Case No. 14-35693

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MELVIN J. HOWARD,

Plaintiff and Appellant,

v.

MAXIMUS, INC., d/b/a
MAXIUMS, CANADA INC., d/b/a
Themis Program Management & Consulting Ltd.,
STEVE KITCHER, in his individual capacity; JOANNE PLATT,
in her individual capacity;

Defendants and Appellees.

On Appeal from the United States District Court, Oregon
PORTLAND DIVISION
Case No. 3:13-CV-01111-ST, Honorable Anna J. Brown, Judge

REPLY BRIEF OF APPELLANT

TO: THE HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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I. INTRODUCTION AND SUMMARY OF ARGUMENT IN REPLY.

In the submission of this Reply Brief, no attempt is made to set forth a response to each of respondent's contentions, most of which are fully covered by the opening brief. Only those points requiring additional comment will be raised to assist this court in resolving the pertinent issues and to focus on the key areas of this case. In the course of this litigation the appellees are seeking to blame the victim for their own misconduct, Maximus/appellees essentially ask to continue their campaign of fraud, corruption, interference with international commerce as well as continued arbitrary detentions for no lawful reason whatsoever without ever bearing any consequences. All because the Appellant had filed a legal challenge under the North American Free Trade Agreement, demanding that U.S. healthcare companies gain access into Canada. To permit them to walk away from this case without making Mr. Howard whole would only encourage the continuation of this type of campaign in the future. Mr. Howard believes he properly preserved the issues he raised here through objections that were broad enough to cover all issues presented. Mr. Howard agrees with Maximus that the argument of *forum non conveniens* was not raised by Maximus nor addressed by the District Court per se (Appellee's Answering Brief, "AAB", at 21). But reflection of the record indicates Maximus put forth this argument of a *forum non conveniens* without really calling it a *forum non conveniens.* The District court for

its part indulged Maximus with its Findings of Facts on the matter. Also in regards to the statement from Maximus that the Appellant never requested any discovery is false (Appellee's Answering Brief, "AAB", at 1). Quoting from the record by Mr. Howard "Dismissing this case without factual discovery and telling the Plaintiff which is an American citizen he cannot get his day in an American court room to challenge the misdeeds of an American corporation who let employees, agents and/or subsidiaries commit such liable acts serves no interest other than preserving ill-gotten corporate largesse and furthering misuse of authority". This appeal is from dismissal on the complaint alone, before appellant had the chance to conduct any discovery. As such, appellant must be afforded every traditional presumption on review. Specifically, this Court must assume the truth of all facts properly pleaded, as well as matters which could have been asserted on amendment of the complaint. In evaluating the validity of the rules, this Court must accept these assertions as true. Moreover, this Court must reverse the dismissal of this case if Appellant can state a cause of action on any possible legal theories or facts. Appellant, and by extension all persons similarly situated, just has not had his day in court. This Court should recognize that Appellant has pleaded facts sufficient to establish a cause of action and reverse the decision of the district court. The principal issue before this Court is whether a U.S. parent corporation who owns an alien defendant corporation can be tried in a United States court based upon

misconduct abroad whenever human rights violations are asserted against a forum resident. Is Due Process satisfied when a court exercises jurisdiction over an U.S. parent corporation who owns an alien defendant corporation based on foreign acts having claimed local effect? With the presents of tortious or otherwise unlawful conduct aimed at the forum? The Supreme Court has provided the answer: Jurisdiction over a foreign defendant may be proper when the defendant is involved "in an *alleged wrongdoing* intentionally directed at a U.S. resident". See id.; cf. Calder v. Jones, 465 U.S. 783, 789–90 (1984) (holding that the court had personal jurisdiction when intentional conduct, performed outside of the forum state but directed towards the state, allegedly caused tortious injury in the forum state).

Jurisdiction is proper under *Calder's* "effects test". This Circuit has invoked the effects test "with respect to intentional torts directed to the plaintiff." *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 420 (9th Cir. 1997). The same is true of sister circuits. *See e.g.*, *IMO Industries, Inc. v. Kiekert AG* 155 F.3d 254 (3rd Cir. 1998) (effects test requires finding that "defendant committed an intentional tort"); *Panda Brandywine Corp. v. Potomoc Elec. Power Co.*, 253 F.3d 865 (5th Cir. 2001) (under *Calder,* "the effects of intentional torts" are assessed as part of traditional jurisdictional analysis). Like the Due Process clause, violation of a legal duty owed to the plaintiff is fundamental to the court's power to render a

judgment against a defendant. *See e.g. Bancroft & Masters, Inc. v. Augusta National Inc.*, 223 F.3d 1082 (9th Cir. 2000). Jurisdiction must comport with Due Process. Undisputed facts in the record clearly indicate the liability of Maximus Inc. The district court erred by failing to apply uniform federal law to issues of vicarious and corporate responsibility. Because the claims are of a federal statute providing liability for violations of international law as incorporated into federal law, uniform federal law should determine the appropriate rules of liability, including the federal common law test for piercing the corporate veil and the traditional rules of agency. This federal law is consistent with international law, providing an additional basis for its application in this case. These federal standards differ from the rules applied by the district court.

