IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

IN RE PETITION OF ESTHER KIOBEL, *Petitioner,* For an Order Granting Leave to Issue Subpoenas to Cravath, Swaine & Moore LLP for Production of Documents Pursuant to 28 U.S.C. § 1782	Civil Action No. 1:16-cv-07992

MEMORANDUM OF LAW IN OPPOSITION TO CRAVATH, SWAINE & MOORE LLP'S MOTION TO STAY THE COURT'S ORDER GRANTING PETITIONER ESTHER KIOBEL LEAVE TO ISSUE A SUBPOENA PURSUANT TO 28 U.S.C. § 1782

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INTRODUCTION

Respondent Cravath, Swaine & Moore LLP ("Cravath") has never suggested that producing the documents requested by Petitioner Esther Kiobel is actually burdensome. Instead, its concern is its belief that law firms should not be subject to Section 1782 discovery, and that this will harm its practice in the long run. Each of these concerns can be vindicated on appeal without a stay; neither provides a basis for suspending its obligation to produce the documents at issue pending appeal.

This is especially so because the Petitioner needs to move forward with her action in the Netherlands as soon as practicable. Further delay risks strengthening arguments that Shell may ultimately raise regarding the timeliness of the Dutch action. There is no reason to do so, when it is so easy for Cravath to produce the documents.

Cravath will not suffer any irreparable harm if the documents are produced. The harms it claims are the harms of the *legal principle* of ordering discovery, not any harm flowing from the production of *these* documents. It is this Court's (and the Second Circuit's) legal holdings, not the actual production, that is the source of any "chilling effect" Cravath claims. While that effect is not plausible to begin with – the idea that foreign clients would not retain U.S. counsel to defend U.S. litigation out of a concern that documents might be subject to U.S. discovery in the future is fanciful – it is beside the point. Assuming Cravath is correct and wins its appeal, its claimed harm will be fully cured.

But Cravath will not win its appeal, or at least is not likely to. Its arguments against the satisfaction of the statutory factors under 28 U.S.C. § 1782 are not issues of "first impression," they are flatly inconsistent with the text of the statute and controlling caselaw: Cravath is present in New York, and Petitioner has done far more than enough to show that the documents are "for use" in Dutch litigation. Cravath's other arguments are directed toward the discretionary factors under *Intel Corp. v. Advanced Micro Devices*, 542 U.S. 241 (2004), but demonstrating a likelihood of success on an

abuse-of-discretion standard is a tall order. The Second Circuit has *never* reversed a grant of discovery under Section 1782 for abuse of discretion; the only reversals have occurred where the Court of Appeals has found that the statutory factors have not been met.

Petitioner respectfully requests that this matter be resolved quickly, so that the Dutch litigation may proceed.[1]

ARGUMENT

I. Respondents in Section 1782 actions rarely meet their "heavy burden" for a stay.

Cravath correctly sets out the factors governing a stay pending appeal, as articulated by the Supreme Court in *Nken v. Holder*, 556 U.S. 418 (2009): "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Id.* at 434 (2009) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)). But while Cravath argues that stays of discovery under 28 U.S.C. § 1782 are "routinely granted" by the Second Circuit, Dkt. 24 at 2, in fact the burden on Cravath to obtain a stay pending appeal is heavy. "Although the weighing of these factors is flexible and within the Court's discretion, the movant's 'burden of establishing a favorable balance of these factors is a heavy one and more commonly stay requests will be denied.'" *Optimum Shipping & Trading v. Prestige Marine Servs. Pte.*, 613 F. Supp. 2d 502, 503 (S.D.N.Y. 2009) (quoting *SEC v. Finazzo*, No. M18-304, 2008 WL 1721517, at *2 (S.D.N.Y. Apr. 11, 2008)); *see also NRDC v. United States FDA*, 884 F. Supp. 2d 108, 122 (S.D.N.Y. 2012); R. Miller & Mary Kay Kane, Federal Practice & Procedure § 2904, at 503-05 (2d ed. 1995) (footnotes omitted) ("Because the burden of meeting this standard is a heavy one, more commonly stay requests will not meet this standard and will be

[1] Although the Court has ordered a longer briefing schedule, Cravath has agreed to submit its reply brief within one week of this Opposition. *See* Declaration of Marco Simons ¶ 3.

denied.").

