENTATIVE OF MEMBERS OF
A CLASS SIMILARLY SITUATED CLAIMANTS,

*Plaintiff,*

v.

LAO PEOPLE'S DEMOCRATIC
REPUBLIC, *et al.*,

*Defendants.*

August 17, 2017, Decided
August 17, 2017, Filed

### ORDER DENYING PLAINTIFFS' MOTION TO AMEND AND DISCHARGING THE COURT'S ORDER TO SHOW CAUSE

This matter is before the Court pursuant to Plaintiffs' Motion to Amend (ECF No. 41) and the Court's Order to Show Cause why this case should not be dismissed for lack

of federal jurisdiction (ECF No. 40). For reasons detailed below, the Court hereby DENIES Plaintiffs' Motion to Amend (ECF No. 41) and DISCHARGES the Order to Show Cause (ECF No. 40).

## I. FACTUAL AND PROCEDURAL BACKGROUND

Hmong I ("Plaintiff"), a fictitiously named person, was the only individual plaintiff in the initial complaint which she brought on behalf of herself and as representative of class members. (ECF No. 1 at 1; ECF No. 43-1 ¶ 6.) The proposed amended complaint lists five named plaintiffs, Hmong I, Hmong 2, Hmong 3, Hmong 4, and Hmong 5 (collectively "Plaintiffs"), who seek to represent the class. (ECF No. 43-1 ¶¶ 6-10 & 15.) The Court will refer to "Plaintiff" in reference to the initial complaint and "Plaintiffs" in reference to the proposed amended complaint.

### A. Procedural History

In the initial complaint, Plaintiff sought injunctive relief and damages for herself and class members under 28 U.S.C. § 1350, the Alien Tort Claims Act or Alien Tort Statute ("ATS"), for "atrocities" Plaintiff alleges Defendants[1] committed. (ECF No. 1 ¶¶ 5, 7.) Defendants

1. Defendants are Lao People's Democratic Republic ("Laos"); Choummaly Sayasone, the President of Laos; Thongsing Thammavong, the Prime Minister of Laos; Dr. Bounkert Sangsomsack, the Minister of Justice of Laos; Lieutenant General Sengnuan Xayalath, the Minister of Defense of Laos; and Thongbanh Sengaphone, the Minister of Public Security of Laos, and Lao

have not responded to this suit and may not have been properly served. (ECF No. 34 at 4.) Plaintiff moved for a default judgment. (ECF No. 5.) Following oral arguments, the magistrate judge issued amended findings and recommendations, to which Plaintiff objected, and which the undersigned adopted in full. (ECF Nos. 34, 39, & 40.)

The Court found Plaintiff had not alleged sufficient facts connected to the United States to justify jurisdiction of a United States court over this matter. (ECF No. 34 at 10.) Plaintiff argued the Court had jurisdiction under the ATS based on Defendants' alleged violations of international laws and treaties. (ECF No. 34 at 3.) The Court found Plaintiff based her claims on alleged actions by Defendants entirely within the national borders of Laos. (ECF No. 34 at 8.) The Court denied Plaintiff's motion for default judgment and ordered Plaintiff to show cause why this case should not be dismissed for lack of federal jurisdiction. (ECF No. 40 at 2.) Plaintiff moved for leave to amend, but the Court declined to rule until Plaintiff responded to the order to show cause. (ECF No. 45.) Plaintiff timely filed her Response to the Order to Show Cause. (ECF No. 46.)

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General Bounchanh (collectively "Defendants"). (ECF No. 1 at 1.) The Court does not know whether Defendants still hold the job titles listed. It does not affect the analysis of this matter.

*Appendix B*

**B. Factual Allegations**[2]

Plaintiffs allege Defendants committed atrocities in Laos against the class members, including "rape, mutilation, torture, disembowelments, poisoning, poisoning of the jungle and environments [including poisoning of the water systems and food systems]." (ECF No. 43-1 ¶ 11.) Plaintiffs allege they "suffered continuous hunting and killing as part and parcel of the official campaign against the Hmong; and have been forced to live in the jungle under those circumstances for decades." (ECF No. 43-1 ¶ 11.) Plaintiffs allege Defendants' actions, led by the Ministry of Defense of Laos, are "part of an official policy making it lawful in Laos to engage in such a murderous campaign [against Plaintiffs]."[3] (ECF No. 43-1 ¶ 12.)

