

17-424-cv

IN THE
**United States Court of Appeals
for the Second Circuit**

ESTHER KIOBEL, BY HER ATTORNEY-IN-FACT CHANNA SAMKALDEN,
Petitioner-Appellee,

v.

CRAVATH, SWAINE & MOORE, LLP
Respondent-Appellant.

Appeal from the United States District Court for the
Southern District of New York

**RESPONDENT-APPELLANT'S OPPOSITION TO
PETITIONER-APPELLEE'S MOTION TO EXPEDITE**

Lauren A. Moskowitz
CRAVATH, SWAINE & MOORE LLP
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019

Neal Kumar Katyal
Jessica L. Ellsworth
Eugene A. Sokoloff
HOGAN LOVELLS US LLP
555 13th Street, N.W.
Washington, D.C. 20004

Attorneys for Respondent-Appellant Cravath, Swaine & Moore LLP

Esther Kiobel (“Kiobel”) asks this Court to force Cravath, Swaine & Moore LLP (“Cravath”) into a rush job in an appeal presenting important questions of first impression. Kiobel’s proposed briefing schedule—which would have Cravath’s brief due in *seven* days—is patently unreasonable, would prejudice Cravath’s right to appellate review, and is unnecessary to avoid prejudice to Kiobel’s interests. Cravath is absolutely fine utilizing the ordinary expedited review process set out in the rules of this Court, and it has already demonstrated its willingness to move quickly in the course of briefing its successful motion for a stay before the District Court. Cravath therefore asks this Court to deny Kiobel’s motion and transfer the instant appeal to the Expedited Appeals Calendar on the briefing schedule provided under Local Rule 32.1(b)(3), instead.

BACKGROUND

Esther Kiobel (“Kiobel”) filed a petition under 28 U.S.C. § 1782 seeking leave to issue subpoenas to Cravath that would require the law firm to produce documents that it had previously gathered from, and produced on behalf of certain predecessors and non-U.S. affiliates of its client, Royal Dutch Shell (“Shell”) in litigation Kiobel filed against Shell in 2002. The documents from that long-dismissed earlier action were produced under, and governed by, a confidentiality agreement. Kiobel alleges that she seeks to have Cravath re-produce the documents so that she can use them to pursue claims against Shell in the

Netherlands, where Shell is based. The District Court (Hellerstein, J.) granted the petition on January 24, 2017 and Cravath filed a timely notice of appeal. By an order dated March 2, 2017, the District Court stayed its order pending resolution of the appeal.

Kiobel's suit against Shell in 2002 alleged Shell's involvement in torts committed in Nigeria against Nigerians by the Nigerian military and invoked the jurisdiction of the U.S. District Court for the Southern District of New York under the Alien Tort Statute, 28 U.S.C. § 1350. *See Kiobel v. Royal Dutch Petroleum Co.*, No. 02 Civ. 7618 (S.D.N.Y.). The district court dismissed Kiobel's claims in part and this Court dismissed them in their entirety. *See Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010). The U.S. Supreme Court affirmed on the ground that the district court lacked subject-matter jurisdiction over Kiobel's claims. *See Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669 (2013).

While Kiobel's action was pending, however, she obtained substantial discovery from Shell and related entities. Cravath, as Shell's counsel, collected and produced these materials to Kiobel subject to stipulated confidentiality orders. Among other things, these confidentiality orders barred Kiobel from using most of the discovery materials in any other litigation.

Six years after the Second Circuit dismissed her original action, and three and a half years after the Supreme Court held that the district court never had

jurisdiction over her claims in the first place, Kiobel alleged that she intended to sue Shell in a Dutch court and invoked the District Court's authority under 28 U.S.C. § 1782 to obtain the materials collected by Cravath.

The District Court granted Kiobel's petition. The District Court ordered Kiobel to serve Cravath with a subpoena by January 27 and ordered Cravath to produce all responsive documents by February 27. On February 13, Cravath filed a notice of appeal and moved for a stay of the District Court's decision, which Kiobel opposed. The District Court stayed the deadline for production pending its decision on the stay motion and ten days thereafter.