Indeed, "[a] stay is not a matter of right, even if irreparable injury might otherwise result." *Nken*, 556 U.S. at 433. Although an order granting discovery under Section 1782 is immediately appealable, *see, e.g.*, *Chevron Corp. v. Berlinger*, 629 F.3d 297, 306 (2d Cir. 2011), motions to stay discovery pending appeal in 28 U.S.C. § 1782 petitions are in fact, routinely denied. *See, e.g., In re Procter & Gamble Co.*, 334 F. Supp. 2d 1112, 1117-18 (E.D. Wis. 2004) (denying request to stay Section 1782 discovery pending appeal—in part holding that the appeal would be unlikely to succeed on the merits because the district court's order would be reviewed for abuse of discretion, and further citing to authority suggesting that the burden of meeting a standard to grant a stay is heavy, and will more commonly not be met); *In re ROZ Trading Ltd.*, No. 1:06-cv-02305, 2007 U.S. Dist. LEXIS 2112, 2007 WL 120844 (N.D. Ga. Jan. 11, 2007) (denying an emergency motion for stay of production pending appeal in a Section 1782 action); *In re Gushlak*, No. 11-MC-218, 2012 U.S. Dist. LEXIS 60342, *8-14 (E.D.N.Y. Apr. 30, 2012) (supporting a magistrate judge's recommendation and denying a request for a stay pending appeal in a Section 1782 action); *see also Republic of Ecuador v. Bjorkman*, No. 11-cv-01470, 2012 U.S. Dist. LEXIS 171087 (D. Colo. Nov. 30, 2012); *In re Letters Rogatory from Tokyo Dist.*, 539 F.2d 1216 (9th Cir. 1976).

While Cravath cites two cases in which the Second Circuit did grant a stay, neither counsels in favor of a stay here. The cursory order in *In re Accent Delight International*, No. 16-3655 (2d Cir. 2016), gives no analysis or guidance. As to the other case – *In re Application of Chevron Corp.*, No. 10-1918 (2d Cir. 2010) – it dealt with serious questions of journalists' privileges. *See generally Chevron Corp. v. Berlinger*, 629 F.3d at 306-10. Neither case involved circumstances such as this, where actual compliance with the discovery order would be trivially easy for Cravath to accomplish and would cause no injury.

II. Cravath does not meet the standard for a stay pending appeal.

In *Nken*, the Supreme Court clarified that "[t]he first two factors of the traditional standard" – a strong showing of likelihood of success on the merits, and irreparable injury – "are the most critical." *Id.* Indeed, if Cravath does not satisfy these two factors, there is no need to consider the remaining factors: it is only *after* "an applicant satisfies the first two factors [that] the traditional stay inquiry calls for assessing the harm to the opposing party and weighing the public interest." *Id.* at 435. And "the Supreme Court has recently emphasized that the applicant must demonstrate that both factors are satisfied, so that even if a party makes a robust showing that it is likely to succeed on appeal, it still must also show that 'irreparable injury is likely.'" *NRDC*, 884 F. Supp. 2d at 122 (quoting *Winter v. Natural Resources Defense Council*, 555 U.S. 7, 22 (2008)).

Here, there is no need to even consider the final two factors, because Cravath has failed to satisfy the first two. Cravath is extremely unlikely to prevail in its appeal because the statutory factors for Section 1782 discovery are plainly met, and Cravath will suffer no harm by producing the documents at issue.

A. Cravath is not likely to succeed on the merits of its appeal.

Cravath outlines four reasons that it suggests demonstrate that this Court's Order will be overturned on appeal. None of them is persuasive, and all of them have already been rejected by this Court. Cravath "does not show a likelihood of success . . . by simply repeating its earlier arguments, which the Court previously considered." *In re ROZ Trading Ltd.*, 2007 U.S. Dist. LEXIS 2112 at *4.

