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 10 Specially Appearing Defendant YAHOO!
 11 HOLDINGS (HONG KONG), LTD.

12 **UNITED STATES DISTRICT COURT**
 13 **NORTHERN DISTRICT OF CALIFORNIA**
 14 **OAKLAND DIVISION**

15 WANG XIAONING, YU LING, SHI TAO,
 16 and ADDITIONAL PRESENTLY
 17 UNNAMED AND TO BE IDENTIFIED
 18 INDIVIDUALS,

19 Plaintiff,

20 v.

21 YAHOO!, INC., a Delaware Corporation,
 22 YAHOO! HONG KONG, LTD., a Foreign
 23 Subsidiary of Yahoo!, AND OTHER
 24 PRESENTLY UNNAMED AND TO BE
 25 IDENTIFIED INDIVIDUAL EMPLOYEES
 26 OF SAID CORPORATIONS,

27 Defendant.

28 **Case No. C07-02151 CW**

**DECLARATION OF MATTHEW T.
 KLINE IN SUPPORT OF DEFENDANT
 YAHOO!, INC.'S OPPOSITION TO
 PLAINTIFFS' MOTION TO ENLARGE
 TIME**

Judge: Hon. Claudia Wilken

I, MATTHEW T. KLINE, declare:

1. I am an attorney in the law firm of O'Melveny & Myers, LLP, attorney of record for defendant Yahoo!, Inc. ("Yahoo!") and specially appearing for defendant Yahoo! Holdings (Hong Kong), Ltd. ("YHKL"). Pursuant to Civil Local Rule 6-3(c), I submit this declaration in support of Defendants' Opposition to Plaintiffs' Motion to Enlarge Time. Except where otherwise indicated, I have personal knowledge of the facts stated herein and, if called as a witness, I could and would testify competently thereto.

2. A true and correct copy of Defendant Yahoo!, Inc's Motion to Dismiss is attached

1 hereto as Exhibit A.

2 3. A true and correct copy of Defendant Yahoo!, Inc's Special Motion to Strike
3 Plaintiffs' State Law Causes of Action Pursuant to the California Anti-SLAPP Statute is attached
4 hereto as Exhibit B.

5 4. I participated in the meet-and-confer telephone conferences and other
6 communications with Plaintiffs' counsel on September 7, 10, 12 and 13 referenced by Morton
7 Sklar in his Declaration Supporting Plaintiffs' Motion to Enlarge Time. Mr. Sklar is correct that
8 Defendants' counsel repeatedly asked for a more specific description of the jurisdictional
9 discovery Plaintiffs seek to take in this case. However, Mr. Sklar's statement that he "provided
10 Defense Counsel with a detailed description of the limited discovery" Plaintiffs are requesting is
11 incorrect. (Sklar Decl. ¶ 7.) During the telephone conference on September 10, Mr. Sklar
12 provided Defendants' counsel only high-level generalities concerning the broad topics of
13 discovery Plaintiffs were seeking. During this call, I requested that Plaintiffs provide a copy of
14 their written discovery proposal before filing their motion with the Court to allow Defendants to
15 consider Plaintiffs' specific discovery requests and meaningfully respond. Plaintiffs never did so
16 before filing these Motions on September 14.

17 5. During the telephone conferences on September 7 and 10, I also requested that
18 Plaintiffs provide specific citations to case law or other authority that Plaintiffs contended
19 supported their entitlement to discovery into the claims in Yahoo!'s Motion to Dismiss. In
20 response, Mr. Sklar provided two case citations taken from the annotated version of the Federal
21 Rules of Civil Procedure, which nowhere appear in Plaintiffs' Discovery Motion, and never
22 provided Defendants with citations to any of the cases actually cited in Plaintiffs' Discovery
23 Motion before it was filed on September 14.

24 6. I drafted the email from which Mr. Sklar selectively quotes in paragraph 11 of his
25 Declaration. I told Mr. Sklar that this email was being sent in an effort to avoid confusion and to
26 clearly outline our position on his proposed motions. I asked that he attach the email to his
27 motion to inform the Court of Defendants' positions, but Mr. Sklar declined to place the entire
28 email before the Court. A true and correct copy of that email is attached hereto as Exhibit C and

1 reproduced below.

2 Morton,

3 Following up on our various conversations, you have informed us in general terms
4 about motions you intend to file concerning the three motions we filed on August
5 27. We thought it would be useful to send you a short summary of our response to
6 your assertions:

7 1) You have told us you will file a motion to “hold in abeyance” Yahoo, Inc.’s
8 Motion to Dismiss and SLAPP Motion, in order to take limited discovery related to
9 these motions. We will oppose this motion for at least the following reasons:

10 First, neither motion turns on disputed facts; both accept as true the facts
11 alleged in the second amended complaint. There is no need for discovery to
12 oppose these motions. Despite our invitation, you have not provided us with case
13 authority demonstrating your right to indefinitely postpone the resolution of our
14 motions in order to obtain discovery.

15 Second, the federal rules permit the filing of motions to dismiss at the threshold
16 of a case in order to test plaintiffs’ legal claims and theories before costly litigation
17 ensues. As we have explained in our motions, we think your complaint fails to state
18 a cognizable legal claim, much less one that is justiciable. We seek a ruling from
19 the court on these arguments.

20 Third, to the extent you believe you need discovery on certain factual issues in
21 order to oppose all or parts of our motion, you have refused to identify the specific
22 discovery you need or the issues in our motion to which such discovery relates.

23 Fourth, the motion to initiate discovery is unnecessary. The Court has not
24 stayed discovery in the case; nor have you initiated any discovery; nor have we
25 indicated we will take the position there should be no discovery.

26 Fifth, your perceived need for certain limited—though unspecified—discovery
27 is not cause to file no response at all to our motions. Certainly, there are many
28 arguments and issues in our motions to which you can respond without any
29 professed need for discovery. You should oppose our motions and specifically
30 identify those arguments to which you believe you cannot respond absent
31 discovery. Once you’ve made your arguments and explained where a factual
32 disputes remain, we and the Court can then evaluate your position, and we can
33 either agree to your request, or failing that, litigate the issue.

34 Sixth, as to YHKL’s motion to dismiss for lack of personal jurisdiction, you
35 have not identified the discovery you need to oppose the motion. If and when you
36 do, we will be in a position to evaluate our response. As of now, you’ve given us
37 no specifics.

38 2) You have told us you will file a motion seeking a three-week continuance of
39 the September 26 deadline for opposing defendants’ three pending motions.
40 Because, as you have explained, you seek this extension in order to file and
41 accelerate your first motion—which seeks to indefinitely postpone your response to
42 defendants’ motions—we anticipate opposing this motion.

43 This, of course, is not a complete statement of our views on these issues--just
44 our reactions based on the conversations we’ve had. But we wanted you to have our
45 basic position before you filed your motions.

EXHIBIT A

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KONG, LTD.
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PRESENTLY UNNAMED AND TO BE
17 IDENTIFIED INDIVIDUAL
EMPLOYEES OF SAID
18 CORPORATIONS,

19 Defendants.

Case No. C07-02151 CW

**CORRECTED VERSION: DEFENDANT
YAHOO!, INC.'S MOTION TO DISMISS
PLAINTIFFS' SECOND AMENDED
COMPLAINT; PROPOSED ORDER**

Date: November 1, 2007

Time: 2 p.m.

Location: Courtroom 2

Judge: Hon. Claudia Wilken

20 TO PLAINTIFFS AND THEIR COUNSEL OF RECORD:

21 PLEASE TAKE NOTICE THAT ON November 1, 2007, at 2 p.m., defendant Yahoo!,
22 Inc. ("Yahoo!") will and hereby does move to dismiss, with prejudice, plaintiffs' second amended
23 complaint ("complaint"), which was filed July 30, 2007. Yahoo! brings this motion pursuant to
24 Rules 12(b)(1), (6), and (7) of the Federal Rules of Civil Procedure. This motion is based on this
25 notice of motion and motion, the following memorandum of points and authorities, the pleadings
26 on file in this matter, the reply memorandum Yahoo! intends to file, and any further argument the
27 Court might allow.
28

1 Without waiving its objection to the exercise of personal jurisdiction in this case, specially
2 appearing defendant Yahoo! Hong Kong, Ltd. ("YHKL") joins this motion.

3 Dated: August 30, 2007

DANIEL M. PETROCELLI
MATTHEW T. KLINE
O'MELVENY & MYERS LLP

6 By: 

7 Daniel M. Petrocelli

8 Attorneys for Defendant Yahoo! Inc and for
9 specially appearing defendant Yahoo! Hong
10 Kong, Ltd.

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1 **I. INTRODUCTION**

2 This is a lawsuit by citizens of China imprisoned for using the internet in China to express
3 political views in violation of China law. It is a political case challenging the laws and actions of
4 the Chinese government. It has no place in the American courts. Yahoo! deeply sympathizes
5 with the plaintiffs and their families and does not condone the suppression of their rights and
6 liberty by their government. But Yahoo! has no control over the sovereign government of the
7 People's Republic of China ("PRC"), the laws it passes, and the manner in which it enforces its
8 laws. Neither Yahoo! Inc. or YHKL, therefore, can be held liable for the independent acts of the
9 PRC just because a former Yahoo! subsidiary in China obeyed a lawful government request for
10 the collection of evidence relevant to a pending investigation.

11 There are numerous legal grounds why plaintiffs' complaint cannot proceed:

12 *First*, plaintiffs' claims are not justiciable under *Sosa v. Alvarez-Machain*, 542 U.S. 692
13 (2004), the act of state doctrine, principles of international comity, and the political question
14 doctrine. The complaint challenges the actions of the PRC in enacting and enforcing laws
15 proscribing certain types of speech deemed inimical to its government. Litigating this case thus
16 risks violating international law principles of sovereignty, interfering with U.S. foreign policy,
17 and jeopardizing the U.S. law enforcement interests.

18 *Second*, plaintiffs have failed to state a claim under the Alien Tort Statute ("ATS"), the
19 Torture Victim Protection Act ("TVPA"), the Electronic Communications Privacy Act ("ECPA"),
20 and the California laws on which they rely. Among other infirmities, plaintiffs' ATS and TVPA
21 theories are not actionable against corporate actors, ECPA does not apply extraterritorially, and
22 plaintiffs' California claims are preempted.

23 *Third*, plaintiffs' claims contravene federal, California, and international law—each of
24 which expressly protects defendants from civil liability for communicating with law enforcement
25 officials regarding investigations. Whether they responded to the PRC's requests voluntarily or
26 under compulsion of PRC law (the complaint seeks to obscure that it was plainly the latter),
27 defendants' conduct was plainly privileged.

28 *Fourth*, the complaint fails to join the PRC or PRC officials who allegedly harmed

1 plaintiffs, and who are “necessary” and “indispensable” parties under Rule 19 of the Federal
2 Rules of Civil Procedure.

3 *Fifth*, this case should not proceed unless counsel of record for plaintiffs establish their
4 authority to represent plaintiffs in this case. *See Pueblo of Santa Rosa v. Fall*, 273 U.S. 315, 319
5 (1927); *Meredith v. Ionian Trader*, 279 F. 2d 471, 474 (2d Cir. 1960).

6 **II. SUMMARY OF PLAINTIFFS’ ALLEGATIONS¹**

7 ***Plaintiff Wang Xiaoning.*** From 2000 to 2002, Wang worked in mainland China as a
8 author and editor of pro-democracy publications. Compl. ¶¶ 32-35. PRC authorities arrested
9 Wang and charged, tried, and convicted him of “incitement to subvert state power,” advocating
10 the establishment of an alternative political party, and communicating with an overseas enemy
11 organization. *Id.* ¶¶ 37-40. Wang was taken into custody on September 1, 2002, charged on
12 September 30, 2002, tried and convicted in July 2003, and sentenced to a 10-year prison term on
13 September 12, 2003. *See id.* ¶¶ 37-41. While in prison, Wang suffered brutal treatment at the
14 hands of the PRC as punishment for his political activities. *See id.* ¶¶ 39, 43-44. Wang is
15 allowed only limited contact with outsiders; it is unclear whether he has any contact with his
16 counsel or authorized this lawsuit. *See id.* ¶ 45.

17 ***Plaintiff Shi Tao.*** Shi Tao worked as a reporter and editor at the *Contemporary Business*
18 *News* in mainland China and wrote articles advocating political reform. *See id.* ¶¶ 52-55. On
19 April 20, 2004, from his place of employment, Shi published anonymously a document the PRC
20 considered to be a “state secret.” *See id.* ¶¶ 55-56, 62-63. PRC authorities arrested Shi on
21 November 23, 2004 and charged him on December 14; he pled guilty on March 11, 2005. *See id.*
22 ¶¶ 57-61. On April 30, 2005, Shi was sentenced to 10 years in prison and is currently
23 incarcerated at a Chinese prison known for abusive treatment of prisoners. *See id.* ¶¶ 62-66.
24 Given the vague allegations about his specific circumstances, it is unclear whether Shi’s counsel
25 have contact with him or the authority to represent him. *See id.* ¶¶ 59, 65-66. Before filing this
26 suit, Shi brought an action against YHKL before the Hong Kong Privacy Commissioner. *See id.*

27 _____
28 ¹ Solely for purposes of this motion, the facts alleged in plaintiffs’ complaint (“compl.,” filed July
30, 2007, are all assumed true. *See Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1985 (2007).

¶ 64. The Commissioner rejected Shi's claim. *See id.*

Yu Ling. Yu Ling is Wang's wife. *See id.* ¶ 11. She and "her family have endured severe psychological and emotional suffering as a direct result of [Wang's] arbitrary detention." *Id.* ¶ 46. She has been "subjected to continued police surveillance," including seizure of her computer. *Id.* ¶¶ 47-48. Yu's "emotional injuries have caused [her] physical injury," and devoting time to Wang's legal defense has cost her time and money. *Id.* ¶¶ 50-51.

Yahoo! and YHKL. Plaintiffs have sued Yahoo! and YHKL. Yahoo! is a Delaware corporation and its primary place of business is Sunnyvale, California. Yahoo! is an internet portal and provides email and other internet-based services. YHKL, which is based in Hong Kong, is Yahoo!'s indirect subsidiary and has a portal business in Hong Kong. *See id.* ¶¶ 14-15.

Plaintiffs allege Yahoo! and YHKL controlled the operations of Yahoo! China, an internet portal serving mainland China. *See id.* ¶¶ 15-17. Having used Yahoo! China email accounts and group lists to publish political literature, *see id.* ¶¶ 33-34, 55, plaintiffs rest their claims on two pivotal allegations: defendants "willingly" provided information regarding plaintiffs' online activities to the PRC and were "instrumental" to "causing the Plaintiff[s]' arrest and criminal prosecution," *id.* ¶¶ 2, 42, 44, 62.

Although the success of this motion in no way turns on refuting these two assertions, the very documents cited in the complaint undermine both claims.² As the Hong Kong Privacy Commissioner concluded in Shi's case, *see* Compl. ¶ 64 (citing ruling), "the disclosure of Information in the circumstances of the case *was not a voluntary act initiated by [YHKL] but was compelled under the force of PRC law.*"³ (All emphases added unless otherwise indicated.) And, plaintiffs' criminal judgments do not show that defendants divulged plaintiffs' identities, caused

² On a motion to dismiss, the court may consider documents described in, but not attached to, a complaint. *See Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994); *In re Calpine Corp. Sec. Litig.*, 288 F. Supp. 2d 1054, 1076 (N.D. Cal. 2003).

³ Exhibits are attached in Appendix A. *See* Ex. A (Office of the Privacy Comm'r for Personal Data, Hong Kong, Report Published under § 48(2) of the Personal Data (Privacy) Ordinance (Cap. 486), Report No.: R07-3619, at ¶ 8.25 (Mar. 14, 2007), http://www.pcpd.org.hk/english/publications/files/Yahoo_e.pdf ("Hong Kong Commissioner's Report")). The Report also explains that Yahoo! China's Privacy Policy and Terms of Service clearly informed users that their information would be disclosed in response to law enforcement requests. *Id.* at 8.37-8.39.

1 them to be investigated, or provided proof essential to their convictions.⁴

2 ***Claims and Relief Sought.*** The complaint contains claims under the ATS, TVPA, and
 3 ECPA; a variety of international law sources; and six California law theories. *See* Compl. ¶¶ 3-6.
 4 Shi asserts 11 causes of action. Wang asserts 10; unlike Shi, he does not make a forced labor
 5 claim. *See id.* at ¶¶ 69-136. Yu asserts three California law claims—for intentional infliction of
 6 emotional distress, negligence, and unfair business practices. *See id.* at ¶¶ 109-27. Plaintiffs seek
 7 compensatory and punitive damages, as well as declaratory relief determining defendants violated
 8 international law, injunctive relief to prevent defendants from complying with future requests for
 9 information, and “affirmative action by the Defendants to secure the release of the detainees.”

10 **III. PLAINTIFFS CLAIMS ARE NOT JUSTICIABLE.**

11 *Sosa v. Alvarez-Machain*, 542 U.S. 692, 728 (2004), instructs courts to proceed in ATS
 12 cases with “great caution.” Trial courts have a duty of “vigilant door keeping,” obligating them
 13 to consider a variety of prudential concerns before exercising jurisdiction. *Id.* at 729; *see also*
 14 *Wang v. Yahoo!, Inc.*, Order Denying Def. Yahoo!’s Mot. for Early Case Mgt. Conf. & Order at
 15 4:19-5:19 (filed July 31, 2007) (“Order”). As this Court has recognized, “[a]lthough it is one
 16 thing for American courts to enforce limits on their own government’s power, . . . it is ‘quite
 17 another to consider suits under rules that would go so far as to claim a limit on the power of
 18 foreign governments over their own citizens, and to hold that a foreign government or its agents
 19 has transgressed those limits.’” *Id.* at 5:1-6 (quoting *Sosa*). Three justiciability doctrines that
 20 reflect these constitutional and prudential concerns—the act of state doctrine, the doctrine of
 21 international comity, and the political question doctrine—compel dismissal here.

22
 23 ⁴ Wang’s and Shi’s judgments—both in the original Chinese and translated into English—are
 24 attached in Appendix A, as Exhibits B and C, respectively. Both judgments cite various sources
 25 of evidence—including physical evidence, witnesses, and plaintiffs’ confessions—on which
 26 plaintiffs’ convictions rested. With regard to defendants, all Wang’s judgment states is that
 27 YHKL provided records that showed that two Yahoo! China email accounts had been set up by
 28 users in China. *See* Appx. A, Ex. B at 6 ¶ e, f. And in Shi’s case, the judgment shows that the
 information YHKL provided merely helped confirm that an email in the case was sent from Shi’s
 place of employment—not that Shi sent it. *See* Appx. A, Ex. C at 4-5, Compl. ¶ 62. *Indeed,*
contrary to the suggestion that the PRC learned about Wang’s identity from defendants, the
judgment discloses that Wang published articles using his real name. *See* Appx. A, Ex. B at 11,
 ¶ 4 and 21, ¶ a.

1 **A. This Case Should Be Dismissed Under The Act Of State Doctrine.**

2 The act of state doctrine provides that “[e]very sovereign State is bound to respect the
3 independence of every other sovereign State, *and the courts of one country will not sit in*
4 *judgment on the acts of the government of another done within its own territory.*” *Underhill v.*
5 *Hernandez*, 168 U.S. 250, 252 (1897). This doctrine is rooted in the recognition that “[t]he
6 conduct of the foreign relations . . . is committed by the Constitution to the Executive and
7 Legislative . . . departments.” *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964).

8 **1. This Case Directly Challenges Sovereign Acts Of The PRC.**

9 As this Court recently observed, “[t]he claims in this case directly implicate the propriety
10 of actions taken by the Chinese government.” Order at 6:22-27. Indeed, the case “require[s] the
11 court to sit in judgment” of at least three sovereign acts of the PRC. *Corrie v. Caterpillar, Inc.*,
12 403 F. Supp. 2d 1019, 1032 (W.D. Wa. 2005). Each is addressed in turn.

13 a. Judging PRC Speech Laws. By its express terms, plaintiffs’ complaint is a facial attack
14 on criminal laws in China banning political speech. One of the complaint’s recurring and critical
15 allegations is that the PRC had no right to detain plaintiffs for publishing political literature.⁵
16 However, “free speech” rights as we understand them in the United States are not the law in
17 China.⁶ As one Chinese court has summarized the law:

18
19
20 ⁵ See, e.g., Compl. ¶ 23 (“As a result of the expression of their views, these ‘dissidents’ are
21 subjected to arbitrary arrest, criminal prosecution, and persecution in violation of numerous
22 protections for fundamental rights involving the exercise of freedom of expression, association,
23 press and assembly under the Chinese Constitution and international law.”); ¶ 27 (“by helping
24 the censors, and by identifying people who could be accused of anti-government speech or
25 communication, the Defendants would be placing many innocent individuals, who were merely
26 expressing their views or communicating with others, at risk of arbitrary arrest, prolonged
27 arbitrary detention, forced labor, and torture as a result of their lawful exercise of free speech and
28 free association rights”); ¶ 85 (“These acts of arbitrary arrest and long-term detention suffered by
the Plaintiffs designated in this Third Claim for Relief, including arrest and detention for an
unlawful purpose in violation of the rights to freedom of speech, association, and assembly”).

⁶ Article 35 of the Chinese Constitution recognizes “freedom of speech” as a right citizens enjoy,
but other parts of the Constitution and PRC law limit this right and prohibit various forms of
speech. Translations of these and other Chinese law sources cited in this motion are included in
Appendix B accompanying this motion. See Appendix B, ex. 1, Constitution of the PRC, Articles
1, 28, 51, and 53; ex. 2, State Security Law (P.R.C), Article 4; ex. 4 Criminal Law (P.R.C.),
Article 105; ex 6, Law on Protecting State Secrets (P.R.C.), Article 24; ex. 10, Management
Provisions on Electronic Bulletin Services in Internet (P.R.C.), Article 9.

1 This court believes that freedom of speech is a political right of the citizens of
 2 China, but when exercising this right, no one may harm the interests or security of
 3 the nation, and may not use rumor mongering or defamation to incite subversion of
 4 the national regime. Therefore, the court takes note that the defense counsel takes a
 5 standpoint that only stresses the right of the accused, and ignores his duties.⁷

6 No matter how strenuous our disagreement, every sovereign nation has a right to regulate
 7 speech within its borders. *See Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*, 169
 8 F. Supp. 2d 1181, 1186 (N.D. Cal. 2001), *rev'd on other grounds*, 433 F.3d 1199 (9th Cir. 2006)
 9 (en banc). Because American law is unique in the protections it affords to free speech—even
 10 among Western democracies—courts have recognized that our First Amendment does not reflect
 11 customary international law. *See Guinto v. Marcos*, 654 F. Supp. 276, 280 (S.D. Cal. 1986) (cited
 12 favorably by *In re Estate of Ferdinand Marcos*, 25 F.3d 1467, 1475 (9th Cir. 1994)).⁸

13 Despite all this, plaintiffs' claims all proceed from the premise that international law is
 14 violated not only when the PRC acts to enforce its laws prohibiting political speech, but when
 15 companies assist the PRC in enforcing these laws.⁹ Endorsement of this theory of liability
 16 requires the Court to consider and declare unlawful the Chinese government's prohibitions on

17 ⁷ Judgment of Huang Qi, Congressional-Executive Committee on China Virtual Academy
 18 <http://www.cecc.gov/pages/virtualAcad/exp/expsecurity.php>

19 ⁸ *See also, e.g.,* Sionaidh Douglas-Scott, *The Hatefulness of Protected Speech*, 7 WM. & MARY
 20 BILL OF RTS. J. 305, 309 (1999) (As “Ronald Dworkin recently commented: ‘The United States
 21 stands alone even among democracies, in the extraordinary degree to which its [C]onstitution
 22 protects freedom of speech and of the press.’”); Ronald J. Krotoszynski, *A Comparative
 23 Perspective on the First Amendment*, 78 TUL. L. REV. 1549 (2004) (German speech protections
 24 more limited than those in the U.S.); Caroline Uyttendaele & Joseph Dumortier, *Free Speech on
 25 the Information Superhighway*, 16 J. MARSHALL J. COMPUTER & INFO. L. 905 (1998) (free speech
 26 more limited in Europe; speech subject to restrictions when it harms the public order); Daria
 27 Vaisman, *Turkey's Restriction, Europe's Problem* ¶¶ 2-3, [http://www.opendemocracy.net/
 28 democracy-turkey/free_speech_3952.jsp](http://www.opendemocracy.net/democracy-turkey/free_speech_3952.jsp) (French law makes it a crime to insult foreign heads of
 state); Reporters Without Borders Briefs for July 2007, *Spain: Gara and Deia Journalists Now
 Face Charges of “Insulting King,”* http://www.rsf.org/article.php3?id_article=23090 (journalists
 who published satire of king “face[d] charges of ‘insulting the king’ under article 491 of the
 criminal code”).

⁹ *See, e.g., supra* n.5; Compl. ¶ 124 (“Defendants have also acted contrary to public policy by
 infringing upon the freedom of speech and expression of the general public.”); *Morton Sklar on
 Yahoo! human rights lawsuit* (Apr. 21, 2007), [http://www.brightcove.com/title.jsp?title=7693
 85554&channel=27638673](http://www.brightcove.com/title.jsp?title=769385554&channel=27638673) (webcast at 06:23-8:16) (“The U.S. Government outlaws these kinds
 of behaviors [against people] who are in favor of free press and free speech. So when Yahoo!
 says that the people involved are just abiding by Chinese law, that may be the case, but the laws
 are unlawful in terms of U.S. and international law and U.S. law requires just the opposite. . . .
 Foreign governments have the right to request information from Yahoo! pursuant to court
 orders China is using it to persecute people for the communication of ideas. And that's not
 something the United States government or a United States corporation should go along with.”).

1 speech. This would be a direct affront to the PRC’s sovereignty. *See Yahoo!*, 169 F. Supp. 2d at
2 1186 (“A basic function of a sovereign state is to determine by law what forms of speech and
3 conduct are acceptable within its borders”).

4 b. Judging The PRC’s Treatment Of Plaintiffs. The complaint also requires the Court to
5 question the PRC’s criminal cases against Wang and Shi—from the lawfulness of their arrest, to
6 the fairness of their trials and appeals, to their treatment in prison. *See* Compl. ¶¶ 37-45, 57-63.
7 Plaintiffs allege that the PRC violated their rights at every turn: “[h]igh level officials of the PRC
8 are involved in the abuses”; the PRC is “falsely imprison[ing]” plaintiffs. *Id.* ¶¶ 45, 141, 105-08.
9 Plaintiffs even ask this Court to order defendants to take “affirmative action . . . to secure
10 [plaintiffs’] release.” *Id.* at 34 ¶ (d). Adjudicating the legitimacy of plaintiffs’ prosecution,
11 conviction, and incarceration—much less granting quasi-habeas corpus relief—openly and
12 directly challenges the PRC’s sovereignty.

13 c. Judging the PRC’s Ability to Gather Evidence. Plaintiffs also seek an order that would
14 require defendants to selectively violate China’s laws, including orders compelling disclosure of
15 evidence. *See* Compl. ¶ 6 (plaintiffs seek “injunctive relief to stop any further disclosures of user
16 information in order to prevent such . . . abuses from taking place in the future”).

17 Defendants cannot be expected, let alone ordered, to violate another nation’s laws. Like
18 any sovereign state, China requires companies operating within its jurisdiction to comply with its
19 laws. *Cf. Dayton Coal & Iron Co. v. Barton*, 183 U.S. 23, 24 (1901). This sovereign power, as
20 has long been recognized, includes the right to compel the production of evidence. *See Consol.*
21 *Rendering Co. v. Vermont*, 207 U.S. 541, 552 (1908). Article 45 of the PRC Criminal Procedure
22 Law provides that “the public security organs shall have the authority to collect or obtain
23 evidence” in connection with investigations.¹⁰ Anyone who receives such a request “shall
24 provide truthful evidence,” and may not “falsif[y], conceal[], or destroy[]” evidence. Compliance
25 with these requests is mandatory and may not be challenged in the Chinese courts.¹¹ It would be

26 ¹⁰ Appendix B, Tab 4.

27 ¹¹ Section 2 of Article 1 of the People’s Supreme Court’s Judicial Interpretations on the People’s
28 Republic of China Administrative Procedure Law (Appendix B, Tab 9) specifically provides that
the courts shall not accept cases initiated by citizens, legal persons, or other organizations

1 a serious affront to the PRC's sovereignty even to entertain the issue of whether companies can
2 disregard such requests.

3 **2. The *Sabbatino* Factors All Favor Dismissal.**

4 Courts consider four factors in determining whether to dismiss on "act of state" grounds:

- 5 • *First*, courts examine the "degree of codification or consensus concerning [the]
6 particular area of international law." *Sabbatino*, 376 U.S. at 428. The less consensus,
7 the stronger the argument is for declining jurisdiction.
- 8 • *Second*, courts consider the case's impact on "foreign relations"; the greater the
9 impact, the greater the "justification" for dismissing the case. *Id.*
- 10 • *Third*, a court has greater authority to hear a case if "the government which
11 perpetrated the challenged act of state is no longer in existence." *Id.*
- 12 • *Fourth*, courts in the Ninth Circuit consider "whether the foreign state was acting in
13 the public interest." *Liu v. Republic of China*, 892 F.2d 1419, 1432 (9th Cir. 1989). If
14 the state was so acting, the court has less leeway to proceed with the case.¹²

15 *The First Factor.* There is nothing remotely close to "codification or consensus" under
16 international law to support plaintiffs' claims. *Sabbatino*, 376 U.S. at 428. As explained in
17 Section IV.E, *infra*, U.S., California, and international law all treat communications with law
18 enforcement officials as privileged acts that cannot give rise to liability. It is likewise an axiom
19 of international law that "a state may not require a person . . . to refrain from doing an act in
20 another state that is required by the law of that state." RESTATEMENT (THIRD) OF FOREIGN
21 RELATIONS § 441 (1987). The first *Sabbatino* strongly favors dismissal.