Under federal and international law, the corporate form should be disregarded where it is used to defeat the enforcement of fundamental human rights norms. The basic principles of agency are firmly rooted in both federal law and international law, common to the world's major legal systems.

II. ARGUMENT

Uniform Federal Law Governs Corporate Liability, Agency, and Joint Venture Liability in Federal Statute Cases.

1. Following *Sosa*, federal common law provides the rules of liability in Federal Statute cases.

In *Sosa*, the Supreme Court settled the question of the source of law to be applied in The Alien Tort Statute (28 U.S.C. § 1350; ATS) and TVPA cases. The

Torture Victim Protection Act ("TVPA") the ATS share much in common. They serve similar purposes and the TVPA was enacted as a note to the ATS. The fact that the TVPA was codified as a note to the ATS implies that they are intended to interact closely. The Eleventh Circuit has ruled that "[t]he TVPA creates no new liabilities nor does it impair rights. Rather, the TVPA extended the ATS, which had been limited to aliens, to allow citizens of the United States to bring suits for torture and extrajudicial killing in United States courts *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1154 (11 th Cir. 2005). Federal common law mandates that courts draw on all "relevant sources" of law in order to effectuate the federal interest in providing an appropriate remedy for violations of a federal statute. The District court should have look to existing federal common law, as applied in previously decided ATS and TVPA cases, to craft a remedy that will appropriately compensate Plaintiff and punish Maximus. The Court ruled that the ATS grants jurisdiction over causes of action present in federal common law, which incorporates international law. *Sosa*, 542 U.S. at 724 (noting that under the ATS "the common law" provides "a cause of action for the modest number of international law violations with a potential for personal liability"). The Court described the process of determining whether a claim is actionable under the ATS as whether a court should "recognize private claims under federal common law for violations of [an] international law norm." *Id.* at 732. The Ninth Circuit affirmed

that federal common law provides the rules of liability, including vicarious liability, to be applied in ATS cases: "Courts applying the [ATS] draw on federal common law, and there are well-settled theories of vicarious liability under federal common law." *Sarei v. Rio Tinto PLC*, 456 F.3d 1069, 1078 (9th Cir. 2006). This Court emphasized, as supportive of the exercise of general jurisdiction, plaintiffs' assertion of claims under the Alien Tort Statute (ATS), *28 U. S. C. §1350*, and the Torture Victim Protection Act of 1991 (TVPA), 106 Stat. 73, note following *28 U. S. C. §1350*. See *644 F. 3d, at 927* ("American federal courts, be they in California or any other state, have a strong interest in adjudicating and redressing international human rights abuses.") The legislative history of the TVPA provides that if a suit is filed in the United States it should be "virtually prima facie evidence that the claimant has exhausted his or her remedies in the jurisdiction in which the torture occurred . . . [and] courts should approach cases. . . with this assumption." Maximus statements that Howard did not and could not, plead adequate facts to allege a cause of action under the TVPA Act (Appellee's Answering Brief, "AAB", at 12). Is a conclusory statement without any foundation in fact. The statement is argumentative because it offers a legal conclusion or an opinion about the value to be given to the evidence. However on further research Mr. Howard does concede that the Supreme Court held unanimously in Mohamad v. Palestinian Authority 132 S. Ct. 1702 that the Torture Victims Protection Act

("TVPA") cannot be used to sue organizations, and by extension, corporations. The Court, however, did not limit the type of individuals subject to suit under the Act, thus a corporation's officers or employees may be held liable under the Act.

2. The *Calder* "Effects Test" Applies to "Tortious Conduct".

The *Calder* "effects test" applies here, in intentional tort cases, unique relations among the defendant, the forum, the tort and the plaintiff may under certain circumstances render the defendant's contacts with the forum sufficient for jurisdiction. *Calder*, 465 U.S. at 788-89; *IMO*, 155 F.3d at 265.