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2. These factual allegations are taken from Plaintiffs' proposed amended complaint (ECF No. 43-1). *See Comm. to Protect our Agric. Water v. Occidental Oil & Gas Corp.*, 235 F. Supp. 3d 1132, *32 (E.D. Cal. 2017) (explaining Local Rule 220 requires an amended complaint be complete without reference to a prior pleading, because once an amended complaint is filed the original pleading no longer serves a function in the case).

3. Plaintiffs also allege Defendants committed acts against persons who are neither fictitiously named plaintiffs in this matter nor members of the class. (ECF No. 43-1 ¶¶ 33 and 34 at 8) (alleging the King and entire Royal family of Laos, along with the "entire National Assembly" of Laos, were placed in labor camps, worked to death, and "died a slow painful death"). It is unclear why Plaintiffs include these allegations. These persons have apparently brought their own suit in this District. *See Savang, et al. v. Lao People's Democratic Republic, et al.*, 2:16-cv-02037-VC. *(cont'd)*

Plaintiffs do not make clear when all of these actions occurred, except that they occurred sometime during and after the Vietnam War up to the recent past. (ECF No. 43-1 ¶¶ 14, 131, & 132.) For example, Plaintiff Hmong I alleges Defendants abducted her husband in Laos less than two years before she filed this suit, but Lao General Bounchanh is being sued "due to his conduct in the Summer of 1979, when three villages were burned and over 100 Hmong women, men, and children, were killed near Nan Chia village, by his order." (ECF No. 43-1 ¶¶ 14 & 144.)

Plaintiffs allege Defendants committed these acts in retaliation for the role of some Hmong in Laos before and during the Vietnam War. (ECF No. 43-1 ¶¶ 1, 2, & 4.) Plaintiffs allege some Hmong opposed the party to which Plaintiffs allege Defendants belong, the Pathet Laos. (ECF No. 43-1 ¶ 3.) Plaintiffs allege that some Hmong worked with the United States Central Intelligence Agency ("CIA") to staff up and train a "Secret Army," that operated in Laos for ten years before the end of the

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Plaintiffs include a lengthy discussion about a dismissed case to which neither Plaintiffs nor Defendants were party for an unrelated claim, malicious prosecution, based on different events. (ECF No. 43-1 ¶¶ 63-80 at 17-20.) (Plaintiffs have repeated use of paragraph numbers 68-80 in ECF No. 43-1 at 18-20 and 20-24, so the Court will specify the page number when referring to the paragraphs.) Plaintiffs assert that the fact that the dismissed case for malicious prosecution and the criminal case underlying it took place in the United States with different parties, different claims, and different events, supports federal jurisdiction over this matter. (ECF No. 43-1 ¶¶ 63, 80 at 20.) Plaintiffs have not explained why this might be so nor provided any authority to support their assertion.

Vietnam War and opposed the Pathet Laos. (ECF No. 43-1 ¶¶ 31 and 33 at 11.)[4] Plaintiffs allege that after the Vietnam War, the Pathet Laos came to power in Laos and Defendants then retaliated against their party's former opponents. (ECF No. 43-1 ¶¶ 31 at 8 & 60.) Plaintiffs allege some of the weapons Defendants used in retaliation were weapons the United States had given the Hmong military commanders, which the Pathet Laos required the Hmong commanders to hand over to the Pathet Laos after the war. (ECF No. 43-1 ¶¶ 23 at 6, 60.)

Plaintiffs allege "Hmong people who were not in the 'Secret Army' nor descended from a person in the Secret Army have safely resided throughout Laos. It is the Hmong that have a connection to the US Secret Army that became the target of extermination..." (ECF No. 43-1 ¶ 4.) Plaintiffs allege Hmong and Lao people living in the United States sympathetic to the plight of the Hmong in Laos "wrote a series of detailed reports to a series of Presidents of the United States, and to the United Nations in New York, requesting help." (ECF No. 43-1 ¶¶ 36-44.)