22 *The Second Factor.* The implications of this case for foreign relations—the most
23 important *Sabbatino* factor, *see Doe v. Qi*, 349 F. Supp. 2d 1258, 1296 (N.D. Cal. 2004)—can

24 concerning the acts of state public security agencies and state security bureaus that are authorized
25 by the PRC Criminal Procedure Law. Article 28 of Provisions on the Procedures for the
26 Handling of Administrative Review Cases by Public Security Bodies states that certain cases,
27 including "objections concerning criminal judicial acts such as compulsory measures and criminal
28 investigation measures carried out in accordance with laws in criminal cases" may not be heard.

¹² Although it militates in favor of dismissal, defendants disagree that this fourth factor is an
appropriate consideration under *Sabbatino*. Because Ninth Circuit law included it, defendants
simply note their objection to preserve it.

1 hardly be overstated. A cornerstone of U.S. foreign policy is maintaining strong and carefully
 2 managed relations with the PRC.¹³ Unlike rogue or smaller states, often implicated in ATS cases,
 3 China is a world power, a significant trading partner, and a fellow permanent member of the U.N.
 4 Security Council.¹⁴ It can be expected to act decisively in protecting its sovereignty and guarding
 5 against perceived encroachments on its authority.¹⁵ Both the Executive Branch and China have
 6 expressed the strong view that the United States must manage its relations with the PRC without
 7 interference from the courts.¹⁶

8 Though openly critical of China's human rights record, the United States has made the
 9 policy judgment to actively engage China, promote investment there by American companies,
 10 and take a "carrot" rather than "stick" approach to urging reform.¹⁷ As the Executive Branch has
 11 consistently urged, ATS cases can threaten U.S. foreign policy toward countries like China,

12 _____
 13 ¹³ See, e.g., Robert B. Zoellick, Deputy Sec'y of State, *Whither China: From Membership to*
Responsibility?, Remarks to National Committee on U.S.-China Relations (Sept. 21, 2005),
 available at <http://www.state.gov/s/d/former/zoellick/rem/53682.htm>.

14 ¹⁴ See, e.g., Thomas J. Christensen, Deputy Assistant Sec'y for East Asian and Pacific Affairs,
 U.S.-China Relations, Statement Before the House Committee on Foreign Affairs, Subcommittee
 15 on Asia, the Pacific and the Global Environment (Mar. 27, 2007), <http://www.state.gov/p/eap/rls/rm/2007/82276.htm>; Evans J.R. Revere, Acting Assistant Sec'y for East Asian and Pacific
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 18 <http://www.un.org/sc/members.asp>.

19 ¹⁵ See, e.g., U.S. Dep't of State, Bureau of East Asian and Pacific Affairs, *Background Note:*
China (Jan. 2007), <http://www.state.gov/r/pa/ei/bgn/18902.htm>.

20 ¹⁶ See, e.g., Ex. E (Statement of Interest of the United States, *Doe v. Qi*, Case No. C02 0672 CW
 (EMC), Tab A at 2-3, 7 (filed Jan. 16, 2004) (condemning human rights abuses by PRC, but
 21 urging that diplomatic means are far more effective than litigation)); Ex. F (Letter from Hon. John
 B. Bellinger III to Hon. Peter D. Keisler re: *Li Weixum, et al. v. Bo Xilai*, No. 1:04CV00649
 (D.D.C.) at 2-3 (July 24, 2006) (same)).

22 ¹⁷ See, e.g., *id.*; William J. Clinton, Remarks by the President at Signing of China Permanent
 Normal Trade Relations (Oct. 10, 2000), [http://www.clintonfoundation.org/legacy/101000-](http://www.clintonfoundation.org/legacy/101000-speech-by-president-at-signing-of-china-pntr.htm)
 23 [speech-by-president-at-signing-of-china-pntr.htm](http://www.clintonfoundation.org/legacy/101000-speech-by-president-at-signing-of-china-pntr.htm) ("the more China opens its markets, the more it
 24 unleashes the power of economic freedom, the more likely it [will] be to more fully liberate the
 human potential of its people"); U.S. Dep't of State, Bureau of East Asian and Pacific Affairs,
 Background Note: China (Jan. 2007), <http://www.state.gov/r/pa/ei/bgn/18902.htm> ("For seven
 25 consecutive administrations, U.S. policy has been to encourage China's opening and integration
 into the global system. As a result, China has moved from being a relatively isolated and poor
 26 country to one that is a key participant in international institutions The State Department's
 annual China human rights and religious freedom reports have noted China's well-documented
 27 abuses of human rights At the same time, *China's economic growth and reform since 1978*
 has improved dramatically the lives of hundreds of millions of Chinese, increased social mobility,
 28 and expanded the scope of personal freedom.").

1 where “constructive [economic] engagement has been advocated as a means of advancing human
2 rights.” Appx. A, Ex. D (*Doe v. Unocal*, Supp. Br. for the U.S. as Amicus Curiae, Case No. 00-
3 56603 at 12-13 (9th Cir. Aug. 25, 2004).

4 This case is a prime example. It is an admitted effort by plaintiffs and their counsel to
5 “convince other U.S. companies to think twice before doing business with the Chinese
6 government.”¹⁸ Indeed, the very purpose of this lawsuit is to attack specific laws in China and the
7 PRC’s ability and authority to enforce them.

8 This Court’s opinion and analysis in *Doe v. Qi* are instructive. In *Qi*, 349 F. Supp. 2d at
9 1264, plaintiffs sued two PRC officials, accusing them of commanding the torture of proponents
10 of Falun Gong. After considering the views of the U.S. and Chinese governments regarding the
11 policy impact of the case, the Court declined to dismiss the case in its entirety, choosing instead
12 to craft a narrow default judgment affording limited declaratory relief. *See id.* at 1266. The
13 Court reasoned that the PRC officials’ acts of torture so clearly violated Chinese and international
14 law, as well as U.S. policy statements condemning such torture, that it would not contradict U.S.
15 foreign policy to declare that the two officials had deviated from these norms. *See id.* at 1266-
16 67.

17 Here, based on plaintiffs’ strategic framing of their complaint, no such compromise is
18 available. Plaintiffs have chosen not to name the PRC, PRC prison guards, or PRC law
19 enforcement personnel as defendants. But considering a declaration on whether defendants did
20 anything wrong—let alone the monetary and injunctive relief plaintiffs seek—does not obviate
21 litigating the legitimacy of Chinese laws regulating speech and the PRC’s ability to enforce them.
22 Undertaking such litigation might well be viewed as a profound rebuke of the PRC and risk
23 poisoning U.S. relations with a significant world power. It might also provoke the PRC into
24 precipitously reacting to the perceived encroachment by cracking down more harshly on political
25 speech or even harming plaintiffs. *Cf. Sabbatino*, 376 U.S. at 423 (act-of-state doctrine rests on
26

27 ¹⁸ World Organization for Human Rights USA, “Major lawsuit filed by Human Rights USA
28 against Yahoo! highlights the internet company’s complicity in human rights abuses in China,
(Apr. 18, 2007), <http://humanrightssusa.blogspot.com/search/label/human%20rights>.

1 the “strong sense of the Judicial Branch that its engagement in the task of passing on the validity
2 of foreign acts of state may hinder rather than further this country’s pursuit of goals both for itself
3 and for the community of nations”).

4 In contrast to *Qi*, the policy implications of this case extend well beyond a mere
5 reaffirmation that the United States condemns torturing political dissidents. Entertaining this
6 lawsuit may invite challenges to U.S. policy and threaten American law enforcement efforts. For
7 example, were this Court to rule, as plaintiffs request, that defendants acted wrongfully in
8 respecting the PRC’s official requests for evidence, nothing would stop courts in other countries
9 from issuing similar rulings about American processes and laws. A court in France could issue an
10 injunction mandating that French companies doing business in America refuse to provide
11 evidence in cases where the defendant might be subject to the death penalty. The Executive
12 Branch is clearly opposed to inviting such responses and has recognized this as a real threat. *See*
13 Appx. A, Ex. E (Statement of Interest of U.S., *Doe v. Qi* at 8 (death penalty example)); Ex. G
14 (*Matar v. Dichter*, Case No. 05 Civ. 10270 (WHP), Statement of Interest of the U.S. at 22
15 (S.D.N.Y. Nov. 29, 2006). Similarly, corporations doing business in the United States could
16 reasonably fear that complying with American requests for information might subject them to
17 civil liability in the United States or abroad. Suits under the ATS challenging the U.S. “War on
18 Terror,” *see* Scott Shane, *Suit Over C.I.A. Program*, N.Y. TIMES, May 31, 2007, are one recent
19 example. To follow the path plaintiffs urge would seriously risk undermining U.S. law
20 enforcement efforts.

21 These policy concerns dramatically distinguish this case from *Qi*, where the defendants
22 were accused of engaging in and commanding acts of universally condemned violence, or the
23 more typical ATS case where a corporate defendant is accused of hiring rogue military forces to
24 commit abuses on its behalf to protect a major infrastructure project. Here, the issue is whether
25 defendants violated international, U.S., and California law by complying with Chinese law in
26 connection with a criminal investigation. American courts cannot be placed in the position of
27 deciding whether law enforcement activities carried out by a foreign state are illegitimate—at
28

1 least not without significantly jeopardizing U.S. foreign relations and law enforcement interests.
2 For these reasons, the second and “central” *Sabbatino* factor mandates dismissal.

3 *The Third Factor.* As this Court held in *Qi*, 349 F. Supp. 2d at 1303, the third *Sabbatino*
4 factor “clearly weighs in favor of applying the act of state doctrine,” because “the PRC still
5 exist[s].” Nor is there any evidence that the PRC has retreated from or repudiated its position that
6 plaintiffs should be incarcerated or that it has a right to enforce its own criminal laws. *Cf. Bigio*
7 *v. Coca-Cola Co.*, 239 F.3d 440, 453 (2d Cir. 2000) (declining to dismiss under act-of-state
8 doctrine where government “ha[d] apparently repudiated the acts in question”).

9 *The Fourth Factor.* This final factor—“whether the foreign state was acting in the public
10 interest,” *Liu*, 892 F.2d at 1432—also favors dismissal. The creation and enforcement of laws
11 regulating speech within a sovereign’s borders are quintessentially acts of a sovereign serving the
12 public’s interest. *See Yahoo!*, 169 F. Supp. 2d at 1186. That the government is China and the
13 laws are inimical to our beliefs does not change the analysis or conclusion. *Cf. In re Quarles*, 158
14 U.S. 532, 535-36 (1895) (It is the duty and the right . . . of every citizen to assist in prosecuting,
15 and in securing the punishment of, any breach of the peace of the United States.”).

16 Again, *Qi* is instructive. This Court rejected the argument that torture and arbitrary
17 detention of Falun Gong members were actions in the public interest, even though the PRC had
18 argued they posed a threat to public health and safety. *See Qi*, 349 F. Supp. 2d at 1306. Unlike
19 *Qi*, this case implicates not only the PRC’s treatment of political dissidents, but also the propriety
20 of China’s laws regulating speech, the right of the PRC to compel assistance to enforce its laws,
21 and ultimately the independence of the sovereign government of China. *Cf. Quarles*, 158 U.S. at
22 537.

23 **B. This Case Should Be Dismissed Under Principles Of International Comity.**

24 Comity counsels courts to decline jurisdiction in cases that call into question executive,
25 legislative, or judicial acts of foreign states. *See Societe Nationale Industrielle Aerospatiele v.*
26 *United States Dist. Court for the Dist. of Iowa*, 482 U.S. 522, 544 n.27 (1987). The *Restatement*
27 *(Third) of Foreign Relations Law* (“RESTATEMENT”) sets forth eight factors to determine
28

1 “[w]hether exercise of jurisdiction over a person or activity is unreasonable.” RESTATEMENT,
2 *supra*, § 403.¹⁹ All eight factors militate against exercising jurisdiction in this case:

- 3 • The first two factors are satisfied because the indisputable locus of this case is China.
4 *See id.* at § 403(a), (b).
- 5 • The third, fifth, and sixth factors are satisfied because evidence-gathering laws are
6 “traditional” and important parts of law enforcement efforts the world over. *See id.* at
7 § 403(c), (e), (f). The PRC’s prohibitions on speech, while misguided, are not
8 uncommon, and a sovereign’s ability to legislate and enforce its own laws is both
9 “generally accepted” and an important part of the “international political, legal, [and]
10 economic system.” *Id.* at § 403(c), (e).
- 11 • The fourth factor is satisfied because companies doing business abroad have a
12 “justified expectation” that they should comply with local law. *Id.* at § 403(d).
13 Plaintiffs’ own authorities recognize companies are “obliged” to do so. Human Rights
14 Watch Letter at 2 ¶ 3 (quoted in Compl. ¶ 27). The U.S. government mandates
15 compliance as well. *See* BUREAU OF ECONOMIC AND BUSINESS AFFAIRS, OECD
16 GUIDELINES FOR MULTINATIONAL ENTERPRISES 5 (2002).
- 17 • The seventh and eighth factors are satisfied because the PRC has an exceedingly
18 strong interest in compliance with its sovereign orders. *See* RESTATEMENT, *supra*, §
19 403(g), (h). Other sovereign states would no doubt object to an American court
20 prescribing which laws American companies (*e.g.*, Yahoo!), and foreign companies

21 ¹⁹ (a) the link of the activity to the territory of the regulating state, *i.e.*, the extent to which the
22 activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or
23 in the territory;

(b) the connections, such as nationality, residence, or economic activity, between the regulating
24 state and the person principally responsible for the activity to be regulated, or between that state
25 and those whom the regulation is designed to protect;

(c) the character of the activity to be regulated, the importance of regulation to the regulating
26 state, the extent to which other states regulate such activities, and the degree to which the
27 desirability of such regulation is generally accepted;

(d) the existence of justified expectations that might be protected or hurt by the regulation;

(e) the importance of the regulation to the international political, legal, or economic system;

(f) the extent to which the regulation is consistent with the traditions of the international system;

(g) the extent to which another state may have an interest in regulating the activity;

and

(h) the likelihood of conflict with regulation by another state.

1 (e.g., YHKL) must obey when doing business in countries other than the U.S. *See id.*
2 §§ 403(g), (h); *Rivendell Forest Prods., Ltd. v. Canadian Forest Prods.*, 810 F. Supp.
3 1116, 1119 (D. Colo. 1993).

4 **C. This Case Should Be Dismissed Under The Political Question Doctrine.**

5 This case presents a nonjusticiable “political question,” *Vieth v. Jubelirer*, 514 U.S. 267,
6 277-78 (2004), and should be dismissed because it “challenges the official acts of an existing
7 government in a region where diplomacy is delicate and U.S. interests are great.” *Corrie*, 403 F.
8 Supp. 2d at 1032. In cases that “touch on foreign relations,” the political question doctrine
9 requires the Court to undertake a “discriminating analysis of the particular question posed, in
10 terms of the history of its management by the political branches, of its susceptibility to judicial
11 handling in light of its nature and posture.” *Baker v. Carr*, 369 U.S. 186, 211-12 (1962).

12 Consideration of the traditional “political question” factors set forth in *Baker v. Carr*,
13 confirm that this case should be dismissed. First, management of foreign relations is plainly
14 “commit[ed]” to the coordinate “political branches.” *Id.* at 217; *American Ins. Ass’n v.*
15 *Garamendi*, 539 U.S. 396, 414 (2003); *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363,
16 383-86 (2000). Second, this Court could not entertain plaintiffs’ complaint without expressing a
17 “lack of respect” for Executive Branch policy toward China, *Baker*, 369 U.S. at 217, which
18 disfavors lawsuits such as this one, encourages investment, encourages compliance with local
19 law, and elects to use diplomatic pressure to improve human rights. *Cf. Corrie*, 403 F. Supp. 2d
20 at 1032 (“For this court to preclude sales of Caterpillar products to Israel would be to make a
21 foreign policy decision and to impinge directly upon the prerogatives of the executive branch of
22 government.”). Third, were it allowed to proceed, this lawsuit would represent “multifarious
23 pronouncements by various departments on one question.” *Baker*, 369 U.S. at 217.

24 “Dismissal is appropriate if *any one* of these . . . factors is ‘inextricable’ from the case.”
25 *Corrie*, 403 F. Supp. 2d at 1032 (quoting *Alperin*, 410 F.3d at 544); *Joo v. Japan*, 413 F.3d 45,
26 49-53 (D.C. Cir. 2005). Here, all three factors are present. Practical concerns, which help guide
27 the political question analysis, also counsel in favor of dismissal. Given Shi’s and Wang’s
28 unavailability to give testimony in this case, the parties’ inability to depose PRC officials

1 regarding plaintiffs' allegations, and the unavailability of other witnesses and documents in
2 China, *see* Def. Yahoo!, Inc.'s Mot. For An Early Case Mgmt. Conf. & Order at 6-7, 10-11 (filed
3 June 21, 2007), "there is a very real possibility that the parties might not be able to compile all the
4 relevant data, thus making any adjudication of this case both difficult and imprudent." *Anderman*
5 *v. Fed. Rep. of Austria*, 256 F. Supp. 2d 1098, 1112 (C.D. Cal. 2003); *see also O.N.E. Shipping*
6 *Ltd. v. Flota Mercante Grancolombiana, S.A.*, 830 F.2d 449, 453 (2d Cir. 1987) (act of state
7 doctrine requires dismissal "[w]hen the causal chain between a defendant's alleged conduct and
8 plaintiff's injury cannot be determined without an inquiry into the motives of the foreign
9 government").

10 **IV. PLAINTIFFS HAVE FAILED TO STATE A COGNIZABLE CLAIM.**

11 Even if justiciable, plaintiffs' complaint must be dismissed because it fails to state a claim
12 upon which relief can be granted. *See* FED. R. CIV. P. 12(b)(6); *Bell Atl. Corp. v. Twombly*, 127
13 S. Ct. 1955, 1964-65 (2007). Plaintiffs' claims under the ATS, TVPA, ECPA, and California law
14 all fail as a matter of law. Moreover, defendants' conduct is privileged and not actionable.

15 **A. Plaintiffs Have Failed To State A Claim Under The ATS.**

16 On their face, plaintiffs' four ATS claims—the First through Fourth Claims for Relief—
17 have no basis in law.

18 **1. Plaintiffs' Allegations Do Not Meet *Sosa's* "High Bar."**

19 In *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), the Supreme Court established a
20 framework for addressing ATS claims. *Sosa* held that, while the ATS grants district courts
21 jurisdiction over "any civil action by an alien for a tort only, committed in violation of the law of
22 nations," 28 U.S.C. § 1350, the statute itself does not create a cause of action, *see Sosa*, 542 U.S.
23 at 713-14. If any cause of action exists under the ATS, the law of nations must provide it. *Sosa*
24 set a "high bar" for recognizing such claims, holding that "the ATS [may] furnish jurisdiction"
25 for only a "relatively modest set of actions." *Id.* at 720, 727. As *Sosa* observed, courts "have no
26 congressional mandate to seek out and define new and debatable violations of the law of nations,"
27 such claims may have "collateral consequences" on the "foreign relations of the United States,"
28 and widespread recognition of ATS claims would permit civil suits to proliferate "without the

1 check imposed by prosecutorial discretion.” *Id.* at 727-28.

2 To overcome *Sosa*’s high bar, plaintiffs face three burdens. They must establish that the
3 specific facts of their case amount to a violation of “definable, universal and obligatory”
4 international norm that is “accepted by the civilized world and defined with . . . specificity.” *Id.*
5 at 720, 725. They must show that “international law extends the scope of liability for a violation
6 of a given norm *to the perpetrator being sued.*” *Id.* at 732 & n.20. And they must overcome the
7 many prudential reasons to dismiss an ATS case, including objections from the “political
8 branches.” *See id.* at 728 n.23. Plaintiffs meet none of these burdens.

9 **2. The ATS Does Not Apply Extraterritorially.**

10 The text of the ATS says nothing about the statute’s extraterritorial application to aliens
11 not harmed on American soil. Absent such a “clear express[ion]” from Congress in the “language
12 of” the ATS, the statute cannot be read to apply beyond outside our nation’s boundaries. *EEOC*
13 *v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991). In the wake of *Sosa*, the United States has
14 argued forcefully that the ATS should not apply where plaintiffs alleged they were harmed abroad
15 by their own governments. *See, e.g.*, Br. of the U.S. as Amicus Curiae, *The Presbyterian Church*
16 *of Sudan v. Talisman Energy, Inc.*, Case No. 07-0016, at 5-12 (2d Cir. May 15, 2007) (“U.S.
17 Talisman Br.”). Not only does the text of the ATS *not* mention extraterritorial claims, *see id.* at
18 8-9, a review of the legislative history in 1789—when Congress enacted the ATS—shows the
19 statute was enacted to do nothing more than provide foreigners with a forum to bring suit in the
20 United States if they were injured here, *see id.* at 6-8. Although several courts in this circuit,
21 including this one, have assumed that the ATS may apply extraterritorially, *cf. id.* at 6 n.2,
22 federal statutes should presumptively *not* be so construed, *see id.* at 9-10.

23 **3. The Norms Plaintiffs Invoke Are Not Actionable Under The ATS.**

24 Even if the ATS applies, plaintiffs’ claims for torture and cruel and inhuman punishment
25 are preempted, and their claims for free speech and forced labor cannot be recognized under *Sosa*.

26 a. Preemption. Plaintiffs Shi and Wang’s “First and Second Claims for Relief” are for
27 “Torture” and “Cruel, Inhuman, or Degrading Treatment or Punishment” in violation of the ATS
28 and TVPA. Compl. ¶¶ 70-83. In enacting the TVPA, Congress occupied the field and precluded

1 enforcement of these international law norms under the ATS. *See Enahoro v. Abubakar*, 408
2 F.3d 877, 886 (7th Cir. 2005); *Corrie v. Caterpillar, Inc.*, 403 F. Supp. 2d 1019, 1025 (W.D. Wa.
3 2005). Although some courts have disagreed with this conclusion, *see, e.g., Doe v. Saravia*, 348
4 F. Supp. 2d 1112, 1145 (E.D. Cal. 2004); *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416
5 F.3d 1242, 1251 (11th Cir. 2005), no post-*Sosa* opinion to the contrary binds this Court, and the
6 reasoning in *Enahoro* is most persuasive. As *Enahoro* explained, and *Sosa* made clear:

7 “Since many attempts by federal courts to craft remedies for the violation of new
8 norms of international law would raise risks of adverse foreign policy
9 consequences, they should be undertaken, if at all, with great caution.” [*Sosa*, 542
10 U.S. at 727-28.] It is [thus] hard to imagine that the *Sosa* Court would approve of
common law claims based on torture and extrajudicial killing when Congress has
specifically provided a cause of action for those violations and has set out how
those claims must proceed.

11 408 F.3d at 885-86. Shi and Wang’s First and Second Claims for Relief stand or fall on whether
12 they can meet the standards Congress set forth in TVPA. Plaintiffs’ failure to state a claim under
13 the TVPA, and their torture claims specifically, are addressed in Section IV.B, *infra*, and in defs.’
14 Alternative Mot. for a More Definite Statement (filed herewith).

15 b. Free Speech. Shi and Wang’s “Third Claim for Relief” is for “Arbitrary Arrest and
16 Prolonged Detention.” Compl. at 24-25. The complaint alleges plaintiffs were wrongly arrested
17 and detained “for an unlawful purpose in violation of the rights to freedom of speech, association,
18 and assembly” and because of their “participation in, and support of, the peaceful exercise of their
19 rights of free speech and free association.” *Id.* ¶¶ 85-86. As explained above, the right to free
20 expression is not guaranteed in China, *supra* at 5-6, many parts of the Western world, *see, e.g.,*
21 Douglas-Scott, *supra*, at 309, or by the law of nations, *see Guinto v. Marcos*, 654 F. Supp. 276,
22 280 (S.D. Cal. 1986).

23 *Sosa* instructs that “federal courts should not recognize private claims under federal
24 common law for violations of any international law norm with less definite content and
25 acceptance among civilized nations than the historical paradigms familiar when [the ATS] was
26 enacted.” 542 U.S. at 732. Plaintiffs’ arbitrary detention claim, which rests on the premise that
27 plaintiffs may not be incarcerated for engaging in political speech, comes nowhere close.
28

1 *Sosa*, 542 U.S. at 730-31, pointed to the Supreme Court’s definition of the law of piracy in
2 *United States v. Smith*, 5 Wheat. 153 (1820), as an example of the “specificity with which the law
3 of nations” must be defined before courts recognize a claim under the ATS. In *Smith*, the Court,
4 listing 20 pages of citations dating back centuries, noted that “[t]here is scarcely a writer on the
5 law of nations who does not allude to piracy as a crime of *settled and determinate* nature; and
6 whatever may be the diversity of definitions, in other respects, *all* writers concur in holding that
7 robbery, or forcible depredations upon sea, *animo furandi*, is piracy.” *Id.* at 161. There is no
8 such international consensus either *protecting* the right to engage in political speech or
9 *prohibiting* nations from criminalizing it.

10 c. Forced Labor. Plaintiff Shi’s “Fourth Claim for Relief” is for “Forced Labor.” Compl.
11 ¶¶ 91-96. However, the complaint fails to describe what labor Shi was forced to do and instead
12 describes the conditions at his prison generally. *See id.* ¶ 66. As this Court and others have
13 recognized, “whether a claim under the [ATS] lies . . . turns on whether the specific facts (not the
14 general characterization of the claim) violates international norms.” *Qi*, 349 F. Supp. 2d at 1278;
15 *Sosa*, 542 U.S. at 737-38 (while “some policies of arbitrary detentions” might be actionable,
16 plaintiffs’ detention was not); *Price v. Socialist People’s Libyan Arab Jamahiriya*, 294 F.3d 82,
17 93-94 (D.C. Cir. 2002); *see also Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1964-65 (2007) ([a]
18 formulaic recitation of the elements of a cause of action will not do.”).

19 Shi’s claim must also be rejected because forced labor in prison, however offensive, is far
20 from universally condemned. There is no “settled and determinate” definition of forced labor on
21 which “all writers concur.” *Smith*, 5 Wheat. at 161. Plaintiffs rely on the definition found in the
22 1930 Forced Labor Convention of the International Labor Organization, *see* Compl. ¶69 (f), but
23 the Convention’s broad definition (“all work or service which is extracted from any person under
24 the menace of penalty and for which said person has not offered himself voluntarily,” Convention
25 art. 2), is riddled with exceptions, including one for prison labor.²⁰ The Supreme Court of the

26 ²⁰ *See, e.g., id.* art. 2 (excluding from definition “[a]ny work or service exacted from any person
27 as a consequence of a conviction in a court of law, provided that the said work or service is
28 carried out under the supervision and control of a public authority and that the said person is not
 hired to or placed at the disposal of private individuals, companies or associations”); *see also id.*
 art. 7 (permitting local “chiefs” to “have recourse to forced or compulsory labor”) *id.* art. 10

1 Netherlands has held that the ILO's definition of "forced and compulsory labour" did not
 2 "contain[] norms that are so precisely defined as to be eligible by virtue of their content for direct
 3 application and hence to be capable of being binding on all persons." *E.O. v. Openbaar*
 4 *Ministerie*, HR 18 Apr. 1995, NJ 1995, 619, reproduced in 28 NETH. Y.B. INT'L L. 336-38
 5 (1997). Even if the ILO Convention's definitions were precise enough, *Sosa* held that such
 6 conventions are not "self-executing" and do not "create obligations enforceable in the federal
 7 courts." *Sosa*, 542 U.S. at 735.

8 To be actionable under the ATS, an alleged tort *cannot* involve the violation of any norm
 9 with "less . . . acceptance among civilized nations than the historical paradigms." *Sosa*, 542 U.S.
 10 at 732. Blackstone, writing in the era the ATS was enacted, *see id.* at 714-15, concluded that the
 11 only international law violations recognized were those "in which *all* the learned of *every* nation
 12 agree." 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 67 (1769) at 67. The
 13 ILO Convention on which plaintiffs rely does not reflect universal consensus: the United States
 14 has not ratified it; nor have China, South Korea, or several other nations.²¹

15 4. Defendants Cannot Be Held Liable On Plaintiffs' ATS Theories.

16 Even recognizing the norms plaintiffs assert: (a) these norms (torture, *etc.*) apply only to
 17

18 (permitting forced labor "exact[ed] as a tax"); *id.* art. 18 (permitting forced labor "for the transport
 19 of persons or goods, such as the labor of porters or boatmen"). In fact, as abhorrent as it is to
 20 some, forced prison labor is constitutional in the United States. *See Pollock v. Williams*, 322 U.S.
 21 4, 17-18 (1944) ("Forced labor in some special circumstances may be consistent with the general
 22 basic system of free labor. For example, forced labor has been sustained as a means of punishing
 23 crime, and there are duties such as work on highways which society may compel.").

21 ²¹ *See* "Ratifications Of The Fundamental Human Rights Conventions By Country,"
 22 <http://www.ilo.org/ilolex/english/docs/declworld.htm>. The absence of a universal norm
 23 prohibiting forced labor is only underscored by its absence among international law violations in
 24 the *Restatement (Third) of Foreign Relations Law of the United States*. In *Sosa*, 542 U.S. at 737,
 25 the Court looked to Section 702 of the *Restatement* to determine whether the arbitrary arrest at
 26 issue in the case was actionable. *Sosa* rejected plaintiffs' claim even though prolonged arbitrary
 27 detention is included in Section 702, reasoning that that claim "expresse[d] an aspiration that
 28 exceeds any binding customary rule having the specificity we require." *Id.* at 738. Section 702
 contains no mention of forced labor; and in 1993, it was practiced in more than 40 countries,
 including Brazil, China, India, Pakistan, and Bulgaria. *See* 1993 Country Reports on Human
 Rights Practices, Bureau of Democracy, Human Rights, and Labor, U.S. Department of State
 (Jan. 31, 1994), http://dosfan.lib.uic.edu/ERC/democracy/1993_hrp_report/93hrp_report_toc.html
 That a rule of international law "as stated is . . . far from full realization . . . is evidence against its
 status as binding law; and an even clearer point against the creation by judges of a private cause
 of action to enforce the aspiration behind the rule claimed." *Sosa* 542 U.S. at 738 n.29.