In *Bancroft & Masters, Inc. v. August Nat. Inc.*, 223 F.3d 1082 (9th Cir. 2000), concurring Judges Sneed and Trott succinctly observed that the "effects test" has "normally been used for tortious conduct in which the 'aimer' in state Y was seeking to injure wrongfully the target in state 'X'". 223 F.3d at 1089. Sister circuits have made similar rulings. The court in *IMO Industries, Inc*, for example, stated at p. 259-260:

> Since this is an intentional tort case, we must consider whether the application of *Calder v. Jones*, *supra*, can change the outcome. Generally speaking under *Calder* an intentional tort directed at the plaintiff and having sufficient impact upon it in the forum may suffice to enhance otherwise insufficient contacts with the forum such that the "minimum contacts" prong of the Due Process test is satisfied.

Other courts have specifically recognized that "*Calder* has been applied to those situations where a plaintiff 'can point to contacts which demonstrate that the defendant expressly aimed its tortious conduct at the forum i.e. the United States,

and thereby made the forum the focal point of the tortious activity'". *See e.g.*, *Zieper v. Reno,* 111 F.Supp.2d 484, 492 (D.N.J. 2000) (citations omitted); *Panda Brandywine Corp. v. Potomoc Elec. Power Co.*, 253 F.3d 865 (5th Cir. 2001) ("the key to Calder is that the effects of an alleged intentional tort are to be assessed as *part* of the analysis of the defendant's relevant contacts with the forum") (emphasis in original; internal citations and quotations omitted).

A tort, whether intentional or negligent, involves a violation of a legal duty, imposed by statute, contract or otherwise, owed by the defendant to the person injured. *See Coleman v. California Yearly Meeting of F. Church*, 27 Cal.App.2d 579, 582 (1938). (Calder effects test "can be satisfied [where] the defendant expressly aimed its tortious conduct at the forum, and thereby made the forum the *focal point* of the tortious activity.") (Emphasis added.) *See also Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 780 (1980) (jurisdictional inquiry "focuses on the relations among the defendant and the forum.

3. The Uniform Federal Standard for Piercing the Corporate Veil, Which Is Consistent With International Law Applies

In determining the issue of piercing the veil of the corporations involved, the district court erred in looking to the law of the jurisdiction of incorporation, Virginia and then further used Canadian choice-of-law rules to settle upon, for different issues. The Supreme Court has instructed that state laws are "unsatisfactory vehicles for the enforcement of federal law when Congress has not

"directly or impliedly direct[ed] courts" to apply it. The general rule adopted in federal cases is that "a corporate entity may be disregarded in the interests of public convenience, fairness and equity," [citing to Capital Telephone Co. v. FCC, 498 F.2d 734, 738 (D.C.Cir.1974). In applying this rule, federal courts will look closely at the purpose of the federal statute to determine whether the statute places importance on the corporate form [citations omitted], an inquiry that usually gives less respect to the corporate form than does the strict common law alter ego doctrine...."[emphasis added]. The district court should have applied the uniform federal standard for veil-piercing, *see Anderson*, 321 U.S. at 365, which is consistent with international law. Federal law is "not bound by the strict standards of the common law alter ego doctrine." *Bhd. of Locomotive Eng'rs v. Springfield Terminal Ry.*, 210 F.3d 18, 26 (1st Cir. 2000). "Nor is there any litmus test." *Id.* Instead, "a corporate entity may be disregarded in the interests of public convenience, fairness and equity." *Id.* In *FNCB*, the Supreme Court held that federal law recognizes a "broad equitable principle that the doctrine of corporate entity, recognized generally and for most purposes, will not be regarded when to do so would work fraud or injustice.'" 462 U.S. at 629 (internal quotation marks omitted). "In particular, the Court has consistently refused to give effect to the corporate form where it is interposed to defeat legislative policies." *Id.* at 629–30.

The Court also found the same principles in international law, noting that they have been adopted by "courts in the United States and abroad," *id.* at 628 (footnote omitted), and citing to a decision of the International Court of Justice holding that the notion of "lifting the corporate veil" is appropriate "to prevent the misuse of the privileges of legal personality . . . to protect third persons . . . or to prevent the evasion of legal requirements or of obligations.'" *Id.* at 628 n.20 (quoting *The Barcelona Traction, Light & Power Co. (Belg. v. Spain),* 1970 I.C.J. 3, 38–39 (Judgment of Feb. 5, 1970)).