Plaintiffs allege Defendants' conduct violated international laws and treaties, including the 1973 Vientiane Ceasefire Agreement; 1962 Geneva Convention; 1966 United Nations International Covenant on Civil and Political Rights; 1948 Convention on the Prevention and

4. Plaintiffs also repeated use of numbers 30-36 in numbering the paragraphs in their proposed amended complaint. (*See* ECF No. 43-1 at 7-8 and 11-12.) The content of the paragraphs is different but the numbers are repeated. The Court will specify the page on which the paragraph is printed when referring to these paragraphs.

Punishment of the Crime of Genocide, and the "local law" of Laos, referring to the "January 9, 1990 Decree of the President of the Lao People's Democratic Republic On the Promulgation of the Penal Law." (ECF No. 43-1 ¶¶ 21-23 at 5 & 122.)[5]

Plaintiffs seek "general and special compensatory damages, and other consequential damages, in an amount according to proof but in excess of $5 million" for each Plaintiff. (ECF No. 43-1 ¶ 139.) Plaintiffs request the Court "makes arrangements to allow [Plaintiffs] to be safeguarded from physical attacks and retaliation for filing the present lawsuit, and to transport her [sic] and her group out of danger to a protection zone in some part of Laos bordering Thailand, Burma, and China." (ECF No. 43-1 ¶ 153.) "Plaintiffs seek a similar protective order for any other Hmong claimants who come forward in this action." (ECF No. 43-1 ¶ 154.)

Plaintiffs request injunctive relief from this Court requiring, among other things, "Defendants to cease their illegal campaign of atrocities," "Laotian government officials to take affirmative steps to declare this campaign as over, and to allow the Hmong people to reside in Laos in peace," "Defendants to abide by the provisions of the series of treaties described herein," Defendants "to abide by Laotian Law," and "in particular" requiring

5. Additionally, Plaintiffs repeat paragraph numbers 21-23 on pages 5 and 6 of their proposed amended complaint. (*See* ECF 43-1 at 5, 6.) The content of these paragraphs is different but the numbers are repeated. When the Court refers to any of the three paragraph numbers, it will specify the page on which the paragraph is printed.

Defendants to hold democratic elections in Laos. (ECF No. 43-1 ¶ 150.)

## II. STANDARDS OF LAW

Granting or denying leave to amend a complaint rests in the sound discretion of the trial court. *Swanson v. United States Forest Serv.*, 87 F.3d 339, 343 (9th Cir. 1996). Under Rule 15(a)(2), "a party may amend its pleading only with the opposing party's written consent or the court's leave," and the "court should freely give leave when justice so requires." The Ninth Circuit has considered five factors in determining whether leave to amend should be given: "(1) bad faith, (2) undue delay, (3) prejudice to the opposing party, (4) futility of amendment; and (5) whether plaintiff has previously amended his complaint." *In re Western States Wholesale Natural Gas Antitrust Litigation*, 715 F.3d 716, 738 (9th Cir. 2013) (citing *Allen v. City of Beverly Hills*, 911 F.2d 367, 373 (9th Cir. 1990)). "[T]he consideration of prejudice to the opposing party carries the greatest weight." *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003).

When a plaintiff cannot cure the flaw in its pleading, any amendment would be futile, and "there is no need to prolong the litigation by permitting further amendment." *Chaset v. Fleer/Skybox Int'l, LP*, 300 F.3d 1083, 1088 (9th Cir. 2002) (holding the district court did not abuse its discretion in denying leave to amend where the plaintiffs could not demonstrate standing and, therefore, amendment would be futile). Although a district court should freely give leave to amend when justice so requires,

"the court's discretion to deny such leave is 'particularly broad' where the plaintiff has previously amended its complaint[.]" *Ecological Rights Found. v. Pac. Gas & Elec. Co.*, 713 F.3d 502, 520 (9th Cir. 2013) (quoting *Miller v. Yokohama Tire Corp.*, 358 F.3d 616, 622 (9th Cir. 2004)).