Cravath attacks both this Court's findings on the statutory requirements of Section 1782, as well as the discretionary factors under *Intel*. On appeal, this Court's treatment of the *Intel* factors and ultimate decision on the petition will be subject to review for abuse of this discretion. *Schmitz v. Bernstein Liebhard & Lifshitz LLP*, 376 F.3d 79, 85 (2d Cir. 2004). Absent an error of law or fact, this Court will be found to have abused its discretion "only if there was no reasonable basis for [its]

decision," *Lancaster Factoring Co. v. Mangone*, 90 F.3d 38, 42 (2d Cir. 1996), such that the ruling "cannot be located within the range of permissible decisions." *Scott v. City of New York*, 626 F.3d 130, 132 (2d Cir. 2010) (quoting *McDaniel v. County of Schenectady*, 595 F.3d 411, 416 (2d Cir. 2010)). Indeed, if this Court court properly applied the law, then the appellate court's review of the lower decision will be "extremely limited and highly deferential." *United Kingdom v. United States*, 238 F.3d 1312, 1319 (11th Cir. 2001). Moreover, while this Court's legal analysis will be reviewed *de novo* on appeal, its factual findings will not be disturbed absent "clear error." *E.g.*, *Process Am., Inc. v. Cynergy Holdings, LLC*, 839 F.3d 125, 141 (2d Cir. 2016). The Second Circuit will not "second guess a district court's choice between permissible inferences to be drawn from the evidence." *Krizek v. CIGNA Group Ins.*, 345 F.3d 91, 100 (2d Cir. 2003).

Cravath does not discuss the standards of review that will apply to its appeal, instead arguing that this case involves supposed "issues of first impression" and purported conflicts with Second Circuit caselaw. Nonsense. Cravath's arguments are unsupported by caselaw and in conflict with the plain text of the statute.

1. Cravath is found in this District.

First, Cravath argues that the question of "whether Section 1782's requirements are satisfied where a law firm is ordered to produce documents that belong to its foreign client because of its location within the district, even though the client has no other connection to the district" is one of "first impression." Dkt. 24 at 10. Cravath's argument, which was rejected by this Court and which Cravath has repeatedly lost, is supported by literally no caselaw whatsoever.

Cravath cannot manufacture an "issue of first impression" by simply arguing in the face of the plain text of Section 1782: Petitioner seeks discovery from Cravath, which is unquestionably found in New York. Cravath does not even bother to offer any statutory construction argument that could lead any court to conclude that Section 1782's language supports its position. That section

begins: "The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document . . . ." 28 U.S.C. § 1782(a). Cravath is a legal person, found in New York, being ordered to give documents.

As Cravath admits, it squarely lost this argument in *In re Application of Schmitz*, 259 F. Supp. 2d 294, 296 (S.D.N.Y. 2003), but claims that the Second Circuit left the question open in the appeal. Dkt. 24 at 10. That is a strained interpretation. The Second Circuit's decision centers on whether the district court properly exercised its discretion in denying discovery, but it would have had no reason to even consider that issue if the statutory factors had not been met. *Schmitz*, 376 F.3d at 83-84. Indeed, the Court of Appeals considered Cravath's argument that it was not the real target, but only in the context of the discretionary factors – it clearly noted that "the respondent in the district court was Cravath." *Id.* at 85. Other district court cases also reject Cravath's position. *See, e.g.*, *In re Mare Shipping*, No. 13 Misc. 238, 2013 U.S. Dist. LEXIS 152337 at *7 (S.D.N.Y. Oct. 23, 2013).

The only case that Cravath cites in its favor demonstrates the weakness of its argument. *See In re Bank of Cyprus Public Co. Ltd.*, No. 10 Misc. 23, 2011 U.S. Dist. LEXIS 6082 (S.D.N.Y. Jan. 21, 2011). Cravath claims that the court denied discovery because the applicant did not meet the statutory factor that the respondent was found in the district, Dkt. 24 at 10-11, but that is simply not true. In *Bank of Cyprus*, the applicant had filed *two* Section 1782 applications: one seeking discovery from a court-appointed bankruptcy trustee in New Jersey (appointed by the District of New Jersey), and another seeking discovery from the trustee's counsel in New York. *Id.*, 2011 U.S. Dist. LEXIS 6082 at *1-4. Judge Keenan, considering the New York application, did not deny discovery based on a failure to satisfy the first statutory factor; indeed he ruled, "On its face, it appears that the statutory requirements are met." *Id.* at *6. Instead, he considered the "overlap" between the two actions. He denied the application to avoid the risk of "inconsistent rulings or a ruling here which the prevailing party could attempt to leverage into a favorable decision from the New Jersey court," and only after

the law firm stipulated that it would "produce documents in its possession, custody, or control requested in the S.D.N.Y. application in response to the § 1782 application granted by the New Jersey court." *Id.* at *7.[2] Nothing in this decision suggests that the statutory factors are not met where the respondent possesses documents that ultimately came from someone else.