1 states, not private actors like defendants; and (b) defendants cannot be held liable on an aiding-
 2 and-abetting theory. As *Sosa* makes clear, in evaluating whether to permit ATS liability, courts
 3 must ask “whether international law extends the scope of liability for a violation of a given norm
 4 to the perpetrator being sued, if the defendant is a private actor such as a corporation.” *Sosa*,
 5 542 U.S. at 732 n.20.

6 a. State Action. International law generally applies only to nations, not to private parties.
 7 See RESTATEMENT, *supra*, Part I, ch. 1, intro. note; *In re Estate of Marcos Human Rights Litig.*,
 8 978 F.2d 493, 501-02 (9th Cir. 1992). Although some courts have expanded international law to
 9 cover *private* violations of an extremely narrow list of norms, there is little dispute that the four
 10 norms alleged by plaintiffs apply *only* to states:

- 11 • The *Restatement* lists “piracy, slave trade, attacks on or hijacking of aircraft, genocide,
 12 war crimes, and perhaps certain acts of terrorism” as the only offenses for which
 13 individuals may be held liable under international law. RESTATEMENT, *supra*, § 404.
- 14 • Several courts have held that *private* actors may *not* be held liable for torture.²²
- 15 • Courts have rejected arbitrary imprisonment claims against non-state actors.²³
- 16 • Courts do not, and should not, recognize international law claims against private
 17 corporations for cruel punishment, violations of free speech rights, or forced labor.

18 b. Aiding and Abetting. As the Executive Branch and courts and scholars who read *Sosa*
 19 correctly have rightly concluded, there is no civil aiding-and-abetting liability under the ATS.²⁴

20 ²² See, e.g., *Kadic v. Karadzic*, 70 F.3d 232, 243 (2d Cir. 1995); *Tel-Oren v. Libyan Arab*
 21 *Republic*, 726 F.2d 774, 795 (D.C. Cir. 1984) (Edwards, J., concurring); *Ibrahim v. Titan Corp.*,
 22 391 F. Supp. 2d 10, 14-15 (D.D.C. 2005); *Abdullahi v. Pfizer, Inc.*, 2002 WL 31082956, at *5
 (S.D.N.Y. Sept. 17, 2002).

23 ²³ See *Wiwa v. Royal Dutch Petroleum*, 2002 U.S. Dist. LEXIS 3293 at *37-40 (S.D.N.Y. 2002).

24 ²⁴ See U.S. Talisman Br. at 12-28; Curtis A. Bradley et al., *Sosa, Customary International Law*
 25 *and the Continuing Relevance of Erie*, 120 HARV. L. REV. 870, 924-29 (2007); *Exxon*, 393 F.
 26 Supp. 2d at 24; *In re South Af. Apartheid Litig.*, 346 F. Supp. 2d 538, 549-51 (S.D.N.Y. 2004).

27 Some courts have held to the contrary, see, e.g., *Presbyterian Church of Sudan v. Talisman*,
 28 453 F. Supp. 2d 633 (S.D.N.Y. 2006), but whether such a norm exists is an open question in the
 Ninth Circuit. In *Rio Tinto*, a panel majority initially concluded that “post-*Sosa*, claims for
vicarious liability for violations of *jus cogens* norms are *actionable* under the [ATS].” *Sarei v.*
Rio Tinto, 456 F.3d 1069, 1078 (9th Cir. 2006) (underline added). But on rehearing, the panel
 modified its opinion and expressly declined to resolve the question. See *Sarei v. Rio Tinto*, 487
 F.3d 1193, 1203 (9th Cir. 2007). On August 20, 2007, the Ninth Circuit granted petition for
 rehearing en banc and vacated the panel majority’s opinion. See Ex. H (Order). It is unclear

1 Even accepting such a theory, defendants' conduct does not qualify—plaintiffs do not allege that
2 defendants *intended* to harm plaintiffs.

3 The text of the ATS, principles of statutory construction, practical considerations, and
4 international law all militate against finding aiding-and-abetting liability under the ATS. The text
5 of the ATS contains no express provision for aiding and abetting liability. *See* 28 U.S.C. § 1350.
6 But the Congress that enacted the ATS knew how to create secondary liability. The year after it
7 enacted the ATS, “Congress enacted a criminal statute containing specific provisions for indirect
8 liability—for example, for aiding or assisting piracy.” Bradley, *supra*, at 926 & n.296 (citing Act
9 of Apr. 30, 1790, ch. 9, § 10, 1 Stat. 112, 114. The ATS is bereft of such language.

10 And courts may not read secondary liability into federal statutes, *see Central Bank of*
11 *Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994), especially in ATS
12 cases. In *Central Bank*, the Supreme Court refused to read civil aiding-and-abetting liability into
13 the federal securities statute. In doing so, the Court reasoned that while Congress has passed a
14 general *criminal* aiding and abetting statute, 18 U.S.C. § 2, it “has *not* enacted a general civil
15 aiding and abetting statute—either for suits by the Government . . . or for suits by private parties.”
16 *Central Bank*, 511 U.S. at 176, 182. While in *criminal* law, “aiding and abetting is an ancient . . .
17 doctrine,” in civil cases, “the doctrine has been at best uncertain in application” and its
18 recognition would be “a vast expansion of federal law.” *Id.* at 181, 183. Moreover, *Sosa*
19 repeatedly emphasized that only a “modest number” of claims could be brought under the ATS
20 without legislative authorization and made clear that any “innovative” interpretations of the Act
21 must be left to the legislative process. *See* 542 U.S. at 730-731. Thus, to endorse civil aiding-
22 and-abetting liability in ATS cases would violate both the command of *Sosa* and of *Central*
23 *Bank*.²⁵

24
25 whether the Ninth Circuit will address vicarious liability issues, the “exhaustion” issue that was
26 the subject of a lengthy dissent, or something else.

27 ²⁵ *See, e.g., In re S. Afr. Apartheid Litig.*, 346 F. Supp. 2d 538, 550-51 (S.D.N.Y. 2004), *appeal*
28 *pending sub nom. Khulumani et al. v. Barclay Nat'l Bank Ltd., et al.*, No. 05-2141 (2nd Cir.
2005) (*Central Bank* applies “with special force” in the ATS context; recognizing aiding-and-
abetting liability “without congressional mandate, in an area that is so ripe for non-meritorious
and blunderbuss suits would be an abdication of this Court’s duty to engage in ‘vigilant door
keeping’” and would be inconsistent with the “‘restrained conception’ of new international law

1 Recognizing such claims would also harm U.S. policy interests. The Executive Branch
 2 has rejected the aiding-and-abetting theory plaintiffs advance, *see* U.S. Talisman Br. at 12-28, in
 3 part, because it poses such significant policy concerns:

4 [C]ivil aiding and abetting . . . liability would inevitably lead to greater diplomatic
 5 friction for the United States. Such liability would trigger a wide range of ATS suits
 6 with plaintiffs challenging the conduct of foreign nations—conduct that would
 otherwise be immune from suit under the Foreign Sovereign Immunities Act. . . .

7 *Id.* at 19-22. The Court has said such policy views must be given “serious weight.” Order at 7.

8 Civil aiding-and-abetting liability is equally disfavored under international law. Notably,
 9 none of the international law sources on which plaintiffs rely mentions the theory. *See* Compl.

10 ¶ 69. That is also not surprising. As one group of scholars recently and rightly observed:

11 The Court in *Sosa* rejected an arbitrary detention claim under the ATS [even
 12 though it was a norm expressed in several treaties and other documents]. . . *There*
 13 *is no relevant treaty that embraces aiding and abetting liability for corporations,*
 14 *the Restatement says nothing about such liability, and there is no widespread state*
 15 *practice of imposing liability on corporations for violations of international*
 16 *human rights law.* To paraphrase *Sosa*, that a rule of corporate liability is so far
 from full realization is evidence against its status as binding law and even stronger
 evidence against the creation by judges of a private cause of action to enforce the
 aspiration behind the rule.

16 Bradley et al., *supra*, at 927-28.²⁶

17 Even if, in theory, corporate actors could be held liable for aiding and abetting under the
 18 ATS, defendants may not be held liable here. Under any ATS theory, plaintiffs must establish

19 violations that the Supreme Court has mandated for the lower federal courts”).

20 ²⁶ Plaintiffs will no doubt cite statutes establishing international *criminal* tribunals that recognize
 21 aiding-and-abetting liability. *See* Rome Statute of the International Criminal Court (“ICC”) art.
 22 25(1), July 17, 1998, 2187 U.N.T.S. 90; Statute of the International Criminal Tribunal for the
 23 Former Yugoslavia (“ICTFY”), S.C. Res. 827, arts. 2-5, U.N. Doc. S/RES/827 (May 25, 1993);
 24 Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, arts. 2-4, U.N. Doc.
 25 S/RES/955 (Nov. 8, 1994). But as *Central Bank* explains, these tribunals’ recognition of the
 26 “ancient doctrine” of *criminal* aiding-and-abetting liability is a far cry from recognizing *civil*
 27 liability. Moreover, even if these criminal law sources were valid evidence of *civil* law, they are
 28 too unspecific to be actionable under *Sosa*. Some tribunals permit aiding-and-abetting liability if
 defendant had knowledge of the principal’s violation; others require defendant to have intended to
 further the violation. *See* Bradley, *supra*, at 927 (comparing ICTFY with ICC). Further, “none of
 the modern international criminal tribunals extends criminal liability to corporations,” and “the
 state parties to the relatively recent [ICC] negotiations considered and rejected international
 criminal liability for corporations.” *Id.* at 925 n.292; *see id.* at 927. These conflicting standards,
 which only undercut plaintiffs’ efforts to hold defendants liable, come nowhere close to the
 “settled and determinate” definitions on which the Supreme Court said one must rely to conclude
 that “all nations” and “all persons” recognize a particular norm. *Smith*, 5 Wheat. at 161-62.

1 that defendants' conduct violated "norm[s] of international character accepted by the civilized
 2 world." *Sosa*, 542 U.S. at 725. As explained in Section IV.E, *infra*, defendants' alleged acts of
 3 aiding and abetting are privileged by U.S. federal, U.S. state, and a wide variety of international
 4 law. Because there is no allegation that defendants *intended* harm to plaintiffs, plaintiffs' aiding-
 5 and-abetting theory also fails. Even those courts that wrongly recognize the theory hold that it
 6 *only* applies if "the defendant knew of the [principal's] specific violation," and "acted with the
 7 *intent* to assist that violation." *The Presbyterian Church of Sudan, v. Talisman Energy, Inc.*, 453
 8 F. Supp. 2d 633, 668 (S.D.N.Y. 2006). Courts have refused to find such intent even where the
 9 defendant is accused of actively working with a local, repressive, military government to protect
 10 defendants' oil extraction business. *See id.* Here, the allegations come nowhere close.

11 **B. Plaintiffs Have Failed to State a Claim Under the TVPA.**

12 Plaintiffs' TVPA claims fail for similar reasons. First, plaintiffs' Third and Fourth Claims
 13 for Relief—for arbitrary arrest and forced labor, which plaintiffs bring, in part, under the TVPA,
 14 *see* Compl. at 25-26—may not be brought under the statute. By its plain terms, the TVPA
 15 provides a remedy for "torture," *not* arbitrary arrest or forced labor.²⁷

16 Second, all of plaintiffs' TVPA claims fail because the TVPA applies only to individuals,
 17 *not* corporations. The statutory text imposes liability on an "*individual* who, under actual or
 18 apparent authority, or color of law, of any foreign nation . . . subjects an *individual* to torture." 28
 19 USC 1350, note. Because a corporation cannot be subjected to "torture," and because the same
 20 word used in the same statute must be given the same meaning, "individual" in section 1350 does
 21 not include "corporations," as numerous courts have recognized. *See, e.g., Mujica v. Occidental*
 22 *Petroleum Corp.*, 381 F. Supp. 2d 1164, 1175-76 (C.D. Cal. 2005); *Doe I v. Exxon Mobil Corp.*,
 23 393 F. Supp. 2d 20, 28 (D.D.C. 2005); *Arndt v. UBS AG*, 342 F. Supp. 2d 132, 141 (S.D.N.Y.
 24

25 ²⁷ *See* P.L. 102-256, 106 Stat. 73 at § 2(a) (codified at 28 U.S.C. § 1350, note) (creating liability
 26 for "[a]n individual who, under actual or apparent authority, or color of law, of any foreign
 27 nation" subjects "an individual to torture" or "extrajudicial killing"); *id.* § 3(b)(1) (defining
 28 "torture" as "any act . . . by which severe pain or suffering . . . is intentionally inflicted on [an]
 individual for such purposes as obtaining . . . information or a confession," punishment,
 intimidation, coercion, or discrimination); *Qi*, 349 F. Supp. 2d at 1278 (TVPA "provides a cause
 of action for the . . . specific tort of torture").

1 2004); *but see Aldana*, 416 F.3d at 1249-50.

2 Third, properly construed, the TVPA does not impose aiding-and-abetting liability. By its
3 plain terms, the TVPA applies only to individuals who “subject[]” others to torture, 28 U.S.C.
4 § 1350, note. Civil aiding-and-abetting liability may not be read into the statute.

5 Fourth, even if the TVPA could be construed to impose aiding-and-abetting liability, only
6 individuals acting under the color of law, not private actors, may be held liable.²⁸

7 Fifth, even if aiding-and-abetting liability were available, defendants’ alleged acts of
8 aiding and abetment—communicating with the PRC—are privileged (see *infra*, IV.E), and
9 defendants are not alleged to have acted with the requisite intent.

10 Finally, plaintiffs Wang and Shi have failed to allege facts sufficient to establish they were
11 tortured and not merely subject to “police brutality,” which is not actionable under the TVPA.
12 *Price v. Socialist People’s Libyan Arab Jamahiriya*, 294 F.3d 82, 93 (D.C. Cir. 2002); *see also*
13 Defs.’ Alternative Mot. for a More Definite Statement (filed herewith) (elaborating on this
14 argument).

15 **C. Plaintiffs Have Failed To State A Claim Under ECPA.**

16 In their Eleventh Claim for Relief, *see* Compl. ¶¶ 128-36, Shi and Wang allege defendants
17 improperly intercepted their emails, 18 U.S.C. § 2511, accessed their communications, 18 U.S.C.

18
19 ²⁸ *See In re S. Afr. Apartheid Litig.*, 346 F. Supp. 2d at 555 (“Since a prerequisite to TVPA
20 liability is that the individual be acting under color of law, this Court finds that creating aider and
21 abettor liability for private actors not acting under color of law would be inconsistent with the
22 statute and precluded by *Central Bank*.”); *Mujica*, 381 F. Supp. 2d at 1174; *Exxon*, 393 F. Supp.
23 2d at 28; *Corrie*, 403 F. Supp. 2d at 1027 (same); S. Rep. No. 102-249, at 9 (1991), 1991 WL
258662 (“[A] higher official need not have personally performed or ordered the abuses in order to
be held liable. Responsibility for torture, summary execution, or disappearances extends beyond
the person who actually committed those acts—anyone with higher authority who authorize,
tolerated or knowingly ignored those acts is liable for them.”).

24 While some courts have wrongly concluded or suggested that the TVPA permits
25 secondary liability, they have done so largely based on statements in committee reports. *See, e.g.,*
26 *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1157–58 (11th Cir. 2005); *Doe v. Saravia*, 348 F.
27 Supp. 2d 1112, 1148–49 (E.D. Cal. 2004). These decisions, including this Court’s dicta in *Qi*, *see*
28 349 F. Supp. 2d at 1332, are incorrect, as “[l]egislative history cannot trump the statute,”
Bonneville Power Admin. v. FERC, 422 F.3d 908, 920 (9th Cir. 2005); *Ratzlaf v. United States*,
510 U.S. 135, 147-48 (1994), and the Supreme Court’s decision in *Central Bank* makes clear that
Congress must speak clearly when, and if, it seeks to impose civil aiding-and-abetting liability.
In any event, this Court’s dicta in *Qi* does not control here, because in *Qi*—unlike here—the
defendants were state actors. *See Qi*, 349 F. Supp. 2d at 1314.

1 § 2701, and disclosed contents of their communications and user information, 18 U.S.C. § 2702.
2 Plaintiffs' ECPA claims must be dismissed because (1) the statute does not apply
3 extraterritorially; and (2) sections 2701 and 2702 do not apply to defendants' alleged disclosures.

4 "Congress ordinarily intends its statutes to have domestic, not extraterritorial,
5 application." *Small v. United States*, 544 U.S. 385, 388-89 (2005). Foreign policy concerns
6 justify this presumption, *see Sale v. Haitian Ctrs. Council*, 509 U.S. 155, 173-74 (1993), as does
7 the fact that, if Congress wishes to, it may rebut the presumption. *Argentine Republic v. Amerada*
8 *Hess Shipping Corp.*, 488 U.S. 428, 440 (1989) ("[w]hen it desires to do so, Congress knows how
9 to place the high seas within the jurisdictional reach of a statute"). "Absent clear evidence of
10 congressional intent to apply a statute beyond our borders [a] statute will apply only to the
11 territorial United States." *United States v. Gatlin*, 216 F.3d 207, 211-12 (2d Cir. 2000).

12 Neither the text of ECPA nor its legislative history gives any indication that Congress
13 intended the statute to apply extraterritorially. ECPA contains no extraterritorial provision, *cf.* 18
14 U.S.C. § 1513(d) (statute prohibiting retaliating against a witnesses: "There is extraterritorial
15 Federal jurisdiction over an offense under this section."), and ECPA's legislative history
16 explicitly states the Act's definition of "wire communication," applicable under both § 2702 and
17 § 2511, "is not meant to suggest that the Electronic Communications Privacy Act applies to
18 interceptions made outside the territorial United States." S. Rep. No. 99-541, at 12 (1986), *as*
19 *reprinted in* 1986 U.S.C.C.A.N. 3555, 3566.

20 The Ninth Circuit has ruled that ECPA's wiretap provisions have no extraterritorial
21 application. *See United States v. Peterson*, 812 F.2d 486, 492 (9th Cir. 1987) (holding that "Title
22 III has no extraterritorial force"). Similarly, the Second Circuit has held that the term "wire
23 communication" in ECPA is intended only to refer to communications "through our Nation's
24 communications network." *United States v. Toscanino*, 500 F.2d 267, 279 (2d Cir. 1974); *United*
25 *States v. Cotroni*, 527 F.2d 708, 711 (2d Cir. 1975); *see also United States v. Angulo-Hurtado*,
26 165 F. Supp. 2d 1363, 1369 (N.D. Ga. 2001); *Berlin Democratic Club v. Rumsfeld*, 410 F. Supp.
27 144, 153 (D.C. D.C. 1976) (denying Austrian citizen standing to sue U.S. military officials in
28 Germany for violations of ECPA's wiretap provisions).

1 The complaint alleges plaintiffs Shi and Wang reside in China, used Chinese email
2 accounts, and that Yahoo!, YHKL, or Yahoo! China disclosed information regarding their
3 internet usage to Chinese authorities. See Compl. ¶¶ 10, 12, 40, 54, 60, 62. For purposes of
4 determining where an alleged interception takes place, the Ninth Circuit has held that telephone
5 conversations are intercepted “where the tapped phone is located *and* where law enforcement
6 officers first overhear the call.” *United States v. Luong*, 471 F.3d 1107, 1109 (9th Cir. 2006); see
7 also *United States v. Denman*, 100 F.3d 399, 403 (5th Cir. 1996). Plaintiffs’ computers—the
8 email equivalent of the “tapped phone”—were located in China, and Chinese officials allegedly
9 read their emails in China. Therefore, any alleged interceptions—even if defendants facilitated
10 them in Hong Kong or the United States, as plaintiffs allege—occurred outside the United States
11 and ECPA’s reach. In *Cotroni*, the court rightly rejected the argument that Canadian wiretaps, set
12 in Canada and authorized by Canadian authorities, violated ECPA’s wiretap provisions because
13 some conversations traveled over U.S. communications systems. *Cotroni* reasoned, “it is not the
14 route followed by foreign communications which determines the application of [the wiretap
15 statute]; it is where the interception took place.” 527 F.2d at 711.²⁹

16 Even if ECPA applied extraterritorially, plaintiffs fail to state a claim under 18 U.S.C.
17 § 2702. While section 2702(a) generally prohibits an electronic-communication-services provider
18 from divulging records or information pertaining to subscribers, the statute permits disclosure “to
19 any person other than a governmental entity.” 18 U.S.C. § 2702(c)(6); *Freedman v. America*
20 *Online, Inc.*, 412 F. Supp. 2d 174, 183 (D. Conn. 2005) (ECPA “permits an ISP to voluntarily
21 divulge a subscriber’s customer information to any person other than a governmental entity”);
22 *United States v. Hambrick*, 55 F. Supp. 2d 504, 507 (W.D. Va. 1999) (“ISPs are free to turn
23

24 ²⁹ To be clear, the ATS does not provide plaintiffs a vehicle by which to bring ECPA claims
25 based on foreign conduct. The ATS allows aliens to bring “civil action[s] . . . for a *tort only*,
26 committed in violation of *the law of nations* or a *treaty of the United States*.” 28 U.S.C. § 1350.
27 The Ninth Circuit has made clear that “garden variety violations of statutes, . . . regulations, and
28 common law” “are not appropriately considered breaches of the ‘law of nations’ for purposes of
jurisdiction under the Alien Tort Statute.” *Hamid v. Price Waterhouse*, 51 F.3d 1411, 1418 (9th
Cir. 1995). Plaintiffs do not allege, nor could they ever prove, that the protections afforded by
ECPA on which they rely are part of the “law of nations” or part of “a treaty of the United
States.” 28 U.S.C. § 1350.

1 stored data and transactional records over to nongovernmental entities”). The PRC is not a
 2 “governmental entity” for purposes of ECPA, because ECPA defines the term as “a department or
 3 agency of the United States or any State or political subdivision thereof.” 18 U.S.C. § 2711(4).³⁰

4 Finally, plaintiffs cannot state a claim under 18 U.S.C. § 2701. They assert defendants
 5 violated this provision by exceeding “their authorization to access and control private information
 6 concerning Plaintiffs’ electronic communications.” Compl. ¶ 130. However, section 2701(a)
 7 does not apply “to conduct authorized . . . by the person or entity providing a wire or electronic
 8 communications service.” 18 U.S.C. § 2701(c)(1) . As the alleged provider of the plaintiffs’
 9 email services, defendants cannot violate this section. *See Bohach v. City of Reno*, 932 F. Supp.
 10 1232, 1236 (D. Nev. 1996) (“§ 2701(c)(1) allows providers to do as they wish when it comes to
 11 accessing communications in electronic storage”).³¹

12 **D. Plaintiffs Have Failed to State a Claim Under California Law.**

13 Plaintiffs’ California claims are for battery, assault, false imprisonment, intentional
 14 infliction of emotional distress, negligence, and unfair competition. Each claim is barred by
 15 Section 47(b) of the California Civil Code, which privileges defendants’ alleged communications.
 16 *See infra* Section IV.E.2. Each is also preempted by the foreign affairs doctrine and suffers from
 17 various defects specific to California law.

18 **1. The Foreign Affairs Doctrine Preempts Plaintiffs’ California Claims.**

19 The federal foreign affairs doctrine limits “state involvement in foreign affairs and
 20 international relations—matters which the Constitution entrusts solely to the Federal
 21 Government.” *Zschernig v. Miller*, 389 U.S. 429, 436 (1968). Where a proposed application of
 22 state law falls outside areas of “traditional state responsibility,” the foreign affairs doctrine

23 _____
 24 ³⁰ The definition of “governmental entity” was added to § 2711 as part of a clarifying amendment
 25 in the USA PATRIOT Improvement and Reauthorization Act of 2005. PL 109-177. Before the
 26 definition was codified, courts recognized that “governmental entity” meant federal, state, and
 27 local governments. *See Ameritech Corp. v. McCann*, 403 F.3d 908, 912-13 (7th Cir. 2005).

28 ³¹ If plaintiffs’ claims proceed past the motion to dismiss stage, defendants will also demonstrate
 that plaintiffs’ ECPA claims are barred by the statute of limitations, vitiated by plaintiffs’ consent
 to terms of services agreements, and precluded by provisions of ECPA allowing disclosure of
 contents of communications and subscriber records where “necessarily incident to the rendition of
 the service or to the protection of the rights or property of the provider of that service.” 18 U.S.C.
 §§ 2702(b)(5) , 2702(c)(3).

1 mandates the dismissal of plaintiffs' claims even if there is no direct conflict between the state's
2 policy and that of the federal government. *American Ins. Ass'n v. Garamendi*, 539 U.S. 396, 419
3 n.11, 425 (2003). The regulation of an American business's conduct in China falls well outside
4 any area of "traditional state responsibility." *Id.* For this reason alone, the Court should either
5 refuse to hear or dismiss plaintiffs' six California claims with prejudice.

6 Even if regulating how companies conduct business in China were within California's
7 "traditional competence," *id.* at 419 n.11, the same outcome is required. California has only the
8 weakest interest in the claims plaintiffs assert because plaintiffs do not reside here, and all the
9 allegedly tortious activity took place in China. To the extent California has any interest in
10 proscribing defendants' alleged conduct, the foreign policy conflict that such regulation would
11 create far outweighs California's interest. *See Mujica*, 381 F. Supp. 2d at 1190.

12 **2. Plaintiffs Cannot Establish Their Intentional Tort Claims.**

13 a. Aiding-and-Abetting Liability. Plaintiffs' intentional tort claims, their Fifth through
14 Eighth Claims for Relief, all hinge on an aiding-and-abetting theory. These claims—for battery,
15 assault, false imprisonment, and intentional infliction of emotional distress, *see* Compl. at 26-
16 28—must be dismissed. Plaintiffs cannot establish that defendants possessed the intent necessary
17 for aiding-and-abetting liability.

18 Under California law, aiding and abetting "necessarily requires a defendant to reach a
19 *conscious decision* to participate in tortious activity for the purpose of assisting another in
20 performing a wrongful act." *Howard v. Superior Court*, 2 Cal. App. 4th 745, 749 (Cal. Ct. App.
21 1992) (emphasis in original). Put another way, aiding-and-abetting liability may only be imposed
22 if the defendant "knew that a tort had been, or was to be committed, and *acted with the intent of*
23 *facilitating the commission of that tort.*" *Gerard v. Ross*, 204 Cal. App. 3d 968, 983 (Cal. Ct.
24 App. 1988).

25 Plaintiffs do not allege that defendants intended to cause them harm or "facilitate" the
26 PRC's alleged torts. They merely allege defendants' conduct was "voluntary" and "willing."
27 Compl. ¶ 2. Neither claim is sufficient to establish that defendants acted "with the intent of
28 facilitating the commission of" their alleged abuse. *Gerard*, 204 Cal. App. 3d at 983. Nor are

1 these conclusory allegations consistent with documents identified in plaintiffs' complaint. *See*
 2 Compl. ¶ 64 (citing ruling of Hong Kong Commissioner, which states at ¶ 8.25: "the disclosure
 3 of Information in the circumstances of the case was not a voluntary act initiated by [YHKL] but
 4 was compelled under the force of PRC law").³²

5 b. Direct Liability. To the extent plaintiffs seek to hold defendants *directly* liable on their
 6 false imprisonment and intentional infliction claims, *see* Compl. ¶¶ 106, 110, those claims must
 7 be rejected as well. Plaintiffs' false imprisonment claim is easily dispensed with, as the
 8 complaint is devoid of allegations that defendants directly engaged in any "nonconsensual
 9 intentional confinement of a person." *Fermino v. Fedco, Inc.*, 7 Cal. 4th 701, 715 (Cal. 1994).

10 Plaintiffs' intentional infliction claim has no basis either. Given California privilege law,
 11 *see infra* Section IV.E.2, providing law enforcement officials with information regarding criminal
 12 activity cannot possibly be "extreme and outrageous conduct . . . so extreme as to exceed all
 13 bounds of that usually tolerated in a civilized community." *Conroy v. Regents of Univ. of Calif.*,
 14 151 Cal. App. 4th 132, 146 (Cal. Ct. App. 2007). Moreover, to be held liable, defendants'
 15 conduct must have been "directed at the plaintiff, or occur in the presence of a plaintiff of whom
 16 the defendant is aware." *Id.* Defendants lacked this knowledge, particularly as to plaintiff Yu.³³

17 **3. Plaintiffs Do Not State a Claim for Negligence.**

18 Plaintiffs' negligence claims, Compl. ¶¶ 114-17, may not proceed on an aiding-and-
 19 abetting theory, which only applies to intentional torts, *see Fiol v. Doellstedt*, 50 Cal. App. 4th
 20 1318, 1325 (Cal. Ct. App. 1996). Plaintiff Yu cannot state a direct claim for negligence because

21 _____
 22 ³² To the extent plaintiffs claim defendants "ratified" the PRC's intentional torts and are liable on
 23 that theory, *see, e.g.*, Compl. ¶ 74, there can be no "ratification" under California law absent an
 24 agency relationship. *See Estate of Stephens*, 28 Cal. 4th 665, 673 (Cal. 2002) ("Ratification is the
 25 voluntary election by a person to adopt in some manner as his own act an act which was
 26 purportedly done *on his behalf* by another person . . ."). Plaintiffs do not allege, nor could they,
 27 that PRC officials acted on behalf of defendants or that defendants exercised control over the
 28 PRC.