## III. ANALYSIS

"The ATS provides, in full, that '[t]he district courts shall 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.'" *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 133 S. Ct. 1659, 1663, 185 L. Ed. 2d 671 (2013) (quoting 28 U.S.C. § 1350). The ATS "provides district courts with jurisdiction to hear certain claims, but does not expressly provide any causes of action." *Id.* "It does not directly regulate conduct or afford relief." *Id.* at 1664. Under the ATS, federal courts may recognize private claims under federal common law for violations of international law, "where the claims touch and concern the territory of the United States," *id.* at 1663, "with sufficient force to displace the presumption against extraterritorial application." *Id.* at 1669.

The presumption against extraterritorial application provides that when a statute such as the ATS "gives no clear indication of an extraterritorial application, it has none.'" *Kiobel*, 569 U.S. 108, 133 S. Ct. 1659 at 1664, 185 L. Ed. 2d 671 (quoting *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247, 255, 130 S. Ct. 2869, 177 L. Ed. 2d 535 (2010)). It presumes "that United States law governs domestically but does not rule the world.'" *Id.* (citing

*Microsoft Corp. v. AT & T Corp.*, 550 U.S. 437, 454, 127 S. Ct. 1746, 167 L. Ed. 2d 737 (2007)).

"The principles underlying the presumption against extraterritoriality [] constrain courts exercising their power under the ATS." *Kiobel*, 569 U.S. 108, 133 S. Ct. 1659 at 1665, 185 L. Ed. 2d 671. The presumption helps ensure "the Judiciary does not erroneously adopt an interpretation of U.S. law that carries foreign policy consequences not clearly intended by the political branches." *Id.* at 1664. "[O]ther nations, also applying the law of nations, could hale our citizens into their courts for alleged violations of the law of nations occurring in the United States, or anywhere else in the world." *Id.* at 1669. "These concerns...are all the more pressing when the question is whether a cause of action under the ATS reaches conduct within the territory of another sovereign." *Id.* at 1665.

Plaintiffs argue this Court has jurisdiction over this matter because Plaintiffs' connection with the United States touches and concerns the United States sufficient to displace the presumption against extraterritoriality that applies to the ATS. (ECF No. 43-1 ¶¶ 21 at 6, 35 at 8.) It is the claims, however, that must "touch and concern the territory of the United States." *Kiobel*, 569 U.S. 108, 133 S. Ct. 1659 at 1669, 185 L. Ed. 2d 671. Plaintiffs allege events that took place in both Laos and the United States. However, Plaintiff alleges the events giving rise to Plaintiffs' causes of actions took place entirely in Laos. "[I] f all the relevant conduct occurred abroad, that is simply the end of the matter under *Kiobel*." *Mujica v. AirScan Inc.*, 771 F.3d 580, 594 (9th Cir. 2014).

Plaintiffs define the class members as those "who have become victims to the atrocities in *Lao People's Democratic Republic* [hereinafter after 'Laos'] committed by the Defendants..." (ECF No. 43-1 ¶ 11) (emphasis added). By Plaintiffs' definition, the acts and events which form the basis of Plaintiffs' claims must necessarily have taken place in Laos.

Plaintiffs also describe events which Plaintiffs allege took place within the United States, but these events do not form the basis for any of their claims. Plaintiffs allege the CIA recruited, operated, and paid for a Secret Army in Laos, had an oral agreement to assist the Hmong, and provided weapons to Hmong military commanders in the Secret Army. (ECF No. 43-1 ¶¶ 1, 23 at 6, 30 at 11, 31 at 11, 45, 49, 54, 57, 59, & 60.) Plaintiffs allege Hmong officers and Laos Royal Military were trained at Fort Knox and in Texas. (ECF No. 43-1 ¶¶ 33-34 at 11.) Plaintiffs allege some people in the United States sympathetic to their plight wrote letters to the United States government and United Nations, and others formed a committee in the United States to study and report on atrocities in Laos. (ECF No. 43-1 ¶¶ 36-40 at 12, 41-44.) None of these allegations forms the basis for Plaintiffs claims or requested relief in this matter.[6]