On March 2, 2017, the District Court granted Cravath's motion for a stay pending appeal. Order Granting Stay Pending Appeal, *In re Petition of Esther Kiobel*, 16 Civ. 7992 (AKH), Doc. 29 ("Stay Order"). The court recognized that "absent a stay, Cravath will be denied a meaningful opportunity to appeal" the order granting Kiobel's petition. Stay Order 1. Although Kiobel has never identified any impending deadline, statute of limitation, or other concrete basis for her purported fear of prejudice, the District Court found "Kiobel's concern that further delay may prejudice her ability to bring an action" in a Dutch court "plausible." *Id.* Accordingly, the District Court directed Cravath to "pursue its appeal expeditiously" and urged the parties to "agree to an expedited briefing schedule and request that the Court of Appeals consider the appeal on an expedited

basis.” *Id.* at 1-2. The District Court did not specify any particular schedule or limit the duration of the stay. The parties have not been able to agree on a briefing schedule.

REASONS FOR GRANTING THE REQUESTED RELIEF

Cravath asks this Court to assign this appeal to the Court’s Expedited Appeals Calendar (“XAC”) and to set a briefing schedule in accordance with Local Rule 32.1(b)(3) to run from the entry of the order calendaring the appeal. That schedule would dramatically expedite the appeal, while making reasonable accommodations for the importance and complexity of the issues presented and the pressing demands on Cravath’s new counsel. Instead of the appeal being briefed over up to 194 days, the case would be fully briefed in less than half that time: Cravath’s brief would be due 35 days from the Order placing this appeal on the XAC, followed by Kiobel’s brief 35 days later (or earlier, if her counsel chose to file early), with the reply brief 14 days after that.

Placing this case on the XAC would allow Cravath the time necessary to properly present the important issues in this case for this Court’s consideration, while avoiding undue prejudice to Kiobel.

A. Cravath’s Proposed Schedule Fairly Balances The Parties’ Rights.

This is no routine discovery dispute. This appeal implicates two questions of first impression for this Court: (1) whether Section 1782’s requirement that the

respondent “resides or is found in the district” can be satisfied where a petitioner seeks a foreign entity’s documents from local counsel and where the foreign entity is not itself “found” in the district, and (2) whether Section 1782 reaches documents in the district solely because the local counsel collected them from the foreign entity for the purpose of responding to discovery requests in prior litigation. The answer to these and other questions presented by this case will affect the willingness of European courts to cooperate with American discovery requests, the ability of parties to exercise continuing control over confidential materials produced in litigation, and the ability of law firms in this Circuit to serve their foreign clients. Briefing these important issues will take time.

Kiobel insists that this appeal is simple because the parties briefed these issues below and the District Court agreed with her. Kiobel Mot. 1-2. If that were a reason to rush the appeal, this Court’s rules would presumably not permit the parties up to 91 days to file principal briefs. *See* Local Rule 32.1(a). After all, every single appellant who comes before this Court with unwaived arguments has by definition briefed those arguments before and lost. That is the point of an appeal; it is not a basis for giving Kiobel special treatment.

Nor is there any merit to Kiobel’s suggestion that the XAC is meant for “much more legally-complex [*sic*] appeals.” Kiobel Mot. 3. Indeed, this Court just recently applied the XAC schedule to another appeal from an order granting a

petition under Section 1782. *See* Order, *In re Accent Delight Int'l*, No. 16-3655 (2d Cir. Dec. 15, 2016), Doc. 75. While this Court granted a shorter schedule in *In re: Application of Chevron*, No. 10-1918, it did so at the *appellant's* request and under a very different set of facts. *See* Doc. 187 (2d Cir. June 8, 2010).

B. Kiobel Can Identify No Prejudice From The Schedule Cravath Seeks.

There is no basis in the record for briefing this appeal more expeditiously and Kiobel has identified none in her motion papers. Kiobel has never pointed to a statute of limitations or any other impending deadline that would require rushing through the briefing. And Cravath has undertaken to preserve all of the materials in its possession. There is no rush here, and certainly nothing that would justify whatever marginal savings in time would accrue to Kiobel at Cravath's expense if this appeal proceeds on a faster timeline than the Court's standard expedited appeals schedule.

Although the District Court found "credible" Kiobel's generalized concerns that she would be that she would be prejudiced by delay, the District Court pointedly did not limit the duration of its stay or require the parties to seek a particular schedule. Stay Order 1. Rather, the Stay Order directs the parties to seek an "expedited briefing schedule and request that the Court of Appeals consider the appeal on an expedited basis." *Id.* at 1-2. That is precisely what placing this appeal on the XAC would accomplish. And there is no reason to think

that the District Court, which is undoubtedly well aware of this Court's local rules concerning expedited and ordinary appeals, would have seen the schedule provided under Local Rule 32.1(b)(3) as unduly burdensome. Indeed, that is almost certainly what the Stay Order had in mind, and there is no indication whatsoever in the Order to the contrary. This Court's Expedited Appeals Calendar is more than adequate to protect whatever interests Kiobel may have without depriving this Court of proper briefing.