2. The purpose for the presence of the documents is irrelevant.

Cravath also claims that it is a "matter of first impression" whether Section 1782 discovery is appropriate for documents that "are in the district only for purposes of prior litigation." Dkt. 24 at 11. This seems merely to be a repackaging of its first argument. Again, Cravath offers no basis for an exception to the clear statutory language of Section 1782, and no caselaw suggesting that it matters *why* documents are present in the district. Again, this argument was squarely rejected by the court in *In re Schmitz*, 259 F. Supp. 2d at 296 ("Application of section 1782 does not involve an analysis of the duration of residency of the documents or even why a respondent has the documents."); *see also In re Mare Shipping*, 2013 U.S. Dist. LEXIS 152337 at *8.

While the Second Circuit noted in passing in *Schmitz* that "whether § 1782 applies to documents only temporarily present in the jurisdiction for the purpose of discovery in another case" might be a "difficult question," 376 F.3d at 85, that is not the situation here. The documents at issue have been present in this jurisdiction for approximately 15 years. Moreover, many if not most of them are likely present nowhere else. The real question here is whether a party can insulate its documents from discovery by giving them to its lawyers, presumably destroying its own copies, and

[2] Indeed, Judge Keenan never once implied that it was improper for the petitioning bank to seek discovery from the New York law firm in addition to the New Jersey firm's client trustees. 2011 U.S. Dist. LEXIS 6082 at *8. And the court could not have reasonably so, since the law firm and the trustees each possessed documents or other evidence that the other did not. *Id.* at *4. In fact, recognizing that many of the documents in the New York law firm's possession would be outside the jurisdictional reach of the New Jersey district court, the parties agreed to the petitioner's term that the law firm would hand over its clients' documents if the petitioner prevailed in the New Jersey action. *Id* at *7.

then have its lawyers argue that discovery from them is inappropriate. That is exactly what the Second Circuit rejected in *Ratliff v. Davis Polk & Wardwell*, 354 F.3d 165, 170 (2d Cir. 2003).

3. The Second Circuit will not disturb this Court's exercise of discretion.

Cravath's third argument is directed squarely at an admittedly discretionary determination: whether a court may, "as a matter of discretion under the *Intel* factors, order Section 1782 discovery against a foreign entity through its U.S. counsel where that entity is or will be a party to the foreign proceeding at issue." Dkt. 24 at 11. This is of course a mischaracterization of this proceeding; the Court did not order "discovery against a foreign entity through its U.S. counsel," it ordered discovery from Cravath, which happens to hold documents obtained from a variety of sources in several countries, some of which are expected to be defendants in the Dutch litigation.

Again, this issue was thoroughly litigated already. Cravath fails even to address the Court's Order, which discussed "several reasons why the discovery may not be obtainable 'absent § 1782 aid.'" Dkt. 21 at 9. Instead, Cravath cites three cases that deal with different factual scenarios – in which the documents were either privileged, *see In re Application Pursuant to 28 U.S.C. § 1782 of Okean B.V. & Logistic Sol. Int'l to Take Discovery of Chadbourne & Parke LLP*, 60 F. Supp. 3d 419 (S.D.N.Y. 2014), or where the documents were undisputedly within the possession or control of a current party to the foreign proceeding, *see Mare Shipping*, 2013 U.S. Dist. LEXIS 152337 at *11-12; *Schmitz*, 376 F.3d at 85.

Given that this is a matter of discretion, even if the district court's decision were in conflict with decisions in other cases, Cravath's likelihood of success would still be quite low. *See In re Procter & Gamble Co.*, 334 F. Supp. 2d at 1117-18 (denying motion to stay in part after finding because the court's decision to grant the § 1782 petition would be reviewed for an abuse of discretion, it was "unlikely" that the movant would succeed on the merits of its appeal). Indeed, Cravath fails to cite –

and Petitioner has not located – a single case where the Second Circuit reversed a district court's discretionary grant of Section 1782 discovery.

4. There is no serious argument that the documents are not "for use" in the Dutch litigation, and the Second Circuit will not disturb this factual finding.