³³ *Cf. Davidson v. City of Westminster*, 32 Cal. 3d 197, 210 (Cal. 1982) (dismissing intentional
 25 infliction claim against police officers who failed to prevent assault they knew was likely to
 26 occur; "Absent an intent to injure, such inaction is not the kind of extreme and outrageous
 27 conduct" that gives rise to liability under the tort); *Christensen v. Superior Ct.*, 54 Cal. 3d 868,
 28 879, 906 (Cal. 1991) (rejecting intentional infliction claims brought against funeral home that
 desecrated remains of plaintiffs' loved ones; plaintiffs had "not alleged that the conduct of any of
 the defendants was directed primarily at them").

1 her injuries were not reasonably foreseeable and, thus, defendants owed her no duty of care. Duty
2 is a “question of law to be resolved by the court,” *Artiglio v. Corning Inc.*, 18 Cal. 4th 604, 614
3 (Cal. 1998), based on:

4 the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff
5 suffered injury, the closeness of the connection between the defendant’s conduct
6 and the injury suffered, the moral blame attached to the defendant’s conduct, the
7 policy of preventing future harm, the extent of the burden to the defendant and
consequences to the community of imposing a duty to exercise care with resulting
liability for breach, and the availability, cost, and prevalence of insurance for the
risk involved.

8 *Friedman v. Merck & Co.*, 107 Cal. App. 4th 454, 465 (Cal. Ct. App. 2003).

9 Yu seeks to hold defendants liable for emotional and other harms suffered on account of
10 her husband’s mistreatment. *Ileto v. Glock*, 194 F. Supp. 2d 1040, 1053 (C.D. Cal. 2002),
11 disposes of her claim. In *Ileto*, plaintiffs were injured by guns defendant manufactured and sued
12 for negligence. Applying California law, the court held, “While it may be foreseeable that some
13 criminals might obtain Glock firearms and use them to harm others, there was no way of
14 foreseeing that this *particular individual* . . . would obtain a Glock firearm and use it to injure
15 *these Plaintiffs*.” *Id.* at 1053. Yu’s claims are similarly too remote.

16 Wang and Shi’s negligence claims must be dismissed because they assumed the risk of
17 harm when they chose to use Yahoo! China email and group list services to engage in activity
18 they knew violated Chinese law. Primary assumption of the risk “operate[s] as a complete bar to
19 the plaintiff’s recovery” in negligence cases, and applies where “by virtue of the nature of the
20 activity and the parties’ relationship to the activity, the defendant owes no legal duty to protect
21 the plaintiff from the particular risk of harm that caused the injury.” *Knight v. Jewett*, 3 Cal. 4th
22 296, 314-15 (Cal. 1992); *Saffro v. Elite Racing, Inc.*, 98 Cal. App. 4th 173, 178 (Cal. Ct. App.
23 2002).

24 Although the doctrine is most commonly applied to active sports, see *Moser v. Ratinoff*,
25 105 Cal. App. 4th 1211, 1220-21 (Cal. Ct. App. 2003), it has also been applied to other
26 dangerous, non-sporting activities.³⁴ In *Cohen v. McIntyre*, 16 Cal. App. 4th 650, 655 (Cal. Ct.

27 ³⁴ See, e.g., *Herrle v. Estate of Marshall*, 45 Cal. App. 4th 1761 (Cal. Ct. App. 1996) (patient’s
28 estate not liable to nurse’s aid struck by patient suffering from senile dementia); *Rosenbloom v.*
Hanour Corp., 66 Cal. App. 4th 1477 (Cal. Ct. App. 1998) (employer not liable to employee

1 App. 1993), for example, the court rejected a negligence claim a veterinarian brought against the
2 owner of a dog that had bit him. “Cohen, a licensed veterinarian, was injured during the course of
3 treating an animal under his control, an activity for which he was employed and compensated and
4 one in which the risk of being attacked and bitten is well known.” *Id.*

5 Wang and Shi both made journalistic careers criticizing the PRC’s repressive policies.
6 *See* Compl. ¶¶ 32-45, 52-56. They were no doubt fully aware of the risk of engaging in political
7 speech. *See, e.g., id.* ¶ 25 (dissidents “face a well-documented pattern of” abuses). According to
8 the complaint, Wang’s writings included the warning: “We should never forget that China is still
9 a totalitarian and despotic country.” *Id.* ¶¶ 33, 43. Shi, like Wang, wrote about the suppression of
10 free expression in China and, indeed, he was prosecuted for publicizing a “state secret” document
11 that related to previous crackdowns on political speech. *See id.* ¶¶ 52-54. Moreover, according to
12 Shi’s criminal judgment cited in the complaint, *see id.* ¶ 62, Shi’s editors warned him he would be
13 prosecuted if he published the document, *see* Appx. A, Ex. C at 5. Defendants cannot be held
14 liable for a knowing and obvious risk that plaintiffs assumed—however righteous their cause. *Cf.*
15 *Baker v. Superior Ct.*, 129 Cal. App. 3d 710 (Cal. Ct. App. 1982) (firefighter cannot sue for
16 injuries sustained while fighting blaze).

17 **4. Plaintiffs Do Not State a Claim For Unfair Competition.**

18 Plaintiffs’ complaint does not state a claim within the meaning of section 17200. It does
19 not allege unlawful, unfair, or fraudulent business practices. To the contrary, the gist of the
20 complaint is that defendants *obeyed laws and procedures* that plaintiffs allege led to their
21 imprisonment.

22 Moreover, plaintiffs lack standing to bring the Tenth Claim for Relief under California
23 Business and Professions Code section 17204. *See* Compl. ¶¶ 118-27. Proposition 64 recently
24 amended section 17204 to limit private suits to those brought by plaintiffs who have “suffered
25 injury *and* lost money or property ‘*as a result* of such unfair competition.’” *Daro v. Superior*

26
27 hired to handle sharks who was bitten by a shark); *Hamilton v. Martinelli & Associates*, 110 Cal.
28 App. 4th 1012, 1021 (Cal. Ct. App. 2003) (training officer not liable to probation officer injured
while performing required training maneuver).

1 Court, 151 Cal. App. 4th 1079, 1098 (2007) (emphasis in original). The new language in section
 2 17204 is similar to existing language in section 17203, which courts have read to permit
 3 restitution only. See *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1150 (Cal.
 4 2003). Thus, under Proposition 64, to bring a UCL action a plaintiff must now allege a valid
 5 claim to restitution. See *Walker v. USAA Casualty Ins. Co.*, 474 F. Supp. 2d 1168, 1172 (E.D.
 6 Cal. 2007). See also *Center for Biological Diversity v. FPL Group, Inc.*, 2006 WL 2987634 at
 7 *4-6 (Cal. Superior Ct., Oct. 13, 2006) (Sabraw, J.).³⁵

8 Restitution claims under section 17204 are limited to the recovery of money or property
 9 “that defendants took *directly* from plaintiff” or that can “be traced” to “*particular funds*” in a
 10 defendant’s possession. *Korea Supply*, 29 Cal. 4th at 1149-50; see also *Colgan v. Leatherman*
 11 *Tool Group, Inc.*, 135 Cal. App. 4th 663, 699 (Cal. Ct. App. 2006) (restitution limited to “money
 12 or property identified as belonging in good conscience to the plaintiff [that] *could clearly be*
 13 *traced to particular funds or property in the defendant’s possession*”). Plaintiffs do not allege
 14 defendants took or have their property. They claim the PRC seized it. See Compl. ¶¶ 10-12, 37,
 15 47, 57. Plaintiffs have no restitution claim against defendants. See *Walker*, 474 F. Supp. 2d at
 16 1172.³⁶

17 **E. Defendants’ Communications With The PRC Are Protected From Liability.**

18 Finally, the complaint must be dismissed because the only actions defendants are alleged
 19 to have taken—communications with law enforcement concerning suspected criminal activity—
 20 are privileged and immunized from liability under federal, California, and international law.

21 **1. The Communications Are Protected Under Federal Law.**

22 Federal law privileges communications with law enforcement officials. In *In re Quarles*,
 23 158 U.S. 532, 535-36 (1895), the Supreme Court explained that principles of sovereignty require
 24 privileging such communications from liability. “It is the right, as well as the duty, of every

25 _____
 26 ³⁵ Plaintiffs might cite two cases that they would argue are contrary. See *White v. Trans Union*
 27 *LLC*, 462 F. Supp. 2d 1079 (C.D. Cal 2006); *Southern California Housing Rights Center v. Los*
 28 *Feliz Towers Homeowners Assoc.*, 426 F. Supp. 2d 1061 (C.D. Cal. 2005). Not so. Neither case
 is apt on these facts, analyzes the issues closely, or is in keeping with the logic of *Korea Supply* or
 the purpose of Proposition 64. *Walker* and its ilk control.

³⁶ Plaintiffs’ California claims, like their ECPA claims, are also time barred.

1 citizen . . . to communicate to the executive officers any information which he has of the
2 commission of an offense against those laws; and such information, given by a private citizen, is
3 a privileged and confidential communication, for which no action of libel or slander will lie . . .
4 The right of a citizen informing of a violation of law . . . *arises out of the creation and*
5 *establishment by the Constitution itself of a national government, paramount and supreme within*
6 *its sphere of action.”*

7 Relying on *Quarles, Vogel v. Gruaz*, 110 U.S. 311 (1884), and their progeny, federal
8 courts have consistently upheld these privileges. The Ninth Circuit, for example, has explained
9 that “the information given to a prosecutor by a private person for the purpose of initiating a
10 prosecution is protected by [a] cloak of immunity . . . so that all persons might freely disclose
11 their suspicions and deductions” without fear of being sued. *Borg v. Boas*, 231 F.2d 788, 794-95
12 (9th Cir. 1956).³⁷ While some courts say the privilege is absolute, *see Vogel*, 110 U.S. at 314;
13 *Holmes v. Eddy*, 341 F.2d 477, 480-481 (4th Cir. 1965), others say it is qualified, *see McDonald*
14 *v. Smith*, 472 U.S. 479, 485 (1985); *Foltz v. Moore McCormack Lines, Inc.*, 189 F.2d 537, 540
15 (2d Cir. 1951). Plaintiffs’ federal claims fail either way. Even under the qualified privilege,
16 defendants’ communications with the PRC are immunized unless they were (1) false; *and* (2)
17 made with malice. *See Foltz*, 189 F.2d at 540; *Swaaley v. U.S.*, 376 F.2d 857, 862 (Ct. Cl. 1967).
18 Plaintiffs do not allege the information defendants provided was false; far from it, they complain
19 it was all too accurate. Nor do they assert that defendants acted with ill will.

20 Plaintiffs’ federal claims are also barred by the foreign sovereign compulsion and *Noerr-*
21 *Pennington* doctrines. The foreign sovereign compulsion doctrine, which finds its roots in

22
23 ³⁷ *See also U.S. v. New York Tel. Co.*, 434 U.S. 159, 175 (1977) (government could compel
24 private phone company to install pen registers on telephones; citing *In re Quarles* approvingly);
25 *Brown v. Edwards*, 721 F.2d 1442, 1454 n.17 (5th Cir. 1984) (citing *Vogel* and *Borg* in support of
26 “an absolute privilege for statements made in the institution of criminal charges”); *Holmes v.*
27 *Eddy*, 341 F.2d 477, 480-481 (4th Cir. 1965) (granting stockbroker immunity for statements made
28 to the SEC about a suspicion that a company was attempting to bilk the public); *Foltz v. Moore*
McCormack Lines, Inc., 189 F.2d 537, 540 (2d Cir. 1951) (defendant who provided information
to FBI was immune from suit unless statement was false and made with malice); *Swaaley v. U. S.*,
376 F.2d 857, 862-63 (Ct. Cl. 1967) (statements made to government concerning suspected
criminal activity privileged); RESTATEMENT (SECOND) OF TORTS § 598 cmt. d (1977) (statement
privileged “when any recognized interest of the public is in danger, including the interest in the
prevention of crime and the apprehension of criminals”).

1 antitrust law, applies here to bar plaintiffs' claims.³⁸ It provides that courts may not require a
 2 person to engage in acts prohibited by a foreign state or refrain from acts compelled by the state.
 3 *See Timberland Lumber Co. v. Bank of America*, 549 F.2d 597, 606 (9th Cir. 1977). One leading
 4 case, *Interamerican Refining Corp. v. Texaco Maracaibo, Inc.*, 307 F. Supp. 1291, 1296 (D. Del.
 5 1970), holds that because "defendants were compelled by regulatory authorities in Venezuela to
 6 boycott plaintiff," they had "a complete defense to [plaintiff's] action under the antitrust laws
 7 based on that boycott." As the court elaborated:

8 When a nation compels a trade practice firms there have no choice but to obey.
 9 Acts of business become effectively acts of the sovereign. The Sherman Act does
 10 not confer jurisdiction on United States courts over acts of foreign sovereigns. . . .
 11 *Were compulsion not a defense, American firms abroad faced with a government
 12 order would have to choose one country or the other in which to do business. Id.*

11 Under the doctrine, defendants must show their communications were (a) "basic and
 12 fundamental" to plaintiffs' case and "not just [of] peripheral" concern, and (b) compelled.
 13 *Brodie*, 174 F. Supp. 2d at 300. Both requirements are met here. Defendants' communications
 14 with the PRC are at the core of plaintiffs' case; and, as documents cited in the complaint make
 15 clear, *see* Compl. ¶ 64, defendants' disclosure of information was compelled by Chinese law. In
 16 its report, the Hong Kong Privacy Commissioner concluded:

- 17 • "[T]he disclosure of Information in the circumstances of the case was not a
 18 voluntary act initiated by [YHKL] but was compelled under the force of PRC
 19 law," Appx. A, Ex. A ¶ 8.25;
- 20 • "the Order was a legal obligation imposed on [YHKL]," and "refusal to
 21 comply [with the order] might result in both criminal and administrative
 22 sanctions," *id.* ¶ 7.12; and
- 23 • "Yahoo! China and [YHKL] did in the circumstances of this case have
 24 genuine penal apprehension of possible violation of Article 45 or Article 277
 25 if refused to comply with the [PRC's] order," *id.* ¶ 7.8.³⁹

22 ³⁸ *See Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*,
 23 357 U.S. 197 (1958) (excusing Swiss company's failure to comply with American discovery
 24 order that required it to violate Swiss law); *United States v. Brodie*, 174 F. Supp. 2d 294, 299-304
 25 (E.D. Pa. 2001) (recognizing potential applicability of doctrine outside antitrust law).

26 ³⁹ Article 45 of the Criminal Procedure Law provides the PRC the authority to gather evidence
 27 requires the government to investigate those who "falsif[y], conceal[], or destroy[]" it. Article 277
 28 of the Criminal Law provides "[w]hoever intentionally obstruct officers of a State security organ
 or a public security organ from maintaining State security in accordance with law" is to be
 punished "to fixed-term imprisonment of not more than three years, criminal detention, or public
 surveillance or be fined." Article 18 of the State Security Law provides that "when a State
 security organ investigates and finds out any circumstances endangering State security and
 gathers related evidence, citizens and organizations concerned shall faithfully furnish it with
 relevant information and may not refuse to do so." *Id.* ¶¶ 7.1-7.11; *see also* Article 57 of PRC

1 As the Supreme Court has said: “It is hardly debatable that fear of criminal prosecution
2 constitutes a weighty excuse for” acting, “and this excuse is not weakened because the laws
3 [engendering this fear] are those of a foreign sovereign.” *Societe Internationale*, 357 U.S. at 211.

4 The *Noerr-Pennington* doctrine also originated in antitrust law and shields firms from
5 liability for communications with government officials. See *United Mine Workers of Am. v.*
6 *Pennington*, 381 U.S. 657 (1965); *Eastern R.R. Presidents Conference v. Noerr Motor Freight,*
7 *Inc.*, 365 U.S. 127 (1961). The doctrine has been extended to non-antitrust cases,⁴⁰ shields
8 defendants from claims based on communications with law enforcement,⁴¹ and applies unless
9 plaintiffs can show that defendants’ communications were a *sham* designed to injure plaintiffs
10 through *false* accusations, see *Oregon Natural Res.*, 944 F.2d at 534. Again, plaintiffs make no
11 such allegations.

12 2. Plaintiffs’ Claims Are Barred By California’s Statutory Privilege.⁴²

13 California Civil Code Section 47(b) “bars” civil actions based on communications with
14 law enforcement. *Hagberg v. Calif. Fed. Bank FSB*, 32 Cal. 4th 350, 360 (Cal. 2004). “[C]ourts
15 have given [47(b)] an expansive reach,” “held that the privilege is absolute, even if the result is
16 inequitable,” and ruled that “any doubt as to whether the privilege applies is resolved in favor of
17 applying it.” *Morales v. Coop. of Am. Physicians, Inc.*, 180 F.3d 1060, 1062 (9th Cir. 1999). Like

18 Regulations on Telecommunications; Article 18 of Measures for the Administration of Internet E-
19 mail Services; Articles 9, 13, 14 and 15 of Administrative Measures on Internet Bulletin Services.
20 See Appendix B, Tabs 2, 3, 4, 7, 10, and 11.

21 ⁴⁰ See, e.g., *Boulware v. State of Nev. Dept. of Human Res.*, 960 F.2d 793, 800 (9th Cir. 1992)
(civil rights); *Evers v. Custer County*, 745 F.2d 1196, 1204 (9th Cir. 1984) (civil conspiracy);
22 *Oregon Natural Res. Council v. Mohla*, 944 F.2d 531, 533-34 (9th Cir. 1991) (tort); *Video Int’l*
Prod. v. Warner-Amex Cable Commc’n, 858 F.2d 1075, 1084 (5th Cir. 1988) (*Noerr-Pennington*
23 doctrine applies to “claims brought under federal and state law,” and to “common-law tort”
claims as well as statutory claims).

24 ⁴¹ See *Forro Precision, Inc. v. Inter. Bus. Machines*, 673 F.2d 1045, 1059-1060 (9th Cir. 1982);
Palmer v. Roosevelt Lake Log Owners Ass’n., 551 F. Supp. 486, 493-494 (D. Wash. 1982).

25 ⁴² Defendants believe Chinese law should control and disposes of plaintiffs’ “state law” claims.
However, for the purposes of this motion, defendants assume *arguendo*, as plaintiffs’ complaint
26 alleges, that California law applies. Cf. *Panama Processes, S.A. v. Cities Services Co.*, 650 F.2d
408, 413 n.6 (2d Cir. 1981) (noting party had reserved right to argue Brazilian law applied,
though it was presently arguing under New York law); *Radiation Sterilizers, Inc. v. U.S.*, 867 F.
27 Supp. 1465, 1476 (E.D. Wash. 1994) (in ruling on motions to dismiss, court did not decide
whether Washington or Georgia law applied, but merely determined whether plaintiffs’ causes of
28 action, brought under Washington law, stated cognizable claims under Washington law).

1 its federal counterparts, section 47(b) is designed to “encourage[e] freedom of communication
2 between citizens and public authorities charged with investigating wrongdoing.” *Forro*
3 *Precision, Inc. v. Int’l Bus. Machs.*, 673 F.2d 1045, 1053 (9th Cir. 1982). The privilege is based
4 on the recognition that “it [is] the duty of every citizen to cooperate with the police in their
5 investigation of crime and to provide information to investigating officers”; it thus “shields” those
6 who give “testimony or statements to officials conducting criminal investigations.” *Hagberg*, 32
7 Cal. 4th at 373.

8 Both federal and California courts have held that the section 47(b) privilege applies to
9 communications made in foreign countries to foreign officials. *See Beroiz v. Wahl*, 84 Cal. App.
10 4th 485 494-95 (Cal. Ct. App. 2000) (Mexico); *E. & J. Gallo Winery v. Andina Licores, S.A.*,
11 Case No. CV F 05-0101, 2006 U.S. DIST. LEXIS 47206, at *24 (E.D. Cal. June 30, 2006)
12 (Ecuador). The *Beroiz* court surveyed case law from other jurisdictions and observed that,
13 throughout the United States, courts “have uniformly held that similar privileges apply to foreign
14 proceedings and communications.” 84 Cal. App. 4th at 494.⁴³

15 3. Plaintiffs’ International Law Claims Are Similarly Barred.

16 Finally, plaintiffs assert defendants violated “universal” standards of international law by
17 providing the PRC with evidence of plaintiffs’ unlawful internet usage. *See* Compl. ¶¶ 3, 5, 70-
18 96. Not so. Numerous countries,⁴⁴ like our country and like virtually every State in the Union,⁴⁵
19 have long *privileged* such communications.

20 _____
21 ⁴³ While *Beroiz*, 84 Cal. App. 4th at 494-96, and *E. & J. Gallo Winery*, 2006 U.S. DIST. LEXIS
22 47206, at *24-26, observed that a qualified, rather than absolute, privilege might apply if
23 defendant initiated foreign legal proceedings and the foreign legal system did not provide
24 adequate safeguards, that circumstance is not presented here. The complaint does not allege that
25 defendants initiated contact with the PRC, nor did they. Plaintiffs also have not alleged
26 defendants acted with “hatred or ill will” or recklessly published false information. *Noel v. River*
27 *Hills Wilsons, Inc.*, 113 Cal. App. 4th 1363, 1370 (Cal. Ct. App. 2003) (“The malice necessary to
28 defeat a qualified privilege is ‘actual malice’ which is established by a showing [1] that the
publication was motivated by hatred or ill will towards the plaintiff or [2] by a showing that the
defendant lacked reasonable grounds for belief in the truth of the publication and therefore acted
in reckless disregard of the plaintiff’s rights.”); see also *Dorn v. Mendelzon*, 196 Cal. App. 3d
933, 945 (Cal. Ct. App. 1987).

⁴⁴ *See* Yahoo!’s concurrently filed Anti-SLAPP Motion at 8, n.5.

⁴⁵ *See* Yahoo!’s concurrently filed Anti-SLAPP Motion at 8, n.6.

1 **V. PLAINTIFFS FAILED TO JOIN AN INDISPENSABLE PARTY.**

2 Plaintiffs' complaint must be dismissed pursuant to Rule 12(b)(7), because the PRC is a
3 "necessary" party and the case cannot proceed without it. *Wilbur v. Locke*, 423 F.3d 1101, 1111
4 (9th Cir. 2005).

5 **A. The PRC Is A Necessary Party.**

6 A party is "necessary" if (1) complete relief cannot be afforded plaintiffs in its absence; *or*
7 (2) a decision on the merits will either (a) impair its ability to protect its interests or (b) subject
8 defendants in this case to "multiple or inconsistent obligations." *Dawavendewa v. Salt River*
9 *Project Agr. Imp. & Power Dist.*, 276 F.3d 1150, 1155 (9th Cir. 2002). Both of these alternative
10 tests are satisfied; satisfying *either* test is sufficient. *See* FED. R. CIV. P. 19(a).

11 Plaintiffs complain they are being wrongly incarcerated and abused by the PRC. Their
12 complaint seeks "affirmative action by the Defendants to secure the[ir] release." Compl. at 34
13 ¶ (d). That relief is not possible in the PRC's absence. No money judgment or declaration of
14 rights would be enough: plaintiffs' harm continues so long as they remain incarcerated.

15 The PRC has a strong interest in this action and its absence will impair its interests and
16 impose conflicting obligations. Plaintiffs seek both an injunction preventing defendants from
17 providing the PRC with evidence in criminal cases, *see* Compl. at 34 ¶ (e), and a declaration that
18 disclosure of such evidence violates international law, *see id.* at 34 ¶ (d). Those requests are a
19 direct attack on the PRC's sovereignty and ability to "govern [its own] territory." *Dawavendewa*,
20 276 F.3d at 1157.⁴⁶ Moreover, there can be no question the case "subject[s] [defendants] to a
21 substantial risk of incurring . . . inconsistent obligations." FED. R. CIV. P. 19(a)(2)(ii). Unless the
22 Court can also bind the PRC, the requested relief will put defendants squarely "between the
23 proverbial rock and hard place." *Dawavendewa*, 276 F.3d at 1156. Rule 19(a)(2) is designed to
24 prevent such results. *See id.*

25
26
27 ⁴⁶ *See also* *Davis v. United States*, 192 F.3d 951, 959 (10th Cir. 1999) (Seminole Tribe necessary
28 party where judgment would overrule Tribe's ordinance); *Ricci v. State Bd. of Law Examiners*,
569 F.2d 782 (3d Cir. 1978) (State Supreme Court was necessary and indispensable party to
action seeking to invalidate court's rule governing bar admission).

1 **B. The PRC Cannot Be Joined.**

2 American courts do not have jurisdiction over foreign states unless the state waives
3 immunity or the plaintiffs' claims fall under one of the statutory exceptions to the Foreign
4 Sovereign Immunity Act, 28 U.S.C. §§ 1604, 1605, *see In re Republic of the Phil.*, 309 F.3d
5 1143, 1149 (9th Cir. 2002). The PRC does not fall into any of the exceptions in this case. *See id.*

6 **C. The PRC Is Indispensable.**

7 If a necessary party cannot be joined, the Court must consider whether in "equity and
8 good conscience" the suit should proceed without it. FED. R. CIV. P. 19(b); *EEOC v. Peabody*
9 *Western Coal Co.*, 400 F.3d 774, 780 (9th Cir. 2005). Courts must balance four factors in making
10 this determination. *See Dawavendewa*, 276 F.3d at 1161. All four factors favor dismissal.

11 The first three factors are closely related: (1) prejudice to the PRC and defendants; (2) the
12 ability to mitigate prejudice by shaping the relief; and (3) the adequacy of a judgment that does
13 not bind the PRC. To award any relief to plaintiffs, the Court must rule that providing evidence
14 to the PRC in a criminal case was a violation of international law. Plaintiffs seek a declaration to
15 such effect, an injunction preventing such disclosures, and damages. Any judgment for plaintiffs
16 in this case—no matter how broad or narrow the relief—will intrude on the PRC's sovereignty,
17 and put defendants in an untenable conflict, *Dawavendewa*, 276 F.3d at 1156.⁴⁷ Moreover, were
18 the Court to award plaintiffs relief without joinder of the PRC, such relief will be inadequate.
19 Political speech will still be criminal in China, plaintiffs will still be in prison, and companies will
20 still be required by Chinese law to furnish evidence.

21 The fourth factor—whether an alternative forum exists—also favors dismissal. Shi
22 instituted legal proceedings before the Hong Kong Privacy Commissioner; his case is pending on
23 appeal; the Commissioner issued a detailed ruling showing Shi's claims were taken seriously; and
24 Hong Kong is an adequate, alternative forum.⁴⁸ But even if no alternative forum existed, that

25 _____
26 ⁴⁷ *See Saudi Arabia v. Nelson*, 507 U.S. 349, 361 (1993) ("however monstrous such abuse
undoubtedly may be, a foreign state's exercise of the power of its police has long been
understood" as sovereign in nature).

27 ⁴⁸ *See e.g., Capri Trading Corp. v. Bank Bumiputra Malaysia Berhad*, 812 F. Supp. 1041, 1043-
28 44 (N.D. Cal. 1993) (Hong Kong is an adequate forum to adjudicate alleged RICO violations,
common law fraud and breach of fiduciary duty claim); *Dragon Capital Partners L.P. v. Merrill*

1 does *not* prevent dismissal when the other Rule 19(b) factors are satisfied.⁴⁹

2 **VI. PLAINTIFFS' COUNSEL MAY LACK AUTHORITY TO BRING THIS SUIT.**

3 In the unique circumstances of this case, there is a serious question about the authority and
4 ability of plaintiffs' counsel to prosecute this case on behalf of Shi and Wang. As the complaint
5 suggests, counsel have no direct contact with Shi and Wang and can only allege the facts of Shi
6 and Wang's case based on information and belief. *See* Compl. ¶¶ 45, 65, 145. A "suit instituted
7 without authority from the party named as plaintiff is a nullity," "any judgment obtained in such a
8 suit is void," and the complaint in such a case must be dismissed. *Meredith v. Ionian Trader*, 279
9 F. 2d 471, 474 (2d Cir. 1960); *see also Pueblo of Santa Rosa v. Fall*, 273 U.S. 315, 319 (1927).

10 Under federal and California law, every action must be prosecuted by the real party in interest or
11 a representative of that party authorized by law. *See* FED. R. CIV. P. 17; CAL. CIV. PROC. CODE
12 § 367. Representative suits are allowed *only* where appropriate documented authority exists.⁵⁰

13 This Court has the power to "require an attorney, one of its officers, to show his authority
14 to appear," and to dismiss a case if that authority is not shown. *Pueblo* 273 U.S. at 319; *see also*
15 *United States v. Wolf*, 352 F. Supp. 2d 1195, 1199 (W.D. Okla. 2004); *In re Retail Chemists*

16
17 *Lynch Capital Servs. Inc.*, 949 F. Supp. 1123, 1130-31 (S.D.N.Y. 1997) (rejecting claim that
18 impending Chinese takeover of Hong Kong will render it an inadequate forum and finding that
19 Hong Kong is an adequate forum to try securities fraud claims).

20 ⁴⁹ *See Dawavendewa*, 276 F.3d at 1162 (collecting cases); *Wilbur*, 423 F.3d at 1115 ("even
21 assuming [plaintiffs] have no other forum in which to pursue a remedy, we have 'regularly held
22 that the [absent party's] interest in [sovereign] immunity overcomes the lack of an alternative
23 remedy or forum for the plaintiffs.>"). Indeed, outside the Ninth Circuit, the fact that the PRC is
24 entitled to sovereign immunity would, by itself, require that this case be dismissed. *See*
25 *Dawavendewa*, 276 F.3d at 1162. Defendants believe this rule is correct and hereby preserve the
26 issue.