In several hundred pages of briefs and supporting material, Plaintiffs have not cited authority to support

6. Hmong, 2, Hmong 3, Hmong 4, and Hmong, 5 have a suit pending in this Court based on many of these allegations which names the United States and the CIA as defendants. (*See* ECF No. 2:17-cv-00927-TLN-AC.)

their assertion that Plaintiffs' contacts with the United States support this Court's jurisdiction over this case. Plaintiffs have cited three cases without explanation for how those cases would support Plaintiffs' assertions. (ECF No. 46 ¶¶ 8-11.) In fact, the cases do not lend such support.

Plaintiffs cite *Kiobel*, 569 U.S. 108, 133 S. Ct. at 1669, holding the ATS did not confer jurisdiction where all the conduct on which the claims were based took place entirely in Nigeria by the Nigerian military; *Sexual Minorities Uganda v. Lively*, 960 F. Supp. 2d 304, 323-24 (D. Mass. 2013), holding a cause of action under the ATS was appropriate where alleged torts occurred to a substantial degree in the United States, over many years, during which time the defendant was in Uganda only a few times; and *Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 516, 530-31 (4th Cir. 2014), holding the plaintiffs' claims "touch and concern" the United States where the defendant corporation and employees on whose conduct the claims were based were United States citizens, the conduct occurred pursuant to a contract with the United States government issued in the United States, and the defendant corporation's managers in the United States approved and attempted to cover up the conduct. The facts here are analogous to *Kiobel*, where the plaintiffs based their claims on alleged conduct that occurred outside the United States.

Ninth Circuit precedent does not support Plaintiffs' assertion. *Mujica*, 771 F.3d at 596, holding the plaintiffs, citizens and residents of Columbia, did not have a valid ATS claim against two U.S.-headquartered corporations

where the plaintiffs' claims exclusively concerned conduct that occurred in Colombia; *Doe I v. Nestle USA, Inc.*, 766 F.3d 1013 (9th Cir. 2014), holding former child slaves had not stated an ATS claim for abuses suffered at the hands of overseers on cocoa plantations in the Ivory Coast, and adding that the Supreme Court did not explain the nature of its "touch and concern" test for determining when an ATS claim is permissible, except that "it is not met when an ATS plaintiff asserts a cause of action against a foreign corporation based solely on foreign conduct." *Id.* at 1027-28.

The Court will not grant Plaintiffs leave to amend their complaint because amendment would be futile. Plaintiffs have not shown this Court has jurisdiction over their complaint, though they have had multiple opportunities to do so. The Court has reviewed and evaluated the initial complaint (ECF No. 1), the motion to amend (ECF No. 41) and proposed amended complaint (ECF No. 43-1), as well as Plaintiffs' response to the Court's order to show cause (ECF No. 46). Plaintiffs' motion to amend, proposed amended complaint, and response to the Court's order to show cause, were all filed after the magistrate judge issued findings and recommendations (ECF No. 39) detailing the deficiencies in Plaintiff's initial complaint. Yet Plaintiffs have not corrected those deficiencies sufficient to show that this Court has jurisdiction.

The Court finds Plaintiffs cannot demonstrate federal jurisdiction and further attempts to amend would be futile. *Chaset*, 300 F.3d at 1088. Plaintiffs' motion to amend is denied.

**IV. CONCLUSION**

For the reasons stated above, IT IS HEREBY ORDERED that:

1. Plaintiffs' Motion to Amend (ECF No. 41.) is DENIED, with prejudice;

2. The Court's Order to Show Cause (ECF No. 40), is DISCHARGED; and

3. The Clerk of the Court is directed to close this case.

IT IS SO ORDERED.

Dated: August 17, 2017

/s/ Troy L. Nunley
Troy L. Nunley
United States District Judge