As the Supreme Court held in *Sosa*, the ATS "was enacted on the congressional understanding that courts would exercise jurisdiction by entertaining some common law claims derived from the law of nations," 542 U.S. at 731 n.19, and, as Justice Breyer noted, those claims include "torture, genocide, crimes against humanity, and war crimes." *Id.* at 762 (Breyer, J., concurring). Under the federal veil-piercing test, courts refuse to give effect to the corporate form where it will defeat legislative purposes, *FNCB*, 462 U.S. at 629–30, irrespective of whether defeating a legislative policy was the reason for incorporation. *Anderson*, 321U.S. at 363. Thus, under federal law, the corporate veil may be lifted in this case where it presents a barrier to the enforcement of international law. In ATS and TVPA cases, federal courts should disregard corporate separateness where it would

result in injustice or defeat the policy of enforcing key norms of international law, including the fundamental human rights at issue in this case.

(a) Uniform federal rules of agency allow a principal to be held liable for the acts of its agent, regardless of corporate structure.

Ultimately, the district court did not engage in any substantive agency analysis. "It is well established that traditional vicarious liability rules ordinarily make principals or employers vicariously liable for acts of their agents or employees in the scope of their authority or employment." *Meyer*, 537 U.S. at 285; *see also* Restatement (Second) of Agency [hereinafter "Restatement"] § 219. The principal may be liable for the agent's torts even though the agent's conduct is unauthorized, as long as it is within the scope of the relationship. Restatement § 216; *see id.* §§ 228–236; *see, e.g.*, *Cantrell v. Forest City Publ'g Co.*, 419 U.S. 245, 253 (1974). A number of factors may be considered in determining whether one actor is the servant of another, *see* Restatement § 220, but the primary question is whether the principal has "'the right to control'" the agent. *Clackamas Gastroenterology Assocs., P.C., v. Wells*, 538 U.S. 440, 448 (2003) (quoting Restatement §§ 2, 220). Liability for an agency relationship is not precluded by the fact that the principal and agent may be related corporations, or a parent and a subsidiary. *See* Restatement § 14M reporters note (distinguishing "situations in which liability is imposed on a parent because of the existence of the agency relation, in our common-law understanding of that relation, from cases in which

the corporate veil of the subsidiary is pierced"). Under "[c]ommon law agency principles," a principal is also "liable if it ratifie[s] the illegal acts" of the agent. *Phelan v. Local 305, United Ass'n of Journeymen*, 973 F.2d 1050, 1062 (2d Cir. 1992); *see also Bowoto*, 312 F. Supp. 2d at 1247–48. A principal may be responsible for an unauthorized act of another that was done or purportedly done on the principal's behalf, where the subsequent conduct of the principal establishes an agency relationship as if it had been authorized from the start. *Daynard v. Ness, Motley, Loadholt, Richardson & Poole, P.A.*, 290 F.3d 42, 59 (1st Cir. 2002) (citing Restatement § 82). "Ratification occurs when the principal, having knowledge of the material facts involved in a transaction, evidences an intention to ratify it." *Phelan*, 973 F.2d at 1062 (internal punctuation omitted). An intent to ratify a transaction may be inferred, for example, from "a failure to repudiate" an "unauthorized transaction," Restatement § 94, or from "acceptance by the principal of benefits of an agent's acts, with full knowledge of the facts." *Monarch Ins. Co. v. Ins. Corp. of Ir., Ltd.*, 835 F.2d 32, 36 (2d Cir. 1987). In the same vein, a principal who defends or covers up the misconduct of an alleged agent embraces that conduct as his own and, thus, ratifies the misconduct. *Seymour v. Summa Vista Cinema, Inc.*, 809 F.2d 1385, 1388 (9th Cir. 1987). This case is distinguishable because of the tortious acts and "substantial connection" with the forum. *See*

Ziegler v. Indian River County, 64 F.3d 470 (9th Cir. 1995) (defendant accused of unlawful conspiracy to have plaintiff arrested.

CONCLUSION

For all the reasons stated here in and his opening brief, the case should be reversed and remanded back to the District Court.

Dated: January 29, 2015

By: *s/*Melvin J. Howard

*s/*Melvin J. Howard

CERTIFICATE OF COMPLIANCE

I, Melvin J. Howard, hereby certify pursuant to Ninth Circuit Rule 32-1 that the foregoing brief is printed in proportionally spaced Times New Roman typeface with a point size of 14, and contains 4,062 words.

Dated: January 29, 2015

By: *s/*Melvin J. Howard

*s/*Melvin J. Howard

CERTIFICATE OF SERVICE

I, Melvin J. Howard hereby certify that on January 29, 2015, I electronically filed the foregoing with the Clerk of the court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. All participants in the case are registered CM/ECF users will be served by the appellate CM/ECF system. I declare under penalty of perjury under the laws of the State of Oregon that the foregoing is true and correct. Executed at Portland, Oregon on January 29, 2015.

*s/*Melvin J. Howard

*s/*Melvin J. Howard