27 ⁵⁰ In California, plaintiffs may grant general powers of attorney to sue on their behalf, *see* CAL.
28 PROB. CODE §§ 4263(a)(1), 4459, but the documents must be (a) dated; (b) signed "either (1) by
the principal or (2) in the principal's name by another adult in the principal's presence and at the
principal's direction"; and (c) "acknowledged before a notary public or . . . signed by at least two
witnesses." *Id.* §§ 4121, 4122; *Estate of Rabinowitz*, 114 Cal. App. 4th 635, 638 (2003).

In China, a party must submit to the People's Court a power of attorney bearing her signature
or seal that specifies the subject matter and the limits of authority granted. An agent must have
special authority to recognize, withdraw, or modify claims; to become involved in mediation; and
to file a counterclaim or to lodge an appeal on behalf of the principal. *See* 1991 Civil Procedure
Law (P.R.C.), Art. 59. (Appx. B, Tab 5). A carte blanche power of attorney, which fails to name
the powers granted, precludes an agent from doing any of the above. *See* Opinions of the
Supreme People's Court on Certain Issues Concerning Application of PRC Civil Procedure Law
2002, SUP. PEOPLE'S CT. GAZ., Art. 69. (Appx. B, Tab 8).

1 Corp, 66 F. 2d 605, 608 (2d Cir. 1933). We submit it is important and prudent to address this
2 issue at the threshold of this case.⁵¹

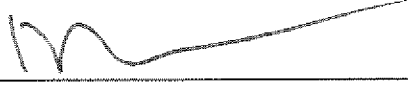
3 Defendants have met and conferred with plaintiffs' counsel regarding this issue.
4 Plaintiffs' counsel have represented they have written powers of attorney granting full authority,
5 but decline to provide them to defendants at this stage of the proceedings. The need for such
6 assurances are especially important here, because it will be impossible to depose plaintiffs or
7 witnesses in China,⁵² attempts to gather evidence may violate Chinese law,⁵³ and plaintiffs have
8 little or no ability to provide *any* evidence to support their claims.⁵⁴

9 **VII. CONCLUSION**

10 Plaintiffs' Second Amended Complaint should be dismissed with prejudice.

11 Dated: August 30, 2007

DANIEL M. PETROCELLI
MATTHEW T. KLINE
O'MELVENY & MYERS LLP

12
13 By: 
14 Daniel M. Petrocelli
15 Attorneys for Defendant Yahoo! Inc and for
16 specially appearing defendant Yahoo! Hong
17 Kong, Ltd.
18
19

20 ⁵¹ Defendants are aware of one prominent ATS case prosecuted for six years, in which certain
21 plaintiffs alleged that they had not authorized counsel to act in settling the case. The judgment
22 and settlement were only upheld, in large part, because plaintiffs had signed powers of attorney,
23 shared them with defendants, and defendants relied on them pursuant to California Probate Code
24 section 4303, which provides: "A third person who acts in good faith reliance on a power of
attorney is not liable to the principal . . . if . . . (1) The power of attorney is presented to the third
25 person by the attorney-in-fact designated in the power of attorney. (2) The power of attorney
26 appears on its face to be valid. (3) The power of attorney includes a notary public's certificate of
acknowledgment or is signed by two witnesses." CAL. PROB. CODE § 4303.

27 ⁵² See U.S. Department of State, China Judicial Assistance,
http://travel.state.gov/law/info/judicial/judicial_694.html ("it does **not** appear possible to take the
28 deposition of a witness located in China") (emphasis in original).

⁵³ See Hong Kong Commissioner's Report ¶¶ 7.17-7.18; see also *id.* ¶¶ 7.3-7.20.

⁵⁴ See *id.* ¶ 3.2 ("No supporting evidence was attached to [Shi's] complaint. Despite repeated
requests, no further information or evidence was produced by [Shi] or his authorized
representative to the Commissioner for consideration."); see also *id.* ¶¶ 3.3, 8.52.

EXHIBIT B

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10 Attorneys for Defendant YAHOO!, INC.

11 **UNITED STATES DISTRICT COURT**
12 **NORTHERN DISTRICT OF CALIFORNIA**
13 **OAKLAND DIVISION**

14 WANG XIAONING, YU LING, SHI TAO,
15 and ADDITIONAL PRESENTLY
16 UNNAMED AND TO BE IDENTIFIED
17 INDIVIDUALS,

18 Plaintiff,

19 v.

20 YAHOO!, INC., a Delaware Corporation,
21 YAHOO! HONG KONG LTD., a Foreign
22 Subsidiary of Yahoo!, AND OTHER
23 PRESENTLY UNNAMED AND TO BE
24 IDENTIFIED INDIVIDUAL EMPLOYEES
25 OF SAID CORPORATIONS,

26 Defendant.

Case No. C07-02151 CW

**DEFENDANT YAHOO!, INC.'S NOTICE
OF MOTION AND SPECIAL MOTION TO
STRIKE PLAINTIFFS' STATE LAW
CAUSES OF ACTION PURSUANT TO
THE CALIFORNIA ANTI-SLAPP
STATUTE**

Date: November 1, 2007

Time: 2 p.m.

Location: Courtroom 2

Judge: Hon. Claudia Wilken

27 TO PLAINTIFFS AND THEIR COUNSEL OF RECORD:

28 PLEASE TAKE NOTICE THAT ON October 4, 2007, at 2 p.m. in Courtroom 2, 4th
Floor, United States Courthouse, 1301 Clay Street, Oakland, California, defendant Yahoo!, Inc.
("Yahoo!") will and hereby does move to strike plaintiffs' six causes of action brought under
California law—*i.e.*, plaintiffs' Fifth through Tenth Claims for Relief in their Second Amended
Complaint ("complaint"). This special motion to strike is brought on the grounds that (1)
plaintiffs' California causes of action are subject to the California anti-SLAPP statute, California
Code of Civil Procedure § 425.16; and (2) are barred by California Civil Code § 47, which
privileges the communications at issue in this case.

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This motion is based on this notice of motion and motion, the following Memorandum of Points and Authorities, Yahoo!'s concurrently filed Motion to Dismiss Plaintiffs' Second Amended Complaint, the pleadings on file in this matter, the reply memorandum Yahoo! intends to file, and any further argument the Court might allow.

Dated: August 27, 2007

DANIEL M. PETROCELLI
MATTHEW T. KLINE
O'MELVENY & MYERS LLP

By: 

Daniel M. Petrocelli
Attorneys for Defendant
YAHOO!, INC.

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1 **I. INTRODUCTION**

2 Plaintiffs' six causes of action brought under California law—their Fifth through Tenth
3 Claims for Relief—each must be stricken pursuant to California's anti-SLAPP statute and
4 California Civil Code section 47, because the claims are based on alleged acts of communications
5 with Chinese law enforcement officials concerning, what is by definition, a matter of public
6 concern—*i.e.*, alleged criminal activity. The anti-SLAPP statute, which is designed to protect
7 participation in matters of public concern, allows defendants an expedited means to challenge
8 lawsuits arising out of such communications. *See* CAL. CODE CIV. PROC. § 425.16. The anti-
9 SLAPP statute applies to supplemental state law claims brought in federal court, *see Globetrotter*
10 *Software, Inc. v. Elan Computer Group, Inc.*, 63 F. Supp. 2d 1127, 1129-30 (N.D. Cal. 1999), and
11 affords Yahoo! substantive and procedural protections, including the right to file this special
12 motion to strike. Civil Code section 47(b) is similar to the SLAPP statute and privileges
13 communications with law enforcement officials—even those that occur abroad—and shields
14 Yahoo! from liability arising out of such acts. Plaintiffs' claims in this case challenge
15 quintessential acts of communication protected by California law. Plaintiffs' Fifth through Tenth
16 Claims for Relief must be stricken.

17 **II. STATEMENT OF FACTS**

18 Plaintiffs allege they published pro-democracy literature in China, using Yahoo! China
19 email accounts and group lists. *See* Compl., ¶¶ 10, 12, 33-35, 53-54, 56. They allege the Chinese
20 government sought to prosecute plaintiffs under Chinese laws prohibiting such speech; and
21 Yahoo!, defendant Yahoo! Hong Kong, Ltd., and/or Yahoo! China (plaintiffs' allegations are
22 unclear) "provided Chinese officials with access to [plaintiffs'] private e-mail records, copies of
23 email messages, e-mail addresses, user ID numbers, and other identifying information"
24 *Id.* ¶¶ 2, 42, 62. Plaintiffs assert that "[t]hese disclosures served . . . as the basis" for their
25 prosecution and detention and that, once incarcerated, government officials abused them and
26 engaged in "acts of persecution." *Id.* ¶ 2. Plaintiffs are deliberately vague as to whether
27 defendants provided information to the Chinese government on their own accord or in response to
28 an official request from the Chinese government. All the complaint says is that defendants acted

1 “voluntarily.” *Id.* ¶ 2.

2 Plaintiffs contend that defendants’ disclosure of information aided and abetted the
3 misconduct of the Chinese government and violated federal, international, and California law. In
4 paragraph 4 of their complaint, plaintiffs describe their California claims. They say defendants
5 “violate[d] California state laws, including prohibitions against battery, false imprisonment,
6 assault, intentional infliction of emotional distress, negligence, negligent supervision, and the
7 California Business & Professions Code § 17200.” Compl. ¶ 4. Plaintiffs elaborate on their
8 California law claims in the “Causes of Action” section of their complaint and their Fifth through
9 Tenth Claims for Relief. *See id.* ¶¶ 69, 97-127.¹

10 For purposes of this motion, Yahoo! assumes the facts alleged in the complaint are true
11 and should be read most favorably to plaintiffs—*i.e.*, that Yahoo! played some role in the
12 transmittal of information regarding plaintiffs to the Chinese authorities. Even on these assumed
13 facts, the veracity of which Yahoo! does not concede, plaintiffs have failed to state a claim.

14 **III. PLAINTIFFS’ CALIFORNIA LAW CLAIMS MUST BE STRICKEN BECAUSE**
15 **YAHOO!’S ALLEGED COMMUNICATIONS WERE PRIVILEGED.**

16 Plaintiffs’ complaint could not more directly challenge Yahoo!’s right to engage in
17 communicative acts protected by California law. As both California state and federal courts have
18 recognized, California Civil Code § 47(b) privileges communications made to both domestic and
19 foreign law enforcement officials. *See Beroiz v. Wahl*, 84 Cal. App. 4th 485, 494-95 (Cal. Ct.
20 App. 2000) (§ 47(b) privilege applies to communications made to Mexican law enforcement); *E.*

21 _____
22 ¹ At times, plaintiffs suggest that their tort claims (*e.g.*, for battery) are brought under both “the
23 laws of California *and the United States.*” *Id.* ¶¶ 98-100 (emphasis added); *see also id.* ¶¶ 112,
24 116. Of course, “[t]here is no federal general common law” and, as the Supreme Court explained
25 70 years ago, “[e]xcept in matters governed by the Federal Constitution or Acts of Congress, the
26 law to be applied in any case *is the law of the State.*” *Erie Railroad Co v. Tompkins*, 304 U.S. 64,
27 78 (1938) (emphasis added). Because plaintiffs’ complaint directly invokes the law of the State
28 of California, Yahoo! assumes, for purposes of bringing this motion, that California law applies.
However, Yahoo! reserves the right to assert that California law does not apply to this case.
Cf. Radiation Sterilizers, Inc. v. U.S., 867 F. Supp. 1465, 1476 (E.D. Wash. 1994) (in ruling on
motions to dismiss, court did not decide whether Washington or Georgia law applied, but merely
determined whether plaintiffs’ causes of action, brought under Washington law, stated cognizable
claims under Washington law); *Panama Processes, S.A. v. Cities Services Co.*, 650 F.2d 408, 413
n.6 (2d Cir. 1981) (party reserved right to argue that Brazilian law applied, though it presently
argued under New York law).

1 & *J. Gallo Winery v. Andina Licores, S.A.*, Case No. CV F 05-0101, 2006 U.S. DIST. LEXIS
2 47206, at *24 (E.D. Cal. June 30, 2006) (privilege applies to communications made in Ecuador);
3 *Johnson v. Symantec Corp.*, 58 F. Supp. 2d 1107, 1110 (N.D. Cal. 1999) (“undisputed” that
4 privilege applies to communications “made in the context of ongoing governmental
5 investigations”). Given this rule, plaintiffs’ California law claims should either be dismissed
6 pursuant to Yahoo!’s concurrently filed motion to dismiss, or stricken pursuant to the anti-SLAPP
7 statute.

8 Adjudicating a SLAPP motion is a two-step process. First, the Court must determine
9 whether the defendant has met its burden of demonstrating that the anti-SLAPP statute applies.
10 *See Navellier v. Sletten*, 29 Cal. 4th 82, 88 (Cal. 2002). Second, if defendant meets that burden,
11 the plaintiffs must demonstrate they have stated a legally cognizable claim. *See id.*

12 In federal court, a plaintiff’s burden in response to an anti-SLAPP motion depends on the
13 nature of defendant’s challenge. If the challenge is based on legal defects on the face of the
14 pleadings, then plaintiffs’ burden is “analogous to [that of] a Rule 12(b)(6) motion to dismiss.”
15 *Rogers v. Home Shopping Network, Inc.*, 57 F. Supp. 2d 973, 982 (C.D. Cal. 1999). If, instead, a
16 defendant’s challenge is based on a lack of evidence to substantiate plaintiff’s claims, then the
17 plaintiff’s burden is analogous to a motion for summary judgment pursuant to Rule 56. *See id.* at
18 982-83. Here, Yahoo! challenges deficiencies on the face of the pleadings. Thus, plaintiffs’
19 allegations should be assumed true and their California law claims stricken only if they failed to
20 plead a “cognizable legal theory” or pled insufficient facts “under a cognizable legal theory.”
21 *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1988) (applying Rule 12(b)(6)).
22 Yahoo! contends plaintiffs’ claims are barred by California privilege law.

23 **A. The Anti-SLAPP Statute Applies.**

24 **1. Plaintiffs’ Claims Target Protected Acts of Communication.**

25 The SLAPP statute applies to any “cause of action against a person arising from any act of
26 that person in furtherance of that person’s right of petition or free speech under the United States
27 or California Constitution in connection with a public issue,” CAL. CODE CIV. PROC.
28 § 425.16(b)(1), including “any written or oral statement or writing made before a legislative,

1 executive, or judicial proceeding, or any other official proceeding authorized by law” and “any
2 written or oral statement or writing made in connection with an issue under consideration or
3 review by a legislative, executive, or judicial body, or any other official proceeding authorized by
4 law,” *id.* §§ 425.16(e)(1)-(2). Plaintiffs’ California claims fall within the scope of the SLAPP
5 statute because they arise from communications with government officials concerning an official
6 investigation.

7 California courts have uniformly held that such communications are protected:

- 8 • In *Briggs v. Eden Council for Hope & Opportunity*, 19 Cal. 4th 1106, 1115 (Cal.
9 1999), the California Supreme Court held that statements made to investigators for the
10 Department of Housing and Urban Development fell within the ambit of the statute.
- 11 • In *Dickens v. Provident Life & Accident Ins. Co.*, 117 Cal. App. 4th 705, 713-717
12 (Cal. Ct. App. 2004), the California court of appeal held that the statute protected
13 statements made to federal prosecutors that resulted in plaintiffs’ prosecution.
- 14 • In *Siam v. Kizilbash*, 130 Cal. App. 4th 1563, 1569-1570 (Cal. Ct. App. 2005), the
15 Court of Appeal held that defendant’s reports of child abuse to police qualified.
- 16 • And in *Computerpress, Inc. v. Jackson*, 93 Cal. App. 4th 993, 1009-10 (Cal. Ct. App.
17 2001), the court held that SLAPP applied to complaints filed with the SEC.

18 None of these results is surprising. As the California Supreme Court has recognized: “it [is] the
19 duty of every citizen to cooperate with the police in their investigation of crime and to provide
20 information to investigating officers,” and defendants cannot be held liable for “fulfill[ing] this
21 duty.” *Hagberg v. Calif. Fed. Bank FSB*, 32 Cal. 4th 350, 373 (Cal. 2004).

22 Under any reading of the complaint, defendants’ alleged communications are protected.
23 Even assuming Yahoo! *volunteered* information to the PRC—which it did not—its actions, like
24 those in *Briggs*, *Dickens*, *Siam*, and *Computer Express*, are fully protected. *See Dickens*, 117 Cal.
25 App. 4th 705 at 707-08 (lawsuit is subject to SLAPP because “Dickens’s cause of action . . .
26 challenges the actions of [defendants] in allegedly playing an instrumental role in procuring the
27 criminal prosecution against him.”)

1 If Yahoo!'s communications were made in response to a formal legal request, then those
2 communications deserve even greater protection. Testimony given before public bodies,
3 evidence produced in response to subpoenas or legal process, and reports made in response to
4 official requests for information are all "protected activities" under the SLAPP statute. *Greka*
5 *Integrated, Inc. v. Lowrey*, 133 Cal. App. 4th 1572, 1580 (Cal. Ct. App. 2005) ("Lowrey
6 disclosed information about Greka to his counsel, to authorities and in deposition and trial
7 testimony *in response to subpoenas. These are all protected activities.* Accordingly, Lowrey met
8 his burden to show the complaint arose from protected speech.") (citing CAL. CODE CIV. PROC. §
9 425.16(e)(1) (statements made "before a legislative, executive, or judicial proceeding, or any
10 other official proceeding authorized by law" are protected activity)) (emphasis added); *Gallanis-*
11 *Politis v. Medina*, 152 Cal. App. 4th 600, 611 (Cal. Ct. App. 2007) (holding that "investigation
12 and report . . . conducted and written in response to a request for information from" County
13 official were "acts in furtherance of [defendants'] right of petition or free speech," and, thus,
14 protected by the SLAPP statute).

15 **2. No Good Reason Exists to Exempt Plaintiffs' Claims from the Statute.**

16 Plaintiffs have not indicated whether they believe the SLAPP statute applies in this case.
17 If they argue against its application, such arguments should be rejected.

18 First, plaintiffs may argue that because they filed this lawsuit to protect their free speech
19 rights—and not to interfere with defendants' rights and duties to speak—the SLAPP statute
20 should not apply. Such an argument would be misguided. The SLAPP statute applies even when
21 plaintiff's lawsuit is not motivated by a desire to chill defendant's speech. *See Dickens*, 117 Cal.
22 App. 4th 705 at 716-17. Even if that were not the rule, plaintiffs clearly intend to silence
23 defendants: they seek "injunctive relief to stop any further disclosures of user information" to the
24 PRC. Compl. at 34.

25 Second, plaintiffs might argue that SLAPP should not apply to communications with
26 foreign law enforcement officials. However, plaintiffs assert claims based on *California* law
27 against a *California* defendant and are, therefore, subject to *California* defenses. Moreover,
28

1 identical language in California's related litigation privilege statute, *see* CAL. CIV. CODE § 47(b),
2 has been held to apply to communications with foreign law enforcement officials.

3 The Ninth Circuit has held that the anti-SLAPP statute furthers "important, substantive
4 state interests," and should be applied to California claims absent a direct conflict with other laws.
5 *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 973 (9th Cir.
6 1999) (extending SLAPP statute's protection to California claims in federal diversity actions).
7 Although a court in this district has recently concluded that the SLAPP statute may not apply to
8 claims *filed* in another jurisdiction and *governed by the substantive law* of that jurisdiction, it
9 recognized that the SLAPP statute does govern "cases where California substantive law was
10 being applied." *Schering Corp. v. First DataBank, Inc.*, 2007 U.S. Dist. LEXIS 50164 at *8
11 (N.D. Cal. Apr 20, 2007). "California has a great interest in determining how much protection to
12 give California speakers" who are sued for California torts. *Id.* at *17. Plaintiffs cannot claim the
13 protections of California law but avoid its burdens.²

14 Moreover, in determining the scope of the SLAPP statute's protections, California courts
15 have often looked to California Civil Code section 47(b), which contains identical language.
16 Though the conduct protected by the two statutes is not identical, courts often examine "the scope
17 of the litigation privilege to determine whether a given communication falls within the ambit of
18 subdivision (e)(1) and (2) [of the SLAPP statute]." *Flatley v. Mauro*, 39 Cal. 4th 299, 322 (Cal.
19 2006); *see also Dickens*, 117 Cal. App. 4th at 715 ("because the defendants' conduct would have
20 been privileged under Civil Code section 47 subsection (b), *it would have necessarily been*
21 *protected activity under section 425.16*") (emphasis added); *Sylmar Air Conditioning v. Pueblo*
22 *Contracting Servs.*, 122 Cal. App. 4th 1049, 1058 (Cal Ct. App. 2004) ("Communications within
23

24 ² Indeed, one Illinois federal court held that, "because California has a great interest in
25 determining how much protection to give California speakers," the SLAPP statute may apply to
26 protect California defendants even where another state's substantive law does govern the
27 underlying action. *See Global Relief Found. v. New York Times Co.*, 2002 U.S. Dist. LEXIS
28 17081 at *32-33 (N.D. Ill 2002) (holding that California defenses to defamation, including
SLAPP, applied even though defamation claim was otherwise governed by Illinois law) (citing
RESTATEMENT (SECOND) OF CONFLICTS § 145, cmt. d (1971) ("[T]he local law of the state where
the parties are domiciled, rather than the local law of the state of conflict and injury, may be
applied to determine whether one party is immune from tort liability to the other.")).

1 the protection of the litigation privilege of Civil Code section 47, subdivision (b) are equally
2 entitled to the benefits of section 425.16.”); *Contemporary Services Corp. v. Staff Pro Inc.*, 152
3 Cal. App. 4th 1043, 1055 (Cal. App. 2007) (“Both section 425.16 and Civil Code section 47 are
4 construed broadly, to protect the right of litigants to the utmost freedom of access to the courts
5 without [the] fear of being harassed subsequently by derivative tort actions. Thus, it has been
6 established for well over a century that a communication is absolutely immune from any tort
7 liability if it has ‘some relation’ to judicial proceedings.”); *but see Flatley*, 39 Cal. 4th at 322-23
8 (finding an instance where the protections did not overlap because the purpose of the SLAPP
9 statute was not served by protecting activities conclusively established to be crimes).

10 Section 47(b) has been held to apply to communications abroad. *See Beroiz v. Wahl*, 84
11 Cal. App. 4th 485 494-95 (Cal. Ct. App. 2000), *E. & J. Gallo Winery v. Andina Licores, S.A.*,
12 Case No. CV F 05-0101, 2006 U.S. DIST. LEXIS 47206, at *24 (E.D. Cal. June 30, 2006). In
13 *Beroiz*, 84 Ca. App. 4th at 490-91, for example, the defendant was an American citizen living in
14 Mexico who filed criminal charges against American members of a Mexican homeowners’
15 association. The members of the homeowners’ association sued the defendant in California court
16 for defamation based on statements made to a Mexican district attorney. *See id.* In ruling that
17 section 47(b) applied, the court noted that the question was an issue of first impression in
18 California, but both out-of-state precedents and the public policy rationales supporting
19 section 47(b) argued strongly in favor of applying it broadly to shield defendants from suit. *See*
20 *id.* at 909-12.

21 Similarly, in *E. & J. Gallo*, Andina sued Gallo in Ecuador for breach of contract. *See*
22 2006 U.S. Dist. LEXIS at *1-9. Gallo then sued Andina in California for declaratory relief,
23 breach of contract, unfair competition, and abuse of process. *See id.* Relying on *Beroiz*,
24 *E. & J. Gallo* held that statements made in connection with foreign legal proceedings were
25 protected under section 47(b). *See id.* at *26-28.³

26 ³ Both courts said that if the foreign legal system was “devoid of adequate procedural
27 safeguards,” and defendants used the foreign legal process as a means and with the intent to harm
28 plaintiffs, then the absolute privilege afforded by § 47(b) might not apply. *See id.*; *see Beroiz*, 84
Cal. App. 4th at 494-96. But where, as here, there is no claim that defendants acted with malice,
the privilege applies to communications outside the state.

1 Indeed, American courts generally have refused to allow plaintiffs to hold defendants
 2 liable for engaging in conduct abroad that would be protected speech here. *See, e.g., Bachchan v.*
 3 *India Abroad Publ'ns, Inc.*, 585 N.Y.S. 2d 661, 664-65 (N.Y. Sup. Ct. 1992) (where plaintiff filed
 4 suit in U.S. to enforce foreign libel judgment, court refused to enforce judgment because foreign
 5 tribunal had not provided defendant with various substantive and procedural free speech
 6 defenses).⁴ And courts in numerous countries⁵ and virtually every state⁶ privilege

7
 8 ⁴ *See also Beroiz*, 84 Cal. App. 4th at 494:

9 In *Vanderkam v. Clarke* (S.D.Tex. 1998) 993 F. Supp. 1031, 1031-1032, the
 10 executive director of a scandal-ridden Irish corporation brought an action against a
 11 lawyer appointed by the High Court of Ireland to investigate the corporation, alleging
 12 that the lawyer's communication of his official findings had defamed the director. The
 13 district court in *Vanderkam* held that the lawyer's conduct was absolutely privileged,
 14 reasoning that the lawyer had published his findings as ordered by the Irish court, and
 15 that under Texas law, lawyers are privileged to publish otherwise defamatory material in
 16 connection with a judicial proceeding. (*Id.* at p. 1032.)

17 Similarly, in *Sorge v. City of New York* (1968) 56 Misc.2d 414, 415 [288 N.Y.S.2d
 18 787, 790-791], two police officers in New York City testified, at the request of the State
 19 Department of the United States, at a hearing before an Italian judge regarding criminal
 20 activity in Italy. When the officers were sued for defamation, the court in *Sorge* held
 21 that their testimony during the Italian judicial proceeding was absolutely privileged
 22 under New York law. (288 N.Y.S.2d at pp. 798-799.)

23 Finally, in *Bakhshandeh v. American Cyanamid Company* (S.D.N.Y. 1962) 211 F.
 24 Supp. 803, 804, an Iranian citizen sued an American corporation for defamation,
 25 alleging, inter alia, that the corporation's employees had made defamatory remarks to an
 26 Iranian governmental official in Tehran. Citing primarily New York law, the district
 27 court in *Bakhshandeh* determined that these remarks to the Iranian official were subject
 28 to a qualified privilege, and thus they were not actionable absent proof of malice. (*Id.* at
 pp. 808-809.)

29 ⁵ *See, e.g., Mann v. O'Neill* (1997) 191 C.L.R. 204 at 216 (Austl.) ("Complaints to prosecuting
 30 authorities—'statements in aid of justice', as they are sometimes called—enjoy qualified
 31 privilege."); *Pleau v. Simpsons-Sears Ltd.*, (1976) 15 O.R. 2d 436 (Ont. C.A.) at ¶16 (Qualified
 32 privilege applied to defendant's publication of a notice to employees regarding possible forged
 33 checks bearing plaintiff's name; reasoning that published statement was privileged because
 34 defendant "acted at the request of the local police"); *Lupee v. Hogan*, (1920) 47 N.B.R. 492 (N.B.
 35 C.A.) at ¶9 ("universally recognized" rule that "all material statements made by persons interested
 36 in the detection of a crime during their investigations, and material thereto, are privileged");
 37 *Padmore v. Lawrence*, 11 Ad. & El. 380, 382 (K.B. 1840) (Coleridge, J.) (Great Britain: "For the
 38 sake of public justice, charges and communications, which would otherwise be slanderous, are
 39 protected if bona fide made in the prosecution of inquiry into suspected crime."); *Martin v.*
 40 *Watson*, [1994] Q.B. 425 at p. 437 (Great Britain: "[Q]ualified privilege . . . applies to a statement
 41 made to a police officer by way of reporting a complaint."); Susanna Frederick Fischer,
 42 *Rethinking Sullivan*, 34 Geo. Wash Int'l L. Rev. 101, 118-26 (2002) (English law privileges
 43 "statement[s] made to the police concerning the commission of a crime"; noting that the laws of
 44 Australia, New Zealand, and England are similar; showing that statutory developments in all three
 45 countries have not changed the common law privilege for communications to police); *Hardaker*
 46 *v. Phillips*, 2005 (4) SA 515 (S. Afr.) (discussing qualified privilege that attaches to witness
 47 statements in ongoing prosecutorial proceedings).

1 communications to law enforcement. In short, the SLAPP statute—like section 47(b)—should be
 2 read broadly to apply in this case.