C. Kiobel's Proposal Is Unnecessary, Highly Prejudicial To Cravath, And A Disservice To This Court.

Kiobel's insistence that Cravath file its opening brief *seven days* from today is particularly egregious in light of the significant demands on Cravath's counsel. As Kiobel is aware, Cravath recently engaged Neal Kumar Katyal of Hogan Lovells US LLP to handle this and any further appellate proceedings. Mr. Katyal faces extraordinary demands on his time in the coming weeks, including in the very time period Kiobel proposes:

- **March 9:** Opening brief filed for the State of Hawaii in the U.S. District Court for the District of Hawaii on an emergency motion to temporarily restrain enforcement of the Executive Order signed by the President on March 6, 2017, "Protecting the Nation From Foreign Terrorist Entry into the United States." *State of Hawaii v. Trump*, No. 17-00050.
- **March 14:** Reply brief in *State of Hawaii v. Trump*, No. 17-00050.
- **March 15:** Oral argument as lead counsel for the State of Hawaii in *State of Hawaii v. Trump*, No. 17-00050.

- **March 17:** Oral argument as lead counsel for Plaintiffs in the U.S. Court of Appeals for the District of Columbia Circuit in an appeal concerning the scope of the copyright act. *Fox Television Stations, Inc., et al v. FilmOn TV Networks Inc., et al*, No. 16-07013.
- **April 10:** Reply brief due in the U.S. Supreme Court in an appeal from this Court concerning intervenor standing. *Town of Chester v. Laroe Estates*, No. 16-605.
- **April 17:** Oral argument as lead counsel in the U.S. Supreme Court in *Town of Chester v. Laroe Estates*, No. 16-605.
- **April 18:** Reply brief due in the U.S. Supreme Court in a case concerning the scope of specific personal jurisdiction. *Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco County*, No. 16-466.
- **April 25:** Oral argument as lead counsel in the U.S. Supreme Court in *Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco County*, No. 16-466.

Kiobel suggests that Mr. Katyal's other commitments are irrelevant because Cravath "should have begun working on its appeal papers" once the District Court granted her petition. Kiobel Mot. 5; *see id.* at 6. Nonsense. Cravath was entitled to take the time allowed by this Court's rules and the District Court's orders to file a notice of appeal and seek a stay from the District Court. Indeed, the District Court *sua sponte* stayed the order granting Kiobel's petition while it considered Cravath's motion and for 10 days thereafter. *See Order Staying Respondent's Obligation to Produce Documents Pending Resolution of Respondent's Motion to Stay, In re Petition of Esther Kiobel*, 16 Civ. 7992 (AKH), Doc. 26. And the

District Court gave Cravath until March 6 to file its reply to Kiobel's opposition. In other words, it is only because Cravath agreed to proceed expeditiously in the District Court that the question of appellate briefing schedules is even ripe.

This Court should not permit Kiobel's amorphous "concerns" that she might be prejudiced by waiting a few weeks to force Cravath into the untenable position of preparing this appeal at breakneck speed—all the more so given that Kiobel has waited *years* to seek Section 1782 discovery since her original claims were finally dismissed. The briefing schedule provided by Local Rule 32.1(b)(3) would vindicate Cravath's right to proceed using the counsel of its choice and to fully and fairly litigate this important appeal.

CONCLUSION

For the foregoing reasons, the motion should be granted and the case assigned to the Court's Expedited Appeals Calendar with a briefing schedule in accordance with Local Rule 32.1(b)(3) to run from the entry of an order granting this motion.

Respectfully submitted,

/s/ Neal Kumar Katyal

Neal Kumar Katyal
Jessica L. Ellsworth
Eugene A. Sokoloff
HOGAN LOVELLS US LLP
555 13th Street, N.W.
Washington, D.C. 20004
(202) 637-5600
neal.katyal@hoganlovells.com

Lauren A. Moskowitz
CRAVATH, SWAINE & MOORE LLP
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019
(212) 474-1000

*Attorneys for Respondent-Appellant
Cravath, Swaine & Moore LLP*

CERTIFICATE OF SERVICE

I certify that the foregoing motion was filed with the Clerk using the appellate CM/ECF system on March 9, 2017. All counsel of record are registered CM/ECF users, and service will be accomplished by the CM/ECF system. I further certify that I caused six paper copies of the motion to be delivered to the Court.

/s/ Neal Kumar Katyal