Cravath reiterates its previously unsuccessful argument that the Petitioner "cannot meet Section 1782's statutory requirement that the discovery is 'for use' in a foreign proceeding that is 'within reasonable contemplation.'" Dkt. 24 at 12 (quoting *Intel*, 542 U.S. at 247). This is directly in tension with Cravath's claim elsewhere in its brief that it will suffer injury because "Petitioner may use the documents in Dutch court immediately." Dkt. 24 at 4. More importantly, however, Cravath is assigning error to the Court's factual findings, not its legal analysis. On the deferential standard of review granted to district court findings of fact, there is little likelihood that the Second Circuit will disturb this Court's findings that Petitioner "provided objective indicia demonstrating that the Dutch proceeding is within reasonable contemplation." Dkt. 21 at 6.

As noted above, this Court's factual findings will not be disturbed absent clear error – and that includes its acceptance of the indicia of the contemplated filing of the Dutch lawsuit. So while Cravath suggests that it does not believe the facts found by this Court – "counsel *claims* to have drafted a Dutch writ of summons and procured Dutch legal aid," Dkt. 24 at 12 (emphasis added) – the Court of Appeals undoubtedly will credit this Court's findings.

Cravath relies only on *Certain Funds, Accounts and/or Inv. Vehicles v. KPMG LLP*, 798 F.3d 113 (2d Cir. 2015), but its own characterization of that case undermines its argument. While *Certain Funds* observed that a "substantial length of time" had passed between the underlying events of the case and the § 1782 petition, Cravath admits that there, "the petitioner had done no more than retain counsel to assess the possibility of bringing claims." Dkt. 24 at 12. The facts found by this Court go far beyond those at issue in *Certain Funds*. Moreover, in *Certain Funds*, the district court had

determined "that the anticipated proceedings were not within reasonable contemplation," and the Second Circuit simply declined to "say that the district court erred" in that determination. 798 F.3d at 124. Nothing in that decision suggests that the Second Circuit would disturb this Court's findings.

B. Cravath will suffer no harm, let alone irreparable injury.

Even if Cravath had established a likelihood of prevailing on appeal, its motion must still be denied because it has shown no irreparable injury. Cravath must do more than "simply show some 'possibility of irreparable injury.'" *Nken*, 556 U.S. at 434. "To support a stay pending appeal, it must show 'injury that "is neither remote nor speculative, but actual and imminent and cannot be remedied by an award of monetary damages."'" *NRDC*, 884 F. Supp. 2d at 123 (quoting *RxUSA Wholesale, Inc. v. Dep't of Health & Human Serv.*, 467 F. Supp. 2d 285, 301 (E.D.N.Y. 2006), in turn quoting *Rodriguez v. DeBuono*, 175 F.3d 227, 234 (2d Cir. 1999) (per curiam)).

Throughout these proceedings, Cravath has never suggested that producing the documents at issue would actually be burdensome as a matter of production. Nor has Cravath suggested that giving Ms. Kiobel access to the documents at issue is injurious. Neither argument would be plausible, because Cravath already produced all these documents to Ms. Kiobel.

Instead, Cravath advances two arguments: that Petitioner might use the documents in question before the Court of Appeals rules, and that Cravath's long-term ability to recruit foreign clients will suffer a "chilling effect" if documents in the U.S. might be discoverable. Neither argument demonstrates irreparable injury.

1. Cravath is not prejudiced by the use of these documents.

It is true that, if the documents are produced, Petitioner may well use them in Dutch court: that is the whole point of this proceeding. (As noted above, however, Cravath claims at the same time that it will be prejudiced because the documents can be used in Dutch court immediately, Dkt. 24 at 4, and that no Dutch litigation is within reasonable contemplation, Dkt. 24 at 12.) But Cravath fails to

show how this actually causes injury to it (or Shell, if Shell's interests are properly before the Court).