3 3. Finally, plaintiffs may not argue that their claims under Business & Profession
 4 Code section 17204 are exempt from the SLAPP statute. California Code of Civil Procedure
 5 section 425.17 exempts claims “brought *solely* in the public interest” when the “plaintiff does *not*
 6 seek any relief greater than or different from the relief sought for the general public.” CAL. CODE
 7 CIV. PROC. § 425.17(b), (b)(1) (emphasis added.) Although plaintiffs advert to the “public
 8 interest” in describing their section 17204 claims, Compl. ¶ 119, they concede that they “bring
 9 this cause of action on behalf of *themselves*” and “seek compensation for the loss of *their*
 10 *property and the personal financial impacts they have suffered,*” *id.* (emphasis added). As a
 11 result, section 425.17 does not exempt their claims. *See, e.g., Ingels v. Westwood One Broad.*
 12 *Servs., Inc.*, 129 Cal. App. 4th 1050, 1067 (Cal. Ct. App. 2005) (“[b]ecause appellant alleges and
 13 seeks recovery of damages personal to himself, his claim fails to meet the first requirement set out
 14

15 ⁶ *See General Elec. Co. v. Sargent & Lundy*, 916 F.2d 1119, 1125-27 (6th Cir. 1990) (Kentucky);
 16 *Borg v. Boas*, 231 F.2d 788, 794 (9th Cir. 1956) (Idaho); *Kahermanes v. Marchese*, 361 F. Supp.
 17 168, 172 (E.D. Pa. 1973); *Marsh v. Commercial & Sav. Bank of Winchester, Va.*, 265 F. Supp.
 18 614, 621 (W.D. Va. 1967); *Cutts v. Am. United Life Ins. Co.*, 505 So. 2d 1211, 1215 (Ala. 1987);
 19 *Miller v. Nuckolls*, 91 S.W. 759, 761, 762 (Ark. 1905); *Kress v. Self*, 526 P.2d 754, 756 (Ariz. Ct.
 20 Appl. 1974); *Burke v. Greene*, 963 P.2d 1119, 1122 (Colo. 1998); *Flanagan v. McLane*, 87 Conn.
 21 220, 87 A. 727, 728 (1913); *Newark Trust Co. v. Bruwer*, 141 A.2d 615, 617 (Del. 1958);
 22 *Fridovich v. Fridovich*, 598 So. 2d 65, 67, 68 (Fla. 1992); *Hardaway v. Sherman Enters., Inc.*,
 23 210 S.E.2d 363, 364 (Ga. 1974); *Starnes v. Int'l Harvester Co.*, 539 N.E.2d 1372-75 (Ill. 4th Dist.
 24 1989); *Indiana Nat. Bank v. Chapman*, 482 N.E.2d 474, 479 (Ind. Ct. App. 4th Dist. 1985);
 25 *Winckel v. Von Maur Inc.*, 652 N.W.2d 453 (Iowa 2002); *Faber v. Byrle*, 229 P.2d 718 (Kan.
 26 1951); *Cormier v. Blake*, 198 So. 2d 139, 144 (La. Ct. App. 3d Cir. 1967); *Robinson v. Van*
 27 *Auken*, 76 N.E. 601, 602 (Mass. 1906); *Packard v. Central Maine Power Co.*, 477 A.2d 264, 268
 28 (Me. 1984); *Kefgen v. Davidson*, 617 N.W.2d 351 (Mich. Ct. App. 2000); *Smits v. Wal-Mart*
Stores, Inc., 525 N.W.2d 554, 557 (Minn. Ct. App. 1994); *Arnold v. Quillian*, 262 So. 2d 414,
 415 (Miss. 1972); *Hancock v. Blackwell*, 41 S.W. 205, 207 (Mo. 1897); *Pierce v. Oard*, 37 N.W.
 677, 679 (Neb. 1888); *Hampe v. Foote*, 47 P.3d 438, 440 (Nev. 2002); *Dijkstra v. Westerink*, 401
 A.2d 1118-21 (N.J. App. Div. 1979); *Grossman v. Fieland*, 483 N.Y.S.2d 735, 736 (2d Dep't
 1985); *Averitt v. Rozier*, 458 S.E.2d 26 (N.C. 1995); *Richmond v. Nodland*, 552 N.W.2d 586
 (N.D. 1996); *Paramount Supply Co. v. Sherlin Corp.*, 16 Ohio App. 3d 176 (8th Dist. Cuyahoga
 County 1984); *Magness v. Pledger*, 334 P.2d 792, 795 (Okla. 1959); *Ducosin v. Mott*, 642 P.2d
 1168, 1169-70 (Or. 1982); *Sylvester v. D'Ambra*, 54 A.2d 418, 420 (R.I. 1947); *Moore v. Bailey*,
 628 S.W.2d 431, 436 (Tenn. Ct. App. 1981); *Hott v. Yarbrough*, 245 S.W. 676, 678, 679 (Tex.
 Comm'n App. 1922); *Schnupp v. Smith*, 457 S.E.2d 42 (Vt. 1995); *Story v. Shelter Bay Co.*, 760
 P.2d 368, 372-73 (Wash. App. Div. 1 1988); *Otten v. Schutt*, 113 N.W.2d 152, 156 (Wis. 1962);
Lever v. Cmty. First Banestates, 989 P.2d 634 (Wyo. 1999); *Columbia First Bank v. Ferguson*,
 665 A.2d 650 (D.C. 1995).

1 in section 425.17, subdivision (b)").

2 **B. Plaintiffs Claims Are Barred by Civil Code Section 47(b).**

3 Because Yahoo! has shown the SLAPP statute applies, plaintiffs bear the burden to show
4 each of their six California claims is cognizable. *See Navellier*, 29 Cal. 4th at 88. Plaintiffs'
5 California claims fail as a matter of law, as fully addressed in Yahoo!'s concurrently filed motion
6 to dismiss. *See Mot.* at 27-31, 35-36.

7 One infirmity that pervades each of plaintiffs' California claims—and the one most
8 closely tied to the anti-SLAPP statute—is the privilege afforded by Civil Code section 47(b). *See*
9 *id.* at 18-19. The privilege, as noted above, is read broadly by Californian courts to shield
10 defendants from liability for communicating with law enforcement officials. *See Johnson*, 58 F.
11 Supp. 2d at 1110. That privilege applies to communications in the United States and abroad. *See*
12 *Beroiz*, 84 Cal. App. at 494-95; *E. & J. Gallo Winery*, 2006 U.S. DIST. LEXIS 47206, at *24.
13 And that privilege is an absolute bar to plaintiffs' six California claims. *See Moore v. Conliffe*, 7
14 Cal. 4th 634, 638 n.1 (Cal. 1994) ("Although the protection afforded by the statute is commonly
15 denominated a 'privilege,' which creates a 'privileged communication,' section 47(b) does not
16 create an evidentiary privilege that protects a communication from compelled disclosure. Instead,
17 the section 47(b) privilege operates as a limitation on liability, precluding use of the protected
18 communications and statements as the basis for a tort action other than for malicious prosecution.
19 Thus, section 47(b) creates what in many other contexts is termed an 'immunity' from suit.").

20 **IV. CONCLUSION**

21 For the foregoing reasons, Yahoo!'s anti-SLAPP motion should be granted and plaintiffs'
22 six causes of action brought under California law—their Fifth through Tenth Claims for Relief—
23 should be immediately stricken from plaintiffs' Second Amended Complaint.

24 Dated: July 27, 2007

DANIEL M. PETROCELLI
MATTHEW T. KLINE
O'MELVENY & MYERS LLP


26 By: 
Daniel M. Petrocelli
27 Attorneys for Defendant
28 YAHOO!, INC.

EXHIBIT C

From: Kline, Matthew
Sent: Thursday, September 13, 2007 5:43 PM
To: 'Morton Sklar'; mortonandsara03@verizon.net; tharris@humanrightsusa.org; Roger Myers
Cc: Petrocelli, Daniel
Subject: Wang v. Yahoo!: Motion Practice

Morton,

Following up on our various conversations, you have informed us in general terms about motions you intend to file concerning the three motions we filed on August 27. We thought it would be useful to send you a short summary of our response to your assertions:

1) You have told us you will file a motion to "hold in abeyance" Yahoo, Inc.'s Motion to Dismiss and SLAPP Motion, in order to take limited discovery related to these motions. We will oppose this motion for at least the following reasons:

First, neither motion turns on disputed facts; both accept as true the facts alleged in the second amended complaint. There is no need for discovery to oppose these motions. Despite our invitation, you have not provided us with case authority demonstrating your right to indefinitely postpone the resolution of our motions in order to obtain discovery.

Second, the federal rules permit the filing of motions to dismiss at the threshold of a case in order to test plaintiffs' legal claims and theories before costly litigation ensues. As we have explained in our motions, we think your complaint fails to state a cognizable legal claim, much less one that is justiciable. We seek a ruling from the court on these arguments.

Third, to the extent you believe you need discovery on certain factual issues in order to oppose all or parts of our motion, you have refused to identify the specific discovery you need or the issues in our motion to which such discovery relates.

Fourth, the motion to initiate discovery is unnecessary. The Court has not stayed discovery in the case; nor have you initiated any discovery; nor have we indicated we will take the position there should be no discovery.

Fifth, your perceived need for certain limited--though unspecified--discovery is not cause to file no response at all to our motions. Certainly, there are many arguments and issues in our motions to which you can respond without any professed need for discovery. You should oppose our motions and specifically identify those arguments to which you believe you cannot respond absent discovery. Once you've made your arguments and explained where a factual disputes remain, we and the Court can then evaluate your position, and we can either agree to your request, or failing that, litigate the issue.

Sixth, as to YHKL's motion to dismiss for lack of personal jurisdiction, you have not identified the discovery you need to oppose the motion. If and when you do, we will be in a position to evaluate our response. As of now, you've given us no specifics.

2) You have told us you will file a motion seeking a three-week continuance of the September 26 deadline for opposing defendants' three pending motions. Because, as you have explained, you seek this extension in order to file and accelerate your first motion--which seeks to indefinitely postpone your response to defendants' motions--we anticipate opposing this motion.

This, of course, is not a complete statement of our views on these issues--just our reactions based on the conversations we've had. But we wanted you to have our basic position before you filed your motions.

Thanks,

Matt

Matthew T. Kline

O'Melveny & Myers LLP

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Los Angeles, CA 90067

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EXHIBIT D

1 DANIEL M. PETROCELLI (S.B. #97802)
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3 O'MELVENY & MYERS LLP
4 1999 Avenue Of The Stars
5 Los Angeles, California 90067-6035
Main Number: (310) 553-6700
Facsimile: (310) 246-6779

6 Attorneys for Defendant YAHOO!, INC. and
7 Specially Appearing Defendant YAHOO!
8 HOLDINGS (HONG KONG), LTD.

9 **UNITED STATES DISTRICT COURT**
10 **NORTHERN DISTRICT OF CALIFORNIA**
11 **OAKLAND DIVISION**

12 WANG XIAONING, YU LING, SHI TAO,
13 and ADDITIONAL PRESENTLY
14 UNNAMED AND TO BE IDENTIFIED
15 INDIVIDUALS,

16 Plaintiff,

17 v.

18 YAHOO!, INC., a Delaware Corporation,
19 YAHOO! HOLDINGS (HONG KONG),
20 LTD., a Foreign Subsidiary of Yahoo!,
ALIBABA.COM, INC. a Delaware
21 Corporation, AND OTHER PRESENTLY
22 UNNAMED AND TO BE IDENTIFIED
23 INDIVIDUAL EMPLOYEES OF SAID
24 CORPORATIONS,

25 Defendant.

Case No. C07-02151 CW

**DEFENDANT YAHOO!, INC.'S MOTION
FOR AN EARLY CASE MANAGEMENT
CONFERENCE AND ORDER;
PROPOSED ORDER**

Date: July 2 or 26, 2007*

Time: TBD

Location: Courtroom 2

Judge: Hon. Claudia Wilken

26 TO PLAINTIFFS; DEFENDANT ALIBABA.COM, INC.; AND THEIR COUNSEL OF
27 RECORD:

28 PLEASE TAKE NOTICE THAT ON Monday, July 2, 2007, at a time to be determined by
the Court or on Thursday, July 26, 2007, at 2:00 p.m.—depending on whether the Court grants
defendant Yahoo!, Inc.'s ("Yahoo!'s") motion to shorten time being filed concurrently


* Defendant Yahoo!, Inc. is filing concurrently herewith a motion to shorten time for the hearing on this motion from July 26, 2007 to July 2, 2007. Defendant Alibaba.com, Inc. joins this case management motion and the motion to shorten time.

1 herewith—in Courtroom 2, 4th Floor, United States Courthouse, 1301 Clay Street, Oakland,
 2 California, defendant Yahoo!, Inc. (“Yahoo!”) will and hereby does move for an early Case
 3 Management Order, pursuant to Civil Local Rule 16-2(d). This Case Management Order, which
 4 proposes bifurcating certain issues and soliciting statements of interest from the political branches
 5 to address others, is sought consistent with the procedures contemplated in *Sosa v. Alvarez-*
 6 *Machain*, 542 U.S. 629, 728 n.23 (2004); other Alien Tort Statute cases that similarly pose
 7 foreign policy concerns, *see, e.g., Doe v. Qi*, 349 F. Supp. 2d 1258 (N.D. Cal. 2004); and the
 8 Standing Order for All Judges of the N.D. Cal., Contents of Joint Case Mgmt. Statement
 9 (effective Mar. 1, 2007), which encourage parties to propose case management procedures that
 10 “facilitate the just, speedy, and inexpensive disposition” of matters by “narrowing,”
 11 “bifurcat[ing],” and “streamlin[ing]” procedures.

12 This motion, which Alibaba.com, Inc. joins, is based on this Notice of Motion and
 13 Motion, the pleadings on file in this matter, the following Memorandum of Points and
 14 Authorities, the Exhibits filed with this Motion, and any further argument the Court might allow.

15 Dated: June 21, 2007

DANIEL M. PETROCELLI
 MATTHEW T. KLINE
 O’MELVENY & MYERS LLP

18 By: 
 19 Daniel M. Petrocelli
 Attorneys for Defendant
 20 YAHOO!, INC.

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I. INTRODUCTION

Pursuant to Standing Order of this Court and Civil Local Rule 16-2(d), Yahoo! seeks an early Case Management Conference and the adoption of a tailored Case Management Order to facilitate a reasoned approach to this litigation, promote efficiency, and narrow and focus the issues, while at the same time respecting the seriousness of plaintiffs’ claims and defendants’ defenses. See Standing Order for All Judges of the N.D. Cal., Contents of Joint Case Mgmt. Statement ¶¶ 15, 16, 20 (effective Mar. 1, 2007). Plaintiffs seek to hold Yahoo! and the other defendants liable under the Alien Tort Statute for alleged acts of torture and violations of human rights committed by officials of the People’s Republic of China. The complaint acknowledges that none of the defendants committed the alleged abuses; the allegation is that defendants aided and abetted the Chinese government by providing it with information about plaintiffs, in response to law enforcement requests.

The Supreme Court has cautioned that cases of this sort raise foreign policy concerns and must be handled with “great caution” and in consultation with the political branches of government. *Sosa v. Alvarez-Machain*, 542 U.S. 629, 728 n.23 (2004). Cases seeking to hold corporations liable for the acts of foreign government officials pose particular concern, because they expand the number of ATS suits that may be brought and provide more direct financial incentives to bring such suits.¹ Because this case challenges several decades of U.S. foreign policy toward China, seeks to adjudge the actions of the Chinese government, and seeks to impose new rules for responding to law enforcement requests for information, we believe the Court should secure a Statement of Interest from the United States before proceeding. The proposed Case Management Order reflects the time it will take to solicit the views of the United States, while at the same time setting a schedule to address other issues in the interim.

Yahoo! proposes that this case be managed in phases, with a hold on discovery unless and until the Court determines the case may proceed. The proposed Order initially divides the case

¹ See, e.g., *Sosa*, 524 U.S. at 732-33 nn.20 & 21; Brief of the United States as Amicus Curiae, *The Presbyterian Church of Sudan v. Talisman*, United States Court of Appeal for the Second Circuit, Case No. 07-0016, at 19-22 (filed May 15, 2007) (“U.S. Amicus Br.”) (attached as Ex. A).

1 into two phases:

- 2 • Phase I: The Court immediately resolves whether plaintiffs have named the
3 correct corporate parties, whether the Court has jurisdiction over the Yahoo! Hong
4 Kong defendant, and whether plaintiffs can prosecute this case, in light of the
5 unique circumstances that they cannot give testimony or communicate with their
6 counsel;
- 7 • Phase II: After the Court obtains a Statement of Interest by the appropriate
8 branches of government, and after jurisdiction and party issues are resolved, the
9 Court can address the varied legal issues presented by plaintiffs' claims asserted
10 under federal, international, and California law.

11 As described below, Yahoo! proposes a briefing schedule for Phases I and II.

12 Yahoo! requests this motion be heard on shortened time, on July 2, 2007, so that these
13 case management issues may be considered and the case streamlined before a great deal of work
14 is done in the coming month. Also, a hearing on this date would make possible the attendance of
15 Yahoo!'s lead counsel, who thereafter will be on a long-scheduled vacation until July 23.

16 Defendant Alibaba.com, Inc. joins in these motions.

17 **II. PLAINTIFFS' ALLEGATIONS**

18 Plaintiffs Wang Xiaoning and Shi Tao are Chinese citizens. *See* Amended Complaint for
19 Tort Damages ¶¶ 10, 12 (filed May 29, 2007) ("Am. Compl."). Both men are currently serving
20 prison terms in China. *See id.* Wang's wife, Yu Ling, is also named as a plaintiff in this suit; she
21 alleges she was harmed by her husband's mistreatment at the hands of the Chinese authorities.
22 *See id.* ¶ 11. The named defendants are Yahoo!, Inc.; Yahoo Holdings (Hong Kong) Ltd.
23 ("YHKL"); and Alibaba.com, Inc. The essence of the complaint is that plaintiffs published pro-
24 democracy and other literature using Yahoo! China group lists or email accounts, and that the
25 Chinese government requested information from YHKL to identify, charge, and try plaintiffs for
26 violations of Chinese law. The complaint alleges that Chinese officials tortured and violated
27 plaintiffs' human rights and seeks to hold defendants liable for the acts of the Chinese
28 government. *See id.* ¶¶ 30-43.

1 Plaintiffs seek to hold defendants liable under three federal statutes (the Alien Tort
2 Statute, 28 U.S.C. § 1350 (“ATS”); the Torture Victim Protection Act, 28 U.S.C. § 1350
3 (“TVPA”); and the Electronic Communications Privacy Act, 18 U.S.C. §§ 2701, 2702, 2511
4 (“ECPA”)), a variety of international law sources, and on a number of California statutory and
5 common law theories (including battery, assault, false imprisonment, intentional infliction of
6 emotional distress, negligence, and unfair business practices). *See* Am. Compl. at 17:5-28:5.
7 Plaintiffs seek to hold defendants liable on aiding and abetting and other theories of vicarious
8 liability. *See, e.g., id.* at ¶¶ 2, 60, 90. Plaintiffs seek, *inter alia*, compensatory and punitive
9 damages, as well as declaratory and injunctive relief. *See id.* at 29:22-30:8.

10 **III. THE COURT SHOULD SEEK THE VIEWS OF THE POLITICAL BRANCHES**
11 **GIVEN THE SERIOUS POLICY QUESTIONS PRESENTED BY THIS CASE.**

12 As this Court and United States Supreme Court both have observed, ATS cases of this sort
13 are “unusual” and must be approached with “great caution.” *Doe v. Qi*, 349 F. Supp. 2d 1258,
14 1273 (N.D. Cal. 2004); *Sosa v. Alvarez-Machain*, 542 U.S. 629, 728 (2004). Caution is essential
15 because such cases seek to compel the courts to pass judgment on the acts of government officials
16 of foreign sovereign nations, thereby raising foreign policy and justiciability concerns. *See Sosa*,
17 524 U.S. at 727. Consequently, there is a “high bar” to asserting such claims, and courts are
18 charged with the duty of “vigilant doorkeeping” to make sure ATS claims fall within the “narrow
19 class” of claims allowed. *Id.* at 728; *Qi*, 349 F. Supp. 2d at 1291. Such doorkeeping, of
20 necessity, must take into account the “policy of case-specific deference to the political branches”
21 and includes seeking the political branches and other governments’ views before allowing such a
22 case to proceed. *Sosa*, 524 U.S. at 733 n. 21; *Qi*, 349 F. Supp. 2d at 1291, 1296-1303.

23 This particular ATS case has unique potential to affecting “impact foreign relations.” *Qi*,
24 349 F. Supp. 2d at 1266. It challenges several decades of U.S. foreign policy toward China, in
25 that one of its stated aims is to curtail American investment in China.² Moreover, the gist of

26 _____
27 ² *Compare* World Organization for Human Rights USA, “Major lawsuit filed by Human Rights
28 USA against Yahoo! highlights the internet company’s complicity in human rights abuses in
China, (Apr. 18, 2007), <http://humanrightsupusa.blogspot.com/search/label/human%20rights>
(Website of Plaintiffs’ Lead Counsel: “[T]his lawsuit ought to convince other U.S. companies to

1 plaintiffs' claim is that when Chinese law enforcement officials requested information from
 2 defendants, defendants should have refused the request on the ground the information provided
 3 could potentially be used to violate plaintiffs' human rights.³ Forcing Internet companies, or any
 4 company, into this quasi-judicial role of evaluating the merits of law enforcement requests, not
 5 only puts companies into an impossible position (requiring them either to break the law and
 6 refuse the request or risk liability in a case of this sort), but would impermissibly delay and
 7 hamper legitimate law enforcement efforts. The U.S. government, foreign governments, law
 8 enforcement agencies, and the international business community no doubt would have serious and
 9 justifiable concerns about the creation of such a rule.

10 It is well settled that the views of the appropriate branches of government should be
 11 sought in ATS cases, where, as here, plaintiffs' case potentially violates the "act of state"
 12 doctrine, poses nonjusticiable "political questions," or should be dismissed under the doctrine of
 13 "international comity."⁴ The Case Management Order, as described below, affords the Court
 14 time to solicit and consider these views and the parties the opportunity to brief them.

15 *think twice before doing business with the Chinese government . . .*"), with U.S. Dep't of State,
 16 Bureau of East Asian and Pacific Affairs, Background Note: China (January, 2007),
 17 <http://www.state.gov/r/pa/ei/bgn/18902.htm> ("U.S. China policy has been remarkably consistent.
 18 For seven consecutive administrations, U.S. policy has been to encourage China's opening and
 19 integration into the global system. As a result, China has moved from being a relatively isolated
 20 and poor country to one that is a key participant in international institutions The State
 21 Department's annual China human rights and religious freedom reports have noted China's well-
 22 documented abuses of human rights At the same time, *China's economic growth and
 23 reform since 1978 has improved dramatically the lives of hundreds of millions of Chinese,
 24 increased social mobility, and expanded the scope of personal freedom.*") (emphases added).

21 ³ See "Some people think the Internet is a bad thing," (June 6, 2007), [http://www.gginetnet1.co.
 22 uk/amnesty/irrepressible01/](http://www.gginetnet1.co.uk/amnesty/irrepressible01/) (video webcast at 1:02:05 to 1:02:33) (Plaintiffs' Lead Counsel:
 23 "The bottom line for Yahoo and the other internet companies that we're concerned about is that
 24 they must be held accountable for their complicity in these abuses, *they must ask themselves,
 25 before any new requests for information are responded to, whether it would result in the arbitrary
 26 arrest and torture of internet users who have committed no real crimes, and they must not allow
 27 themselves to become complicit in major human rights abuses.*") (emphasis added).

26 ⁴ See, e.g., *Sosa*, 524 U.S. at 733 n. 21; *Sarei v. Rio Tinto*, ___ F.3d ___, 2007 WL 1079901, at *7-
 27 14 (9th Cir. Apr. 12, 2007); *Qi*, 349 F. Supp. 2d at 1291, 1296-1303; see also *Banco Nacional de
 28 Cuba v. Sabbatino*, 376 U.S. 398 (1964); *Vieth v. Jubelirer*, 514 U.S. 267, 277-78 (2004);
American Ins. Ass'n v. Garamendi, 539 U.S. 396, 414 (2003); *Societe Nationale Industrielle
 Aerospatiale v. United States Dist. Court for the Dist. of Iowa*, 482 U.S. 522, 544 n.27 (1987).

1 **IV. THIS COMPLICATED LEGAL ISSUES IN THIS CASE SHOULD BE**
2 **RESOLVED IN A LOGICAL, SEQUENTIAL FASHION.**

3 This case should be divided into two initial Phases. In Phase I, which would commence
4 immediately, the parties and Court would address three threshold issues: (1) whether this Court
5 has personal jurisdiction over YHKL; (2) whether plaintiffs have any basis for bringing suit
6 against the named Alibaba defendant; and (3) the complicated issue of how Wang and Shi intend
7 to prove their case, given the fact of their incarceration and presumed inability to give testimony
8 or communicate with the parties or the Court.

9 In Phase II, and with the anticipated benefit of the political branches' views regarding this
10 case, the parties and Court would address merits issues, such as whether (1) this case is justiciable
11 or violates the "act of state" doctrine; (2) plaintiffs have stated a claim under the ATS, TVPA,
12 ECPA, and other sources of law on which they rely; and (3) whether plaintiffs' California state
13 law claims are subject to a special motion to strike under the so-called "Anti-SLAPP" statute.

14 **A. Phase I: Threshold, Procedural Issues.**

15 (1) Personal Jurisdiction. Before the parties' and judicial resources are unnecessarily
16 expended, the Court should determine whether it has personal jurisdiction over YHKL. YHKL is
17 a foreign company that has never purposefully availed itself of California, and its contacts with
18 California are minimal. The fact that YHKL is a wholly owned subsidiary of Yahoo!, a
19 California company, does not confer personal jurisdiction over YHKL. *See, e.g., Doe I v. Unocal*
20 *248 F.3d 915, 925-26 (9th Cir. 2001).* YHKL is an independent Hong Kong business, focused on
21 serving a Hong Kong clientele. It employs over 100 employees in Hong Kong, is well
22 capitalized, and observes corporate formalities. It is not an alter ego or mere agent. Plaintiffs'
23 complaint lacks any allegations to the contrary. Whether YHKL belongs in this case should be
24 addressed at the outset, in Phase I.

25 (2) Alibaba. Plaintiffs conclusorily plead that the information concerning them
26 allegedly disclosed to the Chinese government was provided by "Defendants Yahoo! Inc., its
27 agents, wholly-owned subsidiaries Yahoo! HK and Yahoo! China, *and its strategic partner*
28 *Alibaba.com, Inc.*" Am. Compl. ¶ 2 (emphasis added). Alibaba.com, Inc. does not, and never

1 did, maintain any information about Yahoo! China users and so could not possibly have
2 participated in any way in the disclosures upon which plaintiffs' claims are based. Moreover, the
3 complaint makes clear that it was not until 2005—well after the alleged wrongful disclosures
4 were made in 2002 and 2004—that any Alibaba entity even had a connection with the operation
5 of Yahoo! China. *Id.* ¶ 18. Alibaba.com, Inc. should be dismissed from this case immediately.
6 This threshold issue should be litigated in Phase I before Alibaba.com, Inc. is forced to expend
7 resources litigating the many other issues raised by this case.

8 (3) Plaintiffs' Proffer. A key threshold issue to be discussed at the first Case
9 Management Conference and, if need be, litigated, is how plaintiffs will be able to prove their
10 case and defendants defend it. Wang and Shi are currently serving lengthy prison terms in China.
11 *See* Am. Compl. ¶¶ 10, 12, 39, 42, 60, 63. According to the complaint, Wang and Shi are allowed
12 very little contact with the outside world. Indeed, the complaint alleges that Wang's access to
13 visitors is "strictly limited" and that "[p]rison officials scrutinize all written correspondence to
14 and from Wang, severely limiting his ability to communicate with anyone outside the prison,
15 including his wife." *Id.* ¶ 43. Similarly, Shi is said to be housed at a high-security prison, at
16 which his written communications are monitored, and it is alleged "[h]e has very little contact
17 with people outside the prison." *Id.* ¶ 62.

18 There is no reason to believe that Wang or Shi will be allowed any contact with foreign
19 attorneys (their named counsel in this case or defendants' lawyers), especially for purposes of
20 prosecuting this case. Plaintiffs' counsel will not be able to take their deposition; and neither will
21 defendants' counsel. According to the U.S. Department of State, "it does **not** appear possible to
22 take the deposition of a witness located in China. . . . China does not recognize the right of
23 persons to take depositions, *and any effort to do so could result in the detention and/or arrest of*
24 *U.S. citizen participants.*"⁵

25 The majority of plaintiffs' causes of action, if not all of them, depend on admissible proof
26 that defendants caused plaintiffs to suffer abuse at the hands of the Chinese government.

27 ⁵ U.S. Dep't of State, China Judicial Assistance, [http://travel.state.gov/law/](http://travel.state.gov/law/info/judicial/judicial_694.html)
28 [info/judicial/judicial_694.html](http://travel.state.gov/law/info/judicial/judicial_694.html) (bolding in original) (last accessed on June 11, 2007).

1 Although we have raised the issue, plaintiffs have not explained to date how they will provide
 2 such proof. Any attempt by Yu or other parties to testify as to what Wang and Shi told them, or
 3 mere reliance on generalized reports about abuses in China, is inadmissible hearsay that does not
 4 fall within any recognized exception to the rule. *See Qi*, 349 F. Supp. at 1310 n.39. Under these
 5 circumstances, we believe it is prudent and reasonable to require plaintiffs' to make a factual
 6 proffer identifying the witnesses and other proof available of their claims.

7 (4) A Phase I Briefing Schedule. Defendants propose the following Phase I briefing
 8 schedule: opening briefs addressing these three issues should be due July 27, 2007; oppositions
 9 should be due August 27, 2007; and replies should be due September 14, 2007.

10 **B. Phase II: Dispositive Motions Informed by Governments' Views**

11 We request that the Court solicit the views of the U.S. government regarding this case.
 12 The Court should also ask the U.S. government to solicit the views of other nations regarding the
 13 foreign policy and law enforcement issues this case raises. The Court should request responses
 14 from the government by the beginning of September, if possible. With these statements in hand,
 15 the parties will be able to brief a number of legal issues this case poses:

16 (1) Is this Case Justiciable? Given the foreign policy and impact this case could have on
 17 law enforcement, this Court will need to determine if the case violates the "act of state" doctrine,
 18 poses nonjusticiable "political questions," or should be dismissed under the doctrine of
 19 "international comity." *See supra* n. 4. Waiting for the government's views on these issues is
 20 essential to the analysis. *See id.*

21 (2) Can Claims Be Stated Under the ATS? This statute is the source of great
 22 controversy. ATS issues to be litigated, include:

- 23 • whether aiding and abetting theory of liability exists under the ATS;⁶

24
 25 ⁶ *See, e.g., Sarei v. Rio Tinto*, ___ F.3d ___, 2007 WL 1079901, at *5 (9th Cir. Apr. 12, 2007)
 26 (concluding that such a claim was not frivolous, but stopping short of recognizing such a claim);
 27 U.S. Amicus Br. at 12-27 (arguing against aiding and abetting liability); Curtis A. Bradley et al.,
 28 *Sosa, Customary International Law and the Continuing Relevance of Erie*, 120 HARV. L. REV.
 870, 924-29 (2007) (discussing debate; concluding, that in light of *Sosa*, only Congress and the
 President through legislation, and not the courts, can impose such liability).