Cravath suggests first that the possibility of these documents being used is an injury because these documents "never should have been collected or produced in the U.S. litigation in the first instance because the court that ordered their production lacked subject matter jurisdiction in that litigation *ab initio*." Dkt. 24 at 4. That is both untrue and irrelevant. The documents at issue were produced in connection with the three *Wiwa* cases, which included a mix of Alien Tort Statute (ATS) and common-law claims,[3] and the one *Kiobel* case, which included solely ATS claims. Although the *Wiwa* cases settled before the Supreme Court decided *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013), that decision would not have resulted in their dismissal, because it only addressed ATS claims and expressly distinguished ordinary transitory tort claims, like those asserted in *Wiwa*. *Id.*, 133 S. Ct. at 1666-67. But even if Cravath were correct that the discovery never should have been collected in U.S. litigation, that would not constitute any kind of prejudice. Cravath itself suggests that the Dutch courts could order discovery of any of these documents, *see* Dkt. 24 at 8 n.5, but they would need to be specifically identified, in a procedure that would be far less efficient and could not be used at this stage. *See* Dkt. 10 at 11. Neither Cravath nor Shell is prejudiced by the use of a more efficient procedure to obtain essentially the same scope of documents; neither has any right to have the Dutch action proceed with less than a complete record.

Cravath next asserts, "Once the documents are presented to a Dutch court, the documents may become public in the course of any Dutch proceedings, even if Petitioner endeavors to maintain their confidentiality." Dkt. 24 at 4. But this was the subject of a lengthy confidentiality agreement, to which Cravath stipulated. *See* Dkt. 20. Moreover, Cravath abandoned its claim that

[3] *See, e.g.*, *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 93-94 (2d Cir. 2000) ("The amended complaint seeks damages under the ATCA [Alien Tort Claims Act], the Racketeering Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-1968, international law and treaties, Nigerian law, and various state law torts.")

documents filed in Dutch court are open to the public; they are not. *See* Declaration of Marco Simons ¶ 2; *see also* Dkt. 10 at 19 & Dkt. 10-2 at ¶¶ 11-12. Cravath now suggests that perhaps the Dutch court itself might refer to confidential documents, but this mere possibility, in a context where Cravath has not even made a showing that the 20-year-old documents at issue are deserving of confidential treatment, *see, e.g.*, Dkt. 10 at 2, 18-19, is hardly sufficient to establish an injury. This is a remote and speculative injury.

In any event, Petitioner is happy to cure this alleged injury: If the Court thinks it necessary, Petitioner and her Dutch counsel will stipulate that, prior to the disposition of the appeal, they will not provide copies of the documents (even as permitted by the confidentiality order) to anyone outside their direct control, and that, should the Court of Appeals find that discovery was ordered in error, they will request to withdraw documents previously submitted to the Dutch court and that the Dutch court not rely upon them. *See* Declaration of Channa Samkalden ("Samkalden Decl.") ¶ 4.

2. Cravath's business will not be harmed by this production.

Cravath's alleged harm to its business is both implausible and unconnected to the production of these documents. It is even more remote and speculative than the alleged injury discussed above, and does not constitute irreparable harm.

Cravath constructs a counterfactual scenario to support its claimed harm. It supposes discovery of "documents owned by a foreign client that are provided to a U.S. law firm solely for purposes of providing legal advice." Dkt. 24 at 5. That would be an interesting case, but it is not *this* case. This case involves documents handled by a U.S. law firm for the purposes of production in U.S. litigation. The idea that possible eventual Section 1782 discovery will deter foreign clients from asking U.S. law firms to handle U.S. litigation seems far-fetched at best.

Cravath's citation to language in *Ratliff* relies on that decision's discussion of the same hypothetical, counterfactual scenario, involving documents sent confidentially from a client to its

attorney. In fact, in *Ratliff*, the Second Circuit allowed discovery precisely because the documents – while they may have initially been sent confidentially – were then disclosed to the SEC. 354 F.3d at 170. The Second Circuit acknowledged that the client "might be entitled to protection if it sends documents to its law firm to obtain legal advice. But any such protection does not continue when the client voluntarily discloses the documents to a third party, here a government agency." *Id.* To be clear, the "protection" referred to is "the attorney-client privilege." *Id.* Cravath makes no claim that this case concerns documents protected by attorney-client privilege. The documents were previously disclosed in litigation in which no claim of privilege was asserted.

The ruling in this case presents no more chilling effect than the Second Circuit's ruling in *Ratliff:* that "documents held by an attorney in the United States on behalf of a foreign client, absent privilege, are as susceptible to subpoena as those stored in a warehouse within the district court's jurisdiction." *Id.* Thus the harm that Cravath claims – fanciful though it may be – is the result of *the current state of the law*, not this Court's order, and certainly not production in this particular case. Even if this Court's order extended the holding in *Ratliff* in some significant way (which it does not), any harm would be due to the legal ruling at issue. Surely Cravath's foreign clients, to the extent this affects their behavior at all, care about the governing legal rules, not about whether Cravath has to turn over these specific documents. Again, if the Court of Appeals rules in Cravath's favor, this alleged injury is fully cured.