- 1 • assuming such a theory exists, whether *corporate* defendants may be held liable, given
- 2 that international-law norms are applicable only to *states*;⁷
- 3 • assuming corporations may be held liable, whether *these* defendants may be liable,
- 4 given there is no allegation they *intended* for plaintiffs to suffer any harm;⁸
- 5 • whether plaintiffs’ torture claims under the ATS are preempted by the TVPA;⁹
- 6 • whether plaintiffs’ remaining ATS claims, based on norms against arbitrary arrest and
- 7 forced labor, are of sufficiently “definite content and acceptance” to be actionable
- 8 under the ATS;¹⁰
- 9 • whether the international-law sources on which plaintiffs rely support ATS claims;¹¹
- 10 • and whether plaintiffs’ factual allegations are specific enough even to state a claim,
- 11 particularly as to plaintiff Shi, for whom no specific allegations are made and it is
- 12 merely assumed he was tortured because he is incarcerated at a notoriously abusive
- 13 prison, *see, e.g.*, Am. Compl. ¶¶ 57, 64.

14 Litigating all these issues will take time and is costly, and their resolution is best informed
15 after giving the government an opportunity to express its views. YHKL and Alibaba.com, Inc.,
16 moreover, should not be forced to brief these issues if they do not belong in this case.

17 (3) Can Claims Be Stated Under the TVPA? Plaintiffs’ TVPA claims raise similar
18 questions and equally call out for the government’s views. The questions include:

- 19 • whether the TVPA applies only to individuals, not corporations;¹²

21 ⁷ *See, e.g.*, RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, Part
22 I, ch. 1, introductory note (1987) (noting that international law generally applies to states).

23 ⁸ *See, e.g.*, Rome Statute of the Int’l Criminal Court, art. 25(3), U.N. Doc. A/CONF.183/9 (1998)
24 (recognizing intent requirement); *Presbyterian Church of Sudan v. Talisman Energy*, 453 F.
25 Supp. 2d 633, 668 (S.D.N.Y. 2006) (same).

25 ⁹ *See Enahoro v. Abubakar*, 408 F.3d 877, 886 (7th Cir. 2005) (concluding the TVPA preempts
26 torture claims under the ATS).

26 ¹⁰ *Sosa*, 542 U.S. at 732.

27 ¹¹ *See id.* at 734 (noting that the International Covenant on Civil and Political Rights and the
28 Universal Declaration of Human Rights, on which plaintiffs rely here, have “little utility” in
establishing norms enforceable under the ATS).

- 1 • whether defendants can be held liable when they did not engage in the acts of
- 2 torture;¹³
- 3 • whether even if the TVPA could be construed to impose some form of aiding and
- 4 abetting liability, it would not impose such liability on individuals who were not
- 5 themselves acting under the color of law;¹⁴
- 6 • and whether plaintiffs have alleged sufficient facts to make out their claims.

7 (4) Will the Remaining Claims Survive? Plaintiffs' claims under California common
8 law, the California Unfair Competition Law ("UCL"), and ECPA raise similarly complex
9 questions. For example, the Court will need to decide whether these sources of law can be
10 applied extraterritorially.¹⁵ The Court will also need to decide whether plaintiffs' claims suffer
11 from other defects, including whether some are time-barred.¹⁶

12 Finally, plaintiffs' California state law claims are subject to a special motion to strike.
13 Invoking California law, plaintiffs seek to hold Yahoo! liable for communications allegedly made
14 by its agent, YHKL, to the Chinese government. *See, e.g.,* Am. Compl. ¶¶ 40, 54, 60. Such
15 communicative acts with government officials cannot give rise to claims for civil liability. *See*
16 CAL. CIV. CODE § 47(b); *Beroiz v. Wahl*, 100 Cal. Rprt. 2d 905, 909-12 (Cal. Ct. App. 2000).
17 California law provides Yahoo! immediate means to assert this defense, pursuant to CAL. CIV.

18
19 ¹² *See, e.g., Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164, 1175-76 (C.D. Cal. 2005) (TVPA does not apply to corporations).

20 ¹³ *Cf.* 28 U.S.C. § 1350, *Note*.

21 ¹⁴ *See In re South African Apartheid Litig.*, 346 F. Supp. 2d 538, 555 (S.D.N.Y. 2004) ("Since a
22 prerequisite to TVPA liability is that the individual be acting under color of law, this Court finds
23 that creating aider and abettor liability for private actors not acting under color of law would be
inconsistent with the statute and precluded by *Central Bank*.").

24 ¹⁵ *See, e.g., United States v. Toscanino*, 500 F.2d 267, 279 (2nd Cir. 1974) (refusing to apply
25 ECPA extraterritorially); *Norwest Mortgage, Inc. v. Superior Court*, 72 Cal. App. 4th 214, 223
26 (1999) (refusing to apply UCL extraterritorially); *Arno v. Club Med, Inc.*, 22 F.3d 1464 (9th Cir. 1994) (Californian's claim against foreign employer for injury suffered in France governed by
French law); Amicus Br. at 5-12 (arguing the ATS does not apply extraterritorially).

27 ¹⁶ To take just one example, Yu's intentional infliction of emotional distress claim fails because
28 she was not the target of any of the conduct alleged—her husband allegedly was. *See, e.g., Christensen v. Superior Court*, 54 Cal.3d 868, 905-06 (1991).

1 PROC. § 425.16, the so-called “Anti-SLAPP” statute. *See Vess v. Ciba-Geigy Corp. USA*, 317
2 F.3d 1097, 1109 (9th Cir. 2003) (affirming granting of SLAPP motion).

3 The Anti-SLAPP statute provides that a SLAPP motion should be filed within 60 days of
4 service of the operative complaint and the hearing on a SLAPP motion should be held “not more
5 than 30 days after the service of the motion.” CAL. CIV. PROC. § 425.16(f). If the Court agrees to
6 the phased approach Yahoo! proposes, and if plaintiffs consent to the hearing on the SLAPP
7 motion occurring more than 30 days after the motion is filed, then Yahoo! could file its SLAPP
8 motion and the Court could hear it pursuant to the Phase II briefing schedule below. *See Greka*
9 *Integrated, Inc. v. Lowrey*, 35 Cal. Rptr. 3d 684, 689 (Cal. Ct. App. 2005). If not, Yahoo! will
10 need to file this motion sooner, and it will need to be heard sooner.

11 (5) A Phase II Briefing Schedule. These issues are complex and no doubt disputed.
12 They require extensive briefing, but may not need to be briefed at all after Phase I. To allow time
13 for Phase I and to solicit and receive Statement of Interest letters, opening briefs on Phase II
14 issues should be due October 8, oppositions due October 29, and replies due November 7.

15 **V. STAYING DISCOVERY**

16 Only if plaintiffs’ case survives Phases I and II, should merits discovery begin. A serious
17 issue and impediment in this case is whether defendants may produce documents or interview
18 witnesses related to the requests for information made by the Chinese government without
19 violating Chinese law and subjecting defendants, their employees, and counsel to criminal
20 sanctions. A Hong Kong Privacy Commissioner has already ruled in a parallel case that he would
21 *not* compel the production of such written materials, because producing such materials could
22 violate Chinese “State Secret Laws” and expose defendants to “serious penal consequences.”¹⁷
23 Similarly, China counsel have advised us that merely interviewing witnesses about these events
24 could subject the witnesses and our lawyers to prosecution.

25
26 ¹⁷ Office of the Privacy Commissioner for Personal Data, Hong Kong, *Report Published under*
27 *Section 48(2) of the Personal Data (Privacy) Ordinance (Cap. 486), Report No.: R07-3619*, at
28 ¶¶ 7.17-7.18 (issued Mar. 14, 2007); *see also id.* ¶¶ 7.3-7.20 (attached as Exhibit C),
http://www.pcpd.org.hk/english/publications/files/Yahoo_e.pdf.

1 Before this Court grapples with such extraordinary issues, which directly raise foreign
2 policy concerns, it should first determine whether this case is justiciable, whether plaintiffs can
3 prosecute it, and whether the case should be dismissed for a variety of reasons. This can likely be
4 accomplished by November. Thereafter, the Court will be able to determine whether this case
5 should be allowed to proceed. If the Court answers this question in the negative, the case will be
6 dismissed, foreign policy and justiciability concerns will have been respected, and plaintiffs will
7 be entitled to appeal. If the Court answers the question in the affirmative, the parties can set a
8 schedule to address discovery and move the case toward summary judgment and trial, if need be.

9 **VI. MEET AND CONFER—PLAINTIFFS’ POSITION**

10 We have explored these and other difficult threshold issues with plaintiffs’ counsel.
11 Plaintiffs’ counsel have indicated they would like this case to proceed on the more traditional
12 track. Plaintiffs also object that this motion is contrary to the Court’s June 19, 2007 scheduling
13 order and is premature, given the parties have not gone through the regular ADR process.¹⁸

14 To respond briefly, the stipulation and accompanying declaration that gave rise to the
15 Court’s June 19 order *explicitly* mentioned that Yahoo! would file this motion “promptly.”¹⁹ As
16 for ADR, Yahoo!’s Proposed Order accompanying this motion provides:

17 the phased approach and briefing schedule set forth in Yahoo!’s Motion shall be
18 followed. *By no later than August 17, 2007, the parties shall “meet and discuss”*

19 ¹⁸ Plaintiffs’ precise position, which they asked us to reproduce in this motion, is:

20 Plaintiffs have indicated that they object to both the Defendants’ Motion seeking a
21 special case management conference, and to the Defendants’ request for an early (July 2)
22 date for a hearing on that Motion, on the grounds that, first, these requests are at variance
23 with the new timetable ordered by the Court, and more specifically with the justification
24 given by the Defendants for requesting changes in that timetable, and second, because it
25 is premature to raise the matters the Defendants seek to address before the Court before
26 the regular ADR and case management process takes place.

24 Email from M. Sklar to M. Kline (June 20, 2007).

25 ¹⁹ See Joint Stip. Request For Order Enlarging Time To Respond To Compl. & Extending Initial
26 Deadlines ¶ 3 (filed June 18, 2007) (defendants “reserve[ing] their right to seek further
27 enlargement of time and propose a modified case management plan consistent with the Standing
28 Order for All Judges of the Northern District of California, Contents of Joint Case Management
Statement (effective Mar. 1, 2007)”; Decl. Of Daniel Petrocelli ¶ 9 (filed June 18, 2007)
 (“Defendants anticipate promptly filing a motion to address case management issues.”).

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“early settlement” and “ADR.” Otherwise, all deadlines set forth in this Court’s June 19, 2007 order are hereby superseded by this Order. (Emphasis added.)

VII. CONCLUSION

For the foregoing reasons, Yahoo!’s motion should be granted.

Dated: June 21, 2007

DANIEL M. PETROCELLI
MATTHEW T. KLINE
O’MELVENY & MYERS LLP

By: 

Daniel M. Petrocelli
Attorneys for Defendant
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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

WANG XIAONING, YU LING, SHI TAO, and
ADDITIONAL PRESENTLY UNNAMED AND TO
BE IDENTIFIED INDIVIDUALS,
Plaintiffs,

v.

YAHOO! INC., a Delaware Corporation, YAHOO!
HONG KONG, LTD., a Foreign Subsidiary of Yahoo!,
ALIBABA.COM INC., a Delaware Corporation AND
OTHER PRESENTLY UNNAMED AND TO BE
IDENTIFIED CORPORATE DEFENDANTS AND
UNNAMED AND TO BE IDENTIFIED
INDIVIDUAL EMPLOYEES OF SAID
CORPORATIONS,
Defendants.

CASE NO. C07-02151 CW

**JOINT STIPULATION RE: WITHDRAWAL OF
THE PLAINTIFFS' MOTION FOR LEAVE TO
FILE SECOND AMENDED COMPLAINT, RE:
FILING OF SECOND AMENDED COMPLAINT,
AND RE: EXTENDING TIME DEADLINES
ACCORDINGLY; PROPOSED ORDER**

**[JOINT DECLARATION OF MORTON SKLAR,
MATTHEW KLINE, AND SCOTT REYNOLDS]**

1 **RECITALS**

2 **WHEREAS**, the original Complaint in the above-captioned case was filed on April 18, 2007
3 and a First Amended Complaint was filed on May 29, 2007;

4 **WHEREAS**, Plaintiffs filed a Motion for Leave to File Second Amended Complaint, along
5 with the text of a Second Amended Complaint, without the consent of the Defendants on July 13,
6 2007, and this motion has not yet been opposed by Defendants or heard by the Court;

7 **WHEREAS**, the Court issued an initial Case Schedule Order on April 18, 2007, and a
8 second Case Schedule Order on June 19, 2007 pursuant to a Joint Stipulated Request to Enlarge
9 Time;

10 **WHEREAS**, Defendant Yahoo!, Inc. submitted a Motion For An Early Case Management
11 Conference And Order, which is fully briefed and currently being considered by the Court;

12 **WHEREAS**, Plaintiffs and Defendants have been engaged in discussions regarding
13 Plaintiffs' Second Amended Complaint; Plaintiffs' Motion for Leave to File a Second Amended
14 Complaint; how to reach a stipulated agreement on the filing of a Second Amended Complaint; and
15 the effect of the filing of the Second Amended Complaint on both the existing Court-ordered
16 schedule, and Yahoo!, Inc.'s proposal to modify that schedule;

17 **STIPULATION**

18 **WHEREAS, NOW THEREFORE**, the Parties hereby jointly stipulate and request as follows:
19

20 (1) Plaintiffs hereby withdraw their Motion for Leave to File a Second Amended Complaint;

21 (2) Defendants consent to Plaintiffs' filing the Second Amended Complaint, which has
22 dropped Alibaba.com, Inc. as a Defendant;

23 (3) Defendants hereby reserve any and all objections that they have to the Second Amended
24 Complaint, including but not limited to their ability to move to dismiss the complaint for failure to
25 state a claim, move to strike it pursuant to the anti-SLAPP statute, move for a more definite
26 statement, or move to dismiss for lack of personal jurisdiction;

27 (a) Plaintiffs, for their part, do not by this Stipulation consent to, or accept the validity
28 of, any such Motions;

1 (4) Defendants' respective Answers or Responsive Motions to the Second Amended
2 Complaint will not be due until 30 days following the date on which this Court adopts and issues the
3 accompanying [Proposed] Order;

4 (5) Plaintiffs' Opposition to Defendants' Responsive Motions will not be due until 30 days
5 after Defendants file their Responsive Motions;

6 (6) Defendants' respective Replies to Plaintiffs' Opposition will not be due until 21 days
7 following the filing of Plaintiffs' Opposition.

8 (7) The additional time deadlines set forth in the Court's June 19, 2007 Scheduling Order
9 will be extended as follows:

10 (a) the last day to meet and discuss initial disclosures, early settlement, ADR and
11 discovery matters will be extended from August 17, 2007 to September 7, 2007;

12 (b) the last day to file a Rule 26(f) Report, complete initial disclosures or state
13 objections in a Rule 26(f) report, and file a Case Management Statement or other Civil Local
14 Rule 16-9(a) Joint or Separate Case Management Statements will be extended from
15 September 7, 2007 to September 28, 2007;

16 (c) the Initial Case Management Conference with the Court will be moved from
17 September 18, 2007 to October 9, 2007 at 2 p.m.;

18 (8) This Stipulation and revisions to the schedule do not moot Yahoo!, Inc.'s Motion For An
19 Early Case Management Conference And Order, and if the Court grants Yahoo!'s Motion and
20 Yahoo!'s proposed case schedule is adopted, then:

21 (a) only defendants' "Phase I" briefs would be due 30 days following the date on which this
22 Court adopts and issues the accompanying Order; and

23 (b) all of the obligations set forth in paragraph 7, above, except the obligation to meet and
24 confer regarding ADR would be suspended until after "Phase II" is resolved;

25 (c) it should be noted, however, that plaintiffs have filed a written opposition to Yahoo!'s
26 Motion For An Early Case Management Conference And Order and they oppose both
27 Yahoo!'s Motion and the proposed case schedule in the subparagraphs 8(b) and 8(c) above;
28

1 (9) The parties will continue to meet and confer regarding case management issues and
2 Defendants' objections to Plaintiffs' Second Amended Complaint;

3 (10) The Parties reserve their right to seek further enlargements of time as may be required;

4 (11) Plaintiffs reserve their right to seek further amendments to the Second Amended
5 Complaint; and

6 (12) This Stipulation does not a constitute an appearance or waiver of any defenses
7 including but not limited to those contesting jurisdiction.

8 Respectfully submitted this 19th day of July, 2007,

9
10 MORTON H. SKLAR
11 THERESA HARRIS
12 WORLD ORGANIZATION FOR HUMAN
13 RIGHTS USA

14 By: /s/ Morton Sklar

15 Morton Sklar
16 Attorney for Plaintiffs

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26 Daniel M. Petrocelli, Esq.
27 Attorney for Defendant YAHOO!, INC.

28 JOSEPH P. CYR, ESQ.
SCOTT REYNOLDS, ESQ.
LOVELLS LLP

By: /s/ Scott Reynolds

Scott Reynolds, Esq.
Attorneys for Defendant ALIBABA.COM,
INC.

ORDER [Proposed]

PURSUANT TO THE ABOVE JOINT STIPULATION and the accompanying Notice Of Withdrawal Of Plaintiffs' Motion For Leave To File A Second Amended Complaint: (a) Plaintiffs' Motion For Leave To File A Second Amended Complaint is withdrawn; (b) Plaintiffs' Second Amended Complaint (filed with this Stipulation) is deemed filed; and (c) the case management schedule set forth in the parties Joint Stipulation is approved and hereby amended accordingly. It is hereby ORDERED.

SIGNED on the _____ day of _____, 2007.

The Honorable Claudia Wilken
Judge, United States District Court
for the Northern District of California

CC1:767278.1
7/19/07

EXHIBIT F

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11 **UNITED STATES DISTRICT COURT**
12 **NORTHERN DISTRICT OF CALIFORNIA**
13 **OAKLAND DIVISION**

14 WANG XIAONING, YU LING, SHI TAO,
and ADDITIONAL PRESENTLY
15 UNNAMED AND TO BE IDENTIFIED
INDIVIDUALS,

16 Plaintiffs,

17 v.

18 YAHOO, INC., a Delaware Corporation,
YAHOO! HOLDINGS (HONG KONG),
LTD., a Foreign Subsidiary of Yahoo!,
19 ALIBABA.COM, INC. a Delaware
Corporation, AND OTHER PRESENTLY
20 UNNAMED AND TO BE IDENTIFIED
INDIVIDUAL EMPLOYEES OF SAID
21 CORPORATIONS,

22 Defendants.

Case No. C07-02151 CW

TORT DAMAGES CLAIM

**DECLARATION OF MORTON SKLAR IN
SUPPORT OF PLAINTIFFS' OPPOSITION
TO DEFENDANTS' MOTION FOR AN
EARLY CASE MANAGEMENT
CONFERENCE AND ORDER**

Date: July 2 or 26, 2007 (Proposed)

Time: TBD

Location: Courtroom 2

Judge: Hon. Claudia Wilken

23
24 I, MORTON SKLAR, declare:

25 1. I am the Executive Director of the World Organization for Human Rights USA,
26 attorney of record and lead counsel for the Plaintiffs in the above-captioned case, and a former
27 Judge (for nine years) with one of the two international courts operated by the Organization of
28

1 American States. This declaration is being submitted pursuant to Civil Local Rule 7-3 in support
2 of Plaintiffs' Opposition To Defendants' Motion To For An Early Case Management Conference.
3 Except where otherwise indicated, I have personal knowledge of the facts stated herein and, if
4 called as a witness, I could and would testify competently thereto.

5
6 2. In an opposition filed today titled Plaintiffs' Opposition To Defendants' Motion
7 For An Early Case Management Conference, Plaintiffs are requesting the Court to dismiss
8 Defendant Yahoo!'s Motion For An Early Case Management Conference, and to adhere to the
9 newly revised schedule for ADR and case management activities ordered by the Court on June
10 19, with the Initial Case Management Conference scheduled for September 18, 2007.

11 3. As previously indicated in my Declaration accompanying our Opposition to the
12 Defendants' Motion to Shorten Time for an early, July 2 Motions Hearing date on the request for
13 an early case management conference, Defendants' counsel prevailed upon me, as a matter of
14 professional courtesy, to enter into a Joint Stipulation with them to postpone the original case
15 management schedule initially set by the court, based on their vacation and travel plans. This
16 new schedule set a date for the initial case management conference with the Court for September
17 18. Had I known then that this request for a delay in the case management process was part of a
18 broader strategy by the Defendants seeking to bypass and undercut that process by proposing an
19 alternative approach that is not consistent with the regular case management procedures, I would
20 not have acceded to their request and agreed to the Joint Stipulation, since it is not in the
21 Plaintiffs' interests to delay the litigation process. Moreover, the representations made to me
22 regarding the difficulty of changing Mr. Petrocelli's travel plans were not entirely consistent with
23 the subsequent statements made to me suggesting that minor alterations could be made to
24 accommodate the revised schedule they later proposed, including a July 2 hearing date.
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I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed in Washington, D.C. on this 29th day of June 2007.

/s/ Morton Sklar
Morton Sklar

EXHIBIT G

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13 **NORTHERN DISTRICT OF CALIFORNIA**
14 **OAKLAND DIVISION**

15 WANG XIAONING, YU LING, SHI TAO,
and ADDITIONAL PRESENTLY
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INDIVIDUALS,

17 Plaintiffs,

18 v.

19 YAHOO, INC., a Delaware Corporation,
YAHOO! HOLDINGS (HONG KONG),
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20 ALIBABA.COM, INC. a Delaware
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INDIVIDUAL EMPLOYEES OF SAID
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23 Defendants.

Case No. C07-02151 CW

TORT DAMAGES CLAIM

**PLAINTIFFS' OPPOSITION TO
DEFENDANTS' MOTION FOR AN EARLY
CASE MANAGEMENT CONFERENCE AND
ORDER**

Date: July 2 or 26, 2007 (Proposed)

Time: TBD

Location: Courtroom 2

Judge: Hon. Claudia Wilken

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1 procedures should be allowed to proceed and to accomplish their purposes before alternative,
2 extraordinary methods of the type the Defendants propose are applied.

3 Plaintiffs note, at the outset, that the July 26 date being proposed for the special
4 Conference is just one day earlier than the date (July 27) originally set for the Initial Case
5 Management Conference by the Court. The Defendants successfully sought a change in this July
6 27 date just a few days ago on the basis of the Defendants' attorneys' vacation and travel plans.
7 Why, if the underlying goal of the defendants was anything other than to unnecessarily delay and
8 add to the complexity of the case management process, are the Defendants now seeking an
9 additional case management conference on July 26, instead of using the originally scheduled
10 conference of July 27 to deal with these matters? Why a change in that date was required in the
11 first place given the present Motion for the second change, has not been adequately or logically
12 explained or justified.
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14
15 With respect to the merits of the issues and concerns that the Defendants cite, Plaintiffs
16 note initially that all (or certainly the vast majority) of these matters would and should be raised
17 as part of the regular case management and ADR process. The purpose of the ADR and case
18 management procedures is precisely to provide an efficacious means for the Parties to share and
19 discuss the information and issues that advance the litigation process, to identify the issues in
20 contention, and to provide the Court with a summary of the information and arguments that are
21 needed to decide how the case should best be handled, and hopefully, resolved. Plaintiffs believe
22 that the true motivation of the Defendants, first in seeking a postponement in the case
23 management schedule generally, and now in asking for a fractured (or bifurcated as the
24 Defendants describe it) approach to the case management process is, pure and simple, to
25 unnecessarily delay the progress of the litigation. This underlying goal is indicated most directly
26 by their request to have discovery and the regular case management process "suspended" until the
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1 views of the United States government on the case can be solicited and obtained.

2 Rather than adopt the Defendants' piecemeal approach, whose primary purpose appears to be
3 to delay the effective completion of the case management process, Plaintiffs urge the Court to
4 reject the Defendants' Motion in its entirety, and to maintain the newly rescheduled case
5 management schedule as ordered by the Court on June 19, with the September 18 Initial Case
6 Management Conference used to consider any issues that have been (and will be) raised, and to
7 decide how they best should be handled, after the full benefits of the ADR and case management
8 process have been brought to bear on these matters, as intended by the Court's regular Rules and
9 procedures.
10

11 **II. Many Of The Underlying Arguments Upon Which The Defendants Base Their**
12 **Request For An Alternative Case Management Process Are Based Upon Incorrect**
13 **Assumptions or Mischaracterizations**

14 Defendants request an alternative approach to the case management process that features
15 "bifurcating certain issues," "soliciting statements of interest from the political branches" of the
16 U.S. Government, and placing "a hold on discovery" and other elements of the regular pre-trial
17 and case management process while these initial procedures are completed. Def. Yahoo! Inc.'s
18 Mot. for an Early Case Mgmt. Conference and Order 1:4, 1:24 (filed June 21, 2007). (hereinafter
19 "Def. Mot."). Plaintiffs are unalterably opposed to this proposed approach, the substantial delays
20 in the litigation process that it inherently is designed to produce, and its effect of undercutting and
21 bypassing the regular case management process that has already been approved and scheduled by
22 the Court and previously changed at the Defendants' behest. Plaintiffs point out that many of the
23 proposals are based upon incorrect assumptions and mischaracterizations, placing into serious
24 question the need and justification for the highly unusual procedures and variations from
25 established court practice that the Defendants request.
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1 **A. Defendants Incorrectly Assume that Plaintiffs Will Be Inaccessible for Evidentiary**
2 **Purposes**

3 To provide just a few examples of the incorrect assumptions and mischaracterizations that
4 form the foundation for the Defendants’ Motion, they suggest on page 2, lines 2-6 of their Motion
5 that the Plaintiffs cannot “prosecute this case...in light of the circumstances that they cannot give
6 testimony or communicate with their counsel.” Def. Mot. 2:4-6. Neither of these assumptions is
7 correct. One of the Plaintiffs in the case, Yu Ling, came to the United States from China when
8 the complaint was filed. Another potential Plaintiff, the mother and legally designated
9 representative of Plaintiff Shi Tao, also traveled to South Africa and then to the U.S. from China
10 in the past few weeks to accept the Committee to Protect Journalists’ Golden Pen International
11 Press Freedom Award on behalf of her son, and to check on the status of the present case by
12 stopping in the U.S. on her trip back to China. While communication with and access to those
13 Plaintiffs being detained in China most certainly is restricted and heavily monitored and censored,
14 they do communicate with their family members, and through them with their counsel, including
15 their Chinese lawyers who have been representing them (to little avail) in that country. Nor do
16 we believe that it is appropriate for the Defendants to seek to cite the unlawful detention and
17 communications restrictions imposed on Shi Tao and Wang Xiaoning as a basis for claiming that
18 their lawsuit cannot be carried out in U.S. courts, and for seeking dismissal of their claims.

19 As with so many of the other issues the Defendants seek to cite as justification for the
20 “alternative” forms of case management they are proposing, the question of how problems
21 associated with limited access to some of the Plaintiffs impacts the litigation is not one that can or
22 should be handled summarily. This question requires exactly the kind of detailed information
23 disclosure and discussion between the Parties that the regular case management system is
24 designed to produce, so that the Court will have the information, documentation and legal
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1 analyses necessary to properly evaluate and make decisions on these matters for case
2 management purposes.

3 **B. Defendants' Motion Mischaracterizes the Standing Order as Describing the Case**
4 **Management Process Itself, When in Fact It Only Describes the Contents of the**
5 **Parties' Reports Subsequent to Those Procedures**

6 A second example of the incorrect and inaccurate assumptions underlying the Defendants'
7 Motion is their citation to sections 15, 16, and 20 of the Standing Order for All Judges of the
8 Northern District of California on the Contents of the Joint Case Management Statement. *See*
9 Def. Mot., Standing Order for All Judges of the N.D. Cal., Contents of Joint Case Mgmt.
10 Statement (effective Mar. 1, 2007). That Standing Order refers to the information that the Parties
11 must include in the Case Management Statement to be submitted to the Court (due on September
12 7th in the present case under the Jointly Stipulated Schedule approved by the Court on June 19th).
13 These are not guidelines on how the case management system should be handled, as the
14 Defendants imply, but rather on what the contents of the Parties' reports (joint or separate) to the
15 Court on the Case Management Process must cover. By definition, that report cannot be filed
16 until after the case management process has (at least partially) taken place, initial disclosures and
17 discussions have occurred, and issues in dispute identified and addressed (at least initially) by the
18 parties. Those are exactly the steps, mandated by the Court's Standing Order and regular case
19 management procedures, that the Defendants are seeking to bypass, undercut, and substantially
20 delay through the proposals they have made. Their proposals therefore must be recognized as
21 being inconsistent with the Standing Order and the case management process, not in furtherance
22 of these procedures.

23 **C. Defendants' Motion Misinterprets the *Sosa* Vigilant Doorkeeping Requirement by**
24 **Incorrectly Implying that Plaintiffs' Claims Fall Outside of the Narrow Class of**
25 **Claims Suitable for ATCA Cases**

26 The vigilant door-keeping "cautions" expressed in *Sosa* do not apply to cases such as this
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1 where the human rights violations cited as the bases for the claims, such as torture and long-term
2 arbitrary detention, have been fully recognized and accepted by Congress and by the courts as
3 appropriate foundations for ATCA and TVPA lawsuits. The Supreme Court in its *Sosa* decision
4 made crystal clear that the weighing of political and foreign policy concerns was not appropriate
5 in the special category of cases, such as those arising under the TVPA, where a very explicit
6 determination had been made by Congress that U.S. courts were authorized to exercise
7 jurisdiction and make determinations in cases involving torture abuses.

9 Defendants incorrectly suggest that an early Case Management Conference and the adoption
10 of a “tailored” or “bifurcated” Case Management Order will fulfill the “duty of ‘vigilant
11 doorkeeping’ to make sure ATS claims fall within the ‘narrow class’ of claims allowed,” that the
12 Supreme Court described in *Sosa*. Def. Mot. 3:17-19 (citing *Sosa v. Alvarez-Machain*, 542 U.S.
13 692 (2004)). However, the very same case law cited by Defendants as justification for their
14 argument says exactly the opposite. This case precedent confirms that Plaintiffs’ allegations
15 clearly fall within this “narrow class” of actions that the courts have recognized as justiciable.
16 *Sosa*, 542 U.S. at 729.

18 Defendants’ motion implies that *Sosa*’s doorkeeping requirement precludes cases raising
19 political questions, whereas *Sosa* only holds that doorkeeping is required to evaluate whether or
20 not an allegation brought under ATS falls under a clear and well-accepted norm of customary
21 international law, and whether the balancing tests called for under *Baker v. Carr* and *Sabbatino*
22 have been met. *Sosa*, 542 U.S. at 733 n.21. Defendants cite two cases as a means of defining the
23 bounds of this “narrow class.” See Def. Mot. 3 (citing *Sosa*, 542 U.S. at 692 and *Doe v. Qi*, 349
24 F. Supp.2d 1258 (N.D. Cal. 2004). *Sosa* states that an ATS allegation that is a violation of well-
25 established and universally accepted human rights standards is justiciable, and specifically
26 recognizes torture as a violation of the law of nations that meets these standards. *Sosa*, 542 U.S.
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1 at 762. Following *Sosa*, the District Court for the Northern District of California has stated that
2 “it is well established that torture constitutes *jus cogens* violations.” *Qi*, 349 F. Supp.2d at 1296
3 (citing *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 714-15 (9th Cir. 1992)). *Qi*
4 further found that arbitrary detention and cruel, inhuman or degrading treatment are also
5 actionable under ATS. *Qi*, 349 F. Supp.2d at 1296. Thus, the claims at issue in the present case
6 cannot be dismissed as the Defendants suggest simply because they have political or foreign
7 policy overtones.
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9 It would be a waste of this court’s and both parties’ time to adopt the tailored Case
10 Management Order proposed by Defendants when the cases cited by Defendants as justification
11 for the appropriateness of such a plan clearly state that Plaintiffs’ specific allegations fall squarely
12 within the “narrow class of claims allowed” to be brought under ATS. Moreover, it is generally
13 the role of the courts, not the executive, to interpret the law of nations and thus whether or not a
14 specific violation is actionable under ATS. The Supreme Court in *Sosa* did note the possibility of
15 “case-specific deference to the political branches” where interference with a special mechanism
16 (the South Africa Truth and Reconciliation Commission for example) that had been established
17 locally to resolve those types of claims would result from a U.S. court action. *Sosa*, 542 U.S. at
18 733 n. 21. The district court held that the U.S. claims would directly “interfere with policy
19 embodied by [South Africa’s] Truth and Reconciliation Commission,” a stance which the U.S.
20 endorsed both as a matter of foreign policy and via a Statement of Interest (hereafter “SOI”) to
21 the court. *In re South African Apartheid Litigation*, 238 F. Supp.2d 1379 (JPML 2002)).
22

23 However, unlike the plaintiffs in the *Apartheid* case, the Plaintiffs in the instant case seek relief
24 for claims which are not justiciable in any form in China, let alone in a form that has been
25 endorsed by the United States. In enacting the ATCA and especially the TVPA, Congress made
26 clear its intention to provide a judicial forum in the U.S. for dealing with claims involving torture
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1 abuses, and that these types of claims should not be precluded because of foreign policy
2 overtones. Defendants are misapplying and misconstruing the statements in *Sosa* when they
3 suggest that the *Sosa* standards preclude this lawsuit.

4 **D. Defendants Misrepresent Plaintiffs' Purpose in Initiating This Litigation**

5 Defendants claim that the Plaintiffs' case "challenges several decades of U.S. foreign policy
6 toward China, in that one of its stated aims is to curtail American investment in China," similarly
7 grossly mischaracterizes reality. Def. Mot. 3:24-25. Plaintiffs have brought these claims, not to
8 curtail investment in China as Defendants claim, but to both obtain relief for the abuses they have
9 suffered as a result of Defendants' actions and to encourage other companies operating in
10 oppressive regimes such as China to think carefully and conscientiously about how to responsibly
11 do business in these countries without enabling the most serious form of abuses that these regimes
12 inflict upon their citizens. Nor are Plaintiffs "challenging" decades of U.S. foreign policy. If
13 anything, the lawsuit confirms and supports ongoing efforts by the U.S. Government to bring
14 attention to and to present these abuses, including the annual State Department human rights
15 country reports that single out China for special criticism of their arbitrary detention and torture
16 practices.
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19 **III. The Issues Raised by the Defendants Require the Further Factual and Issue** 20 **Development that the Regular Case Management Process Is Designed To Provide**

21 Since the Defendants have sought in their Motion to bring a number of important issues
22 and questions to the Court's attention, Plaintiffs feel obliged to quickly highlight a few key points
23 in response, not to address and explore these issues in depth, or to seek resolution of these matters
24 at this point in the process, but to further indicate the premature nature of seeking a conference
25 with the Court to address them on an earlier basis, and the value and importance of maintaining
26 and carrying out the regular case management process to develop these issues for proper and
27 more complete presentation to the Court. Proper treatment of these issues requires the more
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1 informed factual and analytical basis that the case management system offers, even for
2 preliminary discussions regarding the proper handling of these issues in early stages of the
3 litigation process. Among the specific issues identified by the Defendants as justification for
4 seeking an early conference that demonstrate why that approach would be premature, and why the
5 regular case management process is needed to properly address these matters on a more effective
6 basis are those described below:

7
8 **A. The Defendants' Personal Jurisdiction Challenges Are Not Conclusive, and**
9 **Require Further Factual Development and Legal Analysis Through the Regular**
10 **Case Management Process and/or Preliminary Discovery**

11 Defendants seek to raise a number of issues or questions concerning whether the Court can
12 exercise personal jurisdiction over various Yahoo! entities. These matters cannot be resolved as
13 simply as the Defendants suggest. Due to the complex corporate structure of Yahoo!, Inc. and its
14 affiliates, major changes in the organizational structure that have taken place in recent years
15 (perhaps in part with a view towards attempting to shield various corporate entities from liability)
16 and the difficulty in finding much of the critical information regarding the organizational
17 structures and responsibilities of the entities in the public domain, some limited preliminary
18 disclosure and factual development is required before the Court can properly consider these
19 issues. A useful analogy that can be drawn is to the authority of courts to order discovery on
20 jurisdictional issues even before the court has determined whether it has personal jurisdiction over
21 a particular defendant. *See, e.g., Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de*
22 *Guinee*, 456 U.S. 694 (1982) (allowing discovery aimed at establishing foreign company's
23 contacts with the forum state); *Data Disc, Inc. v. Systems Technology Associates, Inc.*, 557 F.2d
24 1280, 1285 n.1 (9th Cir. 1977); *Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406,
25 430 n.24 (9th Cir. 1977) (stating that discovery "should be granted where pertinent facts bearing
26 on the question of jurisdiction are controverted...or where a more satisfactory showing of the
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1 facts is necessary”) (internal citation omitted). The Court should allow the fact development and
2 disclosure process of the case management system to run its course, or provide for some type of
3 preliminary discovery to take place, before trying to address these complex jurisdictional
4 questions. The Defendants’ suggestion that the Court can summarily address these issues on an
5 early basis without providing an opportunity to develop the necessary factual information through
6 the case management process makes no logical sense.
7

8 **B. The Regular Case Management Process Will Best Facilitate the Fact Finding Process**
9 **Necessary to Demonstrate the Impropriety of the Defendants Disclosing Internet**
10 **User Information to Chinese Authorities**

11 Similarly, Defendants’ suggestion that they were obliged to comply with information requests
12 from law enforcement authorities in China, and that their actions in this regard were necessary
13 and lawful, requires a far more in-depth analysis than Defendants suggest. The issues relating to
14 Defendants’ actions in complying with Chinese authorities’ requests for personal information of
15 internet users is very complex and will require the benefit of the regular case management process
16 to reveal the extent to which such requests were legitimate, whether Defendants had reason to
17 know that complying with those requests would produce major human rights abuses, and whether
18 their approach comported with accepted business practices and U.S law. The fact finding and
19 discussion that will occur during the regular case management process will make it possible to
20 determine what the prevailing and reasonable industry practices of other companies doing
21 business in repressive countries might be, and will reveal the extent to which Defendants’ actions
22 deviated from such reasonable standards. For example, at a hearing before the U.S. House of
23 Representatives Committee on International Relations on February 15, 2006, Jack Krumholtz,
24 Managing Director of Federal Government Affairs and Associate General Counsel of Microsoft
25 Corporation, testified that his company follows the practice of making sure that “[c]ustomers’
26 personal information is stored on servers located in the United States, so requests for that
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1 information from the Chinese have to be handled under procedures that are provided under the
2 U.S.-China Mutual Legal Assistance Treaty” and pursuant to U.S. law. *The Internet in China: A*
3 *Tool for Freedom or Suppression?*, p. 156, available at
4 http://commdocs.house.gov/committees/intlrel/hfa26075.000/hfa26075_of.htm. Elliot Schrage,
5 Vice President for Corporate Communications and Public Affairs, Google, Inc., also testified to
6 this issue, noting that Google “made a fundamental, strategic decision that we were not going to
7 offer services like G-mail or Blogger, services that provide us commercial value, . . . [and] that
8 we would not provide those services inside of China because we did not want to be put in a
9 position where we would have possess[ion] of data that might create the kinds of problems we are
10 discussing today.” *Id.* at 157 (referring to “privacy and confidentiality of information”). The
11 transcript of this hearing provides an apt illustration of how other companies, similarly situated to
12 Defendants, took affirmative steps to avoid compromising users’ private information in order to
13 avoid, as Mr. Schrage put it, “be[ing] in a position to give it,” and place these users in jeopardy.
14 *Id.* The regular case management process must be adhered to in order that both Parties be
15 afforded the opportunity through initial fact gathering and disclosures to fully explore whether the
16 acts of the Defendants in providing the information to China should be considered reasonable and
17 appropriate under the circumstances.

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21 **IV. Solicitation of the Views of the Political Branches of the U.S. Government On This**
22 **Case Would Not Be Appropriate and Would Not Justify The Requested**
23 **“Suspension” of the Case Management Process**

24 One of the “bifurcated” procedures that the Defendants seek to press upon the Court in
25 place of the regular case management process would be to solicit the views of the “political
26 branches” of the U.S. Government on the case (Def. Mot. 3:10), and to suspend the discovery and
27 case management process until these views can be obtained. In support of this approach they cite
28 the potential for the case to “impact foreign relations,” and the claim that the case “challenges

1 several decades of U.S. foreign policy towards China.” *Id.* at 3:23-24. They also cite the
2 Supreme Court’s urging of “caution” in passing judgment on the acts of sovereign governments
3 and foreign officials in the case of *Sosa v. Alvarez-Machain*. *Sosa*, 542 U.S. at 692. All of these
4 arguments are misleading and misplaced and do not constitute a valid basis for “suspending” the
5 litigation as has been requested.

6
7 This case has been filed against Yahoo! Inc. and its affiliates, not against the Government
8 of China or its officials. To the extent that the actions of the Government of China relate to the
9 litigation, or that the case impacts foreign relations, these matters must be assessed pursuant to the
10 standards that the U.S. Supreme Court set out in the cases of *Baker v. Carr*, 369 U.S. 186 (1962),
11 and *Sabbatino v. Banco Nazionale de Cuba*, 376 U.S. 398 (1964), recognizing that U.S. Courts
12 retain jurisdiction over legal disputes despite potential political or foreign relations implications
13 where clear and well-established legal standards are applicable to the matter in dispute that courts
14 traditionally are called upon to apply. Nor do these supposed foreign policy issues implications
15 justify suspension of the regular discovery and case management procedures, as Defendants are
16 proposing.

17
18 **A. Since Immunity and Act of State Doctrine Issues Are Not Relevant to This Case,
19 Soliciting a Statement of Interest From the Political Branches Would Be
20 Inappropriate**

21 Plaintiffs do not accept the Defendants’ underlying premise that solicitation of the
22 Government’s views is appropriate or necessary. Plaintiffs submit that a solicitation of the
23 Government’s views would amount to an unauthorized and uncalled for reliance on the political
24 process, that is antithetical to the principle of the rule of law and to the requirement that an
25 impartial, objective and non-political determination be made of the legal issues and claims that
26 have been presented, without reference to or reliance upon political considerations. Plaintiffs
27 believe that this approach would violate principles set out by Congress in the TVPA mandating
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1 that these types of issues and cases be adjudicated by the courts without giving deference to the
2 political and diplomatic processes.

3 The solicitation of a SOI would be inappropriate in this case given both the dual facts that
4 neither a foreign government nor foreign officials are defendants in this case, and that the U.S.
5 Government has very clearly and frequently taken the position that major human rights abuses are
6 taking place in China on a systemic basis that violates international law.

7
8 Since the Defendants in this case are not the Government of China, nor officials of that
9 Government, issues of immunity and the act of state doctrine are not relevant. Courts have
10 solicited a SOI from the U.S. Government when a lawsuit concerns the direct involvement of a
11 foreign government as a party to such a lawsuit. In *National Coalition Government of Union of*
12 *Burma v. Unocal, Inc.*, for example, the court requested a SOI from the Government, reasoning
13 that, “a court presented with a foreign government’s lawsuit must consider whether the Executive
14 Branch has demonstrated its willingness to allow that government to assert its claims in the
15 United States court system.” *National Coalition Government of Union of Burma v. Unocal, Inc.*,
16 176 F.R.D. 329, 339 (C.D.Cal. 1997); *see also Estados Unidos Mexicanos v. DeCoster*, 229 F.3d
17 332, 342 (1st Cir. 2000) (where one party to the lawsuit was a government entity, “[t]he district
18 court commendably invited comment from the U.S. Department of State”). Due in part to the
19 court’s deference to the government’s SOI, the case was dismissed as to the NCGUB. This result
20 can be explained by the fact that this portion of the *Unocal* case concerned a government-in-exile
21 (the NCGUB), “not...formally recognized by the United States,” and therefore involved questions
22 that would inevitably reflect on the U.S.’s treatment of another nation’s sovereignty. *Id.* at 340.
23 The district court in *Unocal* concluded that “permitting the NCGUB to sue in its capacity as the
24 purported government-in-exile of Burma would clearly require the court to ‘interfere in sensitive
25 matters of foreign policy,” yet still left the door open for individual plaintiffs to litigate against
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1 Unocal in subsequent lawsuits. *Id.* at 340 (citing *Pfizer, Inc. v. Government of India*, 434 U.S.
2 308, 319 (1978)).

3 Unlike the plaintiff in *Unocal*, however, no party in the instant case is an actual or purported
4 government entity or official, and thus no “sensitive matter of foreign policy” is directly
5 implicated. Although it may be appropriate for a court to solicit the U.S. Government’s statement
6 of interest when a lawsuit names a foreign government or a foreign official as a party, these are
7 not the circumstances of the instant case. Moreover, it is a well-established principle in cases
8 alleging torture that “the act of state doctrine should not be applied...because no state can claim
9 the right to engage in these practices” as a matter of government or government approved policy.
10 Derek Baxter, *Protecting the Power of the Judiciary: Why the Use of State Department*
11 *“Statements of Interest” in Alien Tort Statute Litigation Runs Afoul of Separation of Power*
12 *Concerns*, 37 Rutgers L.J. 807, 825 n.103 (2006); see also *In re Estate of Marcos Human Rights*
13 *Litig.*, 978 F.2d 493, 500 (9th Cir. 1992); *Siderman*, 965 F.2d at 717. Since acts of torture are not
14 considered to be legitimate state actions, they are not entitled to the protection of the act of state
15 doctrine and thus the act of state concerns that Defendant seeks to raise are not implicated in the
16 instant case.
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19 **B. Even if a Statement of Interest Were Submitted, It Would Not Be Dispositive with**
20 **Respect to Any Determinations of the Final Outcome of the Case**

21 Even if the Court should determine that obtaining a SOI is appropriate in order to clarify
22 the Government’s views on this case, it is well established that such a request is not necessarily
23 controlling with respect to any final determinations of justiciability. The *Sosa* court’s statement
24 that there is a “strong argument that federal courts should give serious weight to the Executive
25 Branch’s view of the case’s impact on foreign policy,” goes on to suggest that the deference given
26 by a court to the Executive has always varied on a case-by-case basis to be determined by the
27 court, based on a variety of factors that must be weighed and balanced. *Sosa*, 542 U.S. at 733.

1 The recent Ninth Circuit holding in *Alexis Holyweek Sarei v. Rio Tinto, PLC* illustrates this
2 principle. *Alexis Holyweek Sarei v. Rio Tinto, PLC*, Nos. 02-56256, 02-56390, 2007 WL
3 1079901 (9th Cir. Apr. 12, 2007). There, the Court of Appeals for this Circuit held that “the SOI
4 submitted in this case, even when given serious weight, does not establish that any of the final
5 three *Baker* factors is ‘inextricable from the case,’” and therefore “we hold that none of the
6 plaintiffs' claims present nonjusticiable political questions.” *Id.* (citing *Baker*, 369 U.S. at 217).
7 Moreover, as the Court in *Rio Tinto* noted, “[t]he Supreme Court has been clear that ‘it is error to
8 suppose that every case or controversy which touches foreign relations lies beyond judicial
9 cognizance,’ and that the doctrine ‘is one of “political questions,” not of “political cases.”’” *Id.* at
10 *8 (quoting *Baker*, 369 U.S. at 211, 217). The Ninth Circuit then concluded that the plaintiffs’
11 claims in *Rio Tinto* did not present non-justiciable political questions because they “relate to a
12 foreign conflict in which the United States had little involvement (so far as the record
13 demonstrates), and therefore that merely ‘touch [upon] foreign relations.’” *Id.* at *8 (citing *Baker*,
14 369 U.S. at 211).

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17 Since all ATS cases by definition “touch foreign relations” in the sense that they relate to
18 actions taken by foreign governments abroad, this fact alone does not preclude litigating these
19 issues, and should not be used as a justification for “suspending” the case management process as
20 the Defendants request. To assert otherwise would defeat the very nature and purpose of the
21 TVPA statute, which Congress specifically designed to allow foreign nationals to seek relief for
22 abuses committed outside the United States where no remedy in their home country is available.
23 See 138 Cong. Rec. S. 2667, March 3, 1992. Although this case may indeed have political
24 overtones, Defendants wrongly assume that this fact automatically removes these issues from the
25 Court’s jurisdiction, which is not true.
26

27 The legislative history recognizes that TVPA litigation may have some implications on
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1 foreign policy, but that the concerns for creating accountability for torture override. Congress
2 explained that one of the most enduring principles of U.S. foreign policy was a commitment to
3 individual human rights and the rule of law, and that the United States has sought to assume a
4 special responsibility in the world community to promote human rights and prevent or discourage
5 torture. 135 Cong. Rec. H. 6423, October 2, 1989. The purpose of the TVPA was to ensure that
6 courts assumed this role because “one of the ways in which the United States can promote and
7 enforce peremptory norms of international law is through enforcement of human rights in our
8 own domestic courts.” *Id.* At a Congressional hearing, Senator Grassley asked whether the
9 proposed Bill would improperly involve the judicial branch in foreign affairs. Senator Specter
10 replied that the proposed TVPA would not improperly involve the judicial branch in foreign
11 affairs, because “[t]orture is universally condemned by the family of nations. No nation officially
12 supports or condones torture. Therefore, I do not expect that this Act will entangle the judiciary
13 in sensitive foreign policy matters.” *Id.* Congressmen Broomfield explained during House
14 debate, “There are, of course, situations in which application of this statute could create
15 difficulties in our relations with friendly countries. But this is a small price to pay in order to see
16 that justice is done for the victims of torture.” 137 Cong. Rec. H. 11244, November 25, 1991.

19 Defendants’ assertion is also inconsistent with the great majority of case law, which
20 shows that cases touching on foreign relations can certainly be justiciable. The Defendants’
21 position is not an accurate reading of the controlling standard set out in *Baker* and *Sabbatino*, and
22 not consistent with substantial case law precedent. In fact, the Second Circuit noted that “judges
23 should not reflexively invoke the [political question doctrine and act of state doctrine] to avoid
24 difficult and somewhat sensitive decisions in the context of human rights.” *Kadic v. Karadzic*, 70
25 F.3d 232, 249 (2nd Cir. 1995) (holding that “[n]ot every case ‘touching foreign relations’ is
26 nonjusticiable” and that “[a]lthough these cases present issues that arise in a politically charged
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1 context, that does not transform them into cases involving nonjusticiable political questions”).

2 There is no doubt that this case has political and foreign policy overtones, that there are
3 individuals, businesses and even governments who have strong views on how this case might
4 impact future litigation and corporate practice. However, Congress and most U.S. courts have
5 moved away from the position that these cases should be decided with these political or foreign
6 policy concerns as the sole and controlling consideration. To the contrary, and consistent with
7 our legal system’s strong commitment to the rule of law, the prevailing trend has been to insulate
8 court cases from political influences, and to substantially reduce opportunities for the intrusion of
9 political and foreign policy considerations into the adjudicatory process, especially where the
10 legal standards to be applied are clear and expressly recognized. Therefore, the presence of these
11 potentially sensitive issues does not divest the court of jurisdiction, and certainly does not justify
12 “suspending” the regular court process pending solicitation and receipt of the U.S. Government’s
13 views.
14

15
16 Plaintiffs dispute Defendants’ claim that the lawsuit “challenges three decades” of U.S.
17 foreign policy. Def. Mot. 3:24. The exact opposite is true. Consistently, for a number of years,
18 the U.S. Department of State Country Reports on Human Rights, and annual reports on
19 International Religions Freedom have placed China at or near the top of the list of the most
20 serious human rights violators. For example, the most recent Country Report on Human Rights
21 Practices in China, released March 6, 2007, notes that “the [Chinese] government’s human rights
22 record remained poor, and in certain areas deteriorated...[with] an increased number of high-
23 profile cases involving the monitoring, harassment, detention, arrest, and imprisonment of
24 journalists, writers, activists, and defense lawyers, many of whom were seeking to exercise their
25 rights under law,” citing the use of “torture and coerced confessions of prisoners” and “stricter
26 control and censorship of the Internet” as well. Country Reports on Human Rights Practices,
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1 (Mar. 6, 2007) *available at* <http://www.state.gov/g/drl/rls/hrrpt/2006/78771.htm>.

2 In fact, the Report specifically references the parties in the present case and the subject
3 matter of this litigation in terms very critical of the Government of China. The Report states that
4 “citizens writing on the Internet were detained, arrested, and sentenced on state secrets and
5 subversion charges during the year” and specifically refers to the role played by the Defendants in
6 producing these results. *Id.* The Report makes specific reference by name to Plaintiff Shi Tao,
7 noting that “Yahoo provided information to security authorities, including access to private e-mail
8 accounts, used in the prosecution of journalist Shi Tao” and more importantly that “Yahoo’s
9 Chinese Web site issued a joint proposal calling for the Internet industry to...accept government
10 supervision.” *Id.* The U.S. Department of State has thus directly acknowledged the very abuses
11 for which Plaintiffs seek relief in this case, and has gone on record criticizing the Government of
12 China’s and the Defendants’ actions in this case in the clearest of terms. Defendants contend that
13 “reliance on generalized reports about abuses in China [] is inadmissible hearsay.” Def. Mot.
14 7:3. However, the very case Defendants cite to support this contention notes that “[t]he State
15 Department’s annual human rights reports have been held to fall within the public records
16 exception to the hearsay rule under *Fed. R. Evid. 803(8)*, and is thus admissible.” *Qi*, 349 F.
17 Supp.2d at 1310 n. 39. It is clear, therefore, that the U.S. Government has consistently and
18 frequently publicly condemned the very abuses for which Plaintiffs seek remedy. Delaying the
19 case management process to solicit the U.S. Government’s opinions on these grounds is therefore
20 without merit, particularly given the fact that the Department of State has itself officially
21 acknowledged the illegality of the abuse of one of the specific Plaintiffs in this case.

22 Moreover, the House Report on the TVPA suggest that far from interfering with foreign
23 policy, the maintenance of TVPA lawsuits of this type is in fact mandated by U.S. treaty
24 obligations. It points out that the Convention Against Torture essentially obligated State parties

1 to “adopt measures to ensure that [those committing these abuses] are held accountable for their
2 acts.” H.R. Rep. 103-367 *3.

3 It is true that a request for a SOI may also be considered necessary or appropriate where
4 agreements or declarations exist between two governments that purport to settle the very issues
5 that parties would seek to litigate. In *In re Nazi Era Cases Against German Defendants*
6 *Litigation*, for example, the plaintiff sought recovery from a German company for forced labor
7 during World War II. *In re Nazi*, 129 F. Supp.2d at 370. The court ruled that recovery was
8 precluded because the lawsuit challenged the validity of a diplomatic agreement addressing these
9 issues, and “since the United States has spoken to the validity of the Foundation [established by
10 the agreement] via its Statement of Interest” reiterating therein its support of the Foundation
11 through an Executive Agreement it had formed with Germany. *Id.* at 387. The district court
12 reasoned that “based on the weight of history” and in light of the SOI and Executive agreement it
13 was “clearly demonstrate[d] that the claims against German Industry presently before the Court
14 constitute political questions best left to the political branches.” *Id.* The defendants in the instant
15 case can point to no existing Executive Agreement, let alone a treaty, that would create a conflict
16 with an international agreement and bring the plaintiffs’ claims into the political question
17 category.
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21 **C. Because Determining the Justiciability of Claims Requires a Comprehensive Record**
22 **of the Pleadings and Facts, the Regular Discovery and Case Management Process**
23 **Should Not Be Delayed Pending Receipt of a Statement of Interest**

24 Defendants’ request for a bifurcated and premature case management schedule includes
25 the contention that before proceeding in this case, a SOI from the “political branches” of the
26 United States should be solicited by the Court. To support this contention, Defendant cites the
27 possibility of an outright dismissal based on the allegation that “plaintiffs’ case potentially
28 violates the ‘act of state’ doctrine, poses nonjusticiable ‘political questions,’ or should be

1 dismissed under the doctrine of ‘international comity.’” Def. Mot. 4:11-13. However, delaying
2 the regular case management schedule while awaiting such a submission falsely presupposes that
3 a SOI from the United States would be both appropriate and dispositive with respect to these
4 issues, when in fact there is no indication based on current case law to believe this to be true.

5
6 Whether a SOI would indeed be appropriate, and should affect the outcome of this case, is
7 a question for this court to review after receiving more adequate information about the
8 circumstances of the case, and whether these political views would be relevant pursuant to the
9 *Baker* and *Sabbatino* standards. In *Renee v. Geary*, the Supreme Court applied the *Baker* and
10 *Sabbatino* balancing tests in holding that “proper resolution of the justiciability issues presented
11 here requires examination of the pleadings and record to determine the nature of the dispute and
12 the interests of the parties in having it resolved in this judicial proceeding.” *Renee v. Geary*, 501
13 U.S.312, 316 (1991). See also *In re Nazi Era Cases Against German Defendants Litigation*, 129
14 F. Supp.2d 370, 375 (D.N.J. 2001) (relying on *Renee* to support the principle that “[t]o resolve a
15 justiciability issue, a Court should examine the pleadings and the record to determine the nature
16 of the underlying dispute and the interests of the parties in having the dispute resolved”). This
17 type of balancing cannot take place theoretically or in a vacuum, but must make use of the fact
18 development, the pleadings and the case management process is designed to produce. Without
19 this opportunity for factual and analytical development of these issues, or even the benefit of the
20 Defendants’ response to Plaintiffs’ complaint, this Court should not be put in the position of
21 making premature determinations of whether or not solicitation of a SOI is appropriate or
22 necessary. Under no circumstances is the suspension of the regular court process warranted
23 pending resolution of these questions.

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25
26 Suspending regular case management procedures pending solicitation and submission of a
27 SOI by the U.S. Government could cause significant and unnecessary delays in the litigation
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1 process. In the most recent ATCA/TVPA case litigated by the Plaintiffs' counsel where a
2 Statement of Interest from the U.S. Government was solicited, it took almost five months from
3 the time the request by the Court was made until the Government's views were submitted to the
4 Court. *Li Weixun v. Bo Xilai*, Case No. 1:04CV00649 (D.D.C.). That type of delay should not be
5 encouraged, especially where Plaintiffs remain in detention in China and are subject to great
6 personal risk, and where additional individuals are at risk of having personal information
7 disclosed by the Defendants in a similar way, potentially leading to their arbitrary arrest and
8 torture.
9

10 **V. Conclusion**

11 For the foregoing reasons, and given the inappropriateness of the Defendants' seeking a
12 second amendment to the Case Management schedule that was ordered by the Court on June 19,
13 Defendants' Motion should be denied in its entirety. Since the Defendants' Motion is without
14 merit, and a summary denial is justified, no Motions Hearing is necessary or appropriate.
15

16 Respectfully submitted this 29th day of June, 2007,

17
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CERTIFICATE OF COMPLIANCE

This opposition on behalf of the Plaintiffs in the above captioned case complies with all Federal and Local Rule requirements, including the page limit of 25 pages for the narrative text set out in Rule 7-3(a). It is written in 12 point Times New Roman font and covers a total of 7,006 words and 21 pages.

Signed and Certified to this 29th day of June, 2007.

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