In the preliminary injunction context, the Second Circuit has considered a potential loss of prospective business to be irreparable harm, but only in far more specific and concrete contexts than this. Thus, in *Semmes Motors, Inc. v. Ford Motor Co.*, 429 F.2d 1197, 1205 (2d Cir. 1970), the court found that the threatened termination of a car dealership franchise was an irreparable harm. Similarly, in *Tom Doherty Associates v. Saban Entertainment, Inc.*, 60 F.3d 27, 37 (2d Cir. 1995), which Cravath cites, the court found that the inability to publish a specific book constitutes irreparable

harm. In both cases, the harm was direct, obvious and highly specific.

Here, by contrast, the claimed harm is indirect, unlikely and generalized. It is not plausible that any of Cravath's current or prospective foreign clients would examine this situation, determine that *Ratliff* did not already establish that non-privileged client documents were subject to discovery from a U.S. law firm, further conclude that this Court's order did establish that principle, decide that they would need to eschew Cravath's services due to this potential risk, but then be sufficiently reassured that in this case, the documents had not been produced *yet*. The theoretical possibility that a unicorn may exist does not mean that the failure to protect such a beast constitutes an injury. This is the very definition of remote and speculative.

C. The remaining factors do not demonstrate Cravath's right to a stay.

"Because "'the first two factors – the movant's likelihood of success on appeal and prospect of suffering irreparable harm – are the most critical [and] movants have failed to make the required showing on these two prongs, little more needs to be said as to the second two, which ask whether a stay is likely irreparably to harm [Petitioner] and whether a stay is in the public interest.'"" *Strougo v. Barclays PLC*, No. 14 Civ. 5797, 2016 U.S. Dist. LEXIS 87071, *9 (S.D.N.Y. July 5, 2016) (quoting *Duka v. U.S. S.E.C.*, No. 15 Civ. 357, 2015 U.S. Dist. LEXIS 124444, 2015 WL 5547463, at *7 (S.D.N.Y. Sept. 17, 2015) (first alteration in original)). Nonetheless, Petitioner is likely to suffer greater harm than Cravath by a delay here, and the public interest militates against a stay.

1. Petitioner will suffer substantial injury from a delay in production.

While Cravath will suffer no harm from allowing production, Petitioner very well may suffer substantial injury from a delay in production. Ms. Kiobel has been trying for years to obtain justice for the murder of her husband and other abuses committed against her. That justice was denied to her in the United States, not on the merits, but due to an unforeseen limitation on the reach of the Alien Tort Statute that no lower court had previously imposed.

Further delay at this point could prejudice her case. As her Dutch counsel, Ms. Samkalden, explains:

> Since my client settled in the United States after the events giving rise to this case, she has incessantly tried to bring her case before a court. She turned to the Netherlands when – 18 years after those events – the Supreme Court of the United States dismissed her case for lack of jurisdiction. The preparation of her case in the Netherlands has taken considerable time for the reasons set out in my previous declaration. At this moment, a full draft of the summons has been completed and discussed with my client. This draft should now be supplemented with the evidence marked as confidential in the American procedure. My client has urged me to file her case as soon as possible as she fears that further delay may result in unforeseen complications permanently barring her access to justice.
>
> The myriad of procedural arguments Shell made in the case of *Milieudefensie c.s. v. Shell* further underlines the urgency of filing this case as soon as possible. I have no doubt that Shell would try to use the delay to its advantage if it thought it could argue that my client's claim is, for example, barred by the statute of limitations.

Samkalden Decl. ¶¶ 2-3. To be clear, Petitioner does not think her claims are time-barred in the Netherlands. But she should not be forced to bear the risk of a limitations bar under these circumstances, where Cravath has shown no likelihood of success on appeal and only slight injury at best. As the Second Circuit has found in other contexts, the potential expiration of the statute of limitations "would severely prejudice" a plaintiff. *Corke v. Sameiet M. S. Song of Norway*, 572 F.2d 77, 80 (2d Cir. 1977).

Cravath's assertion that "Petitioner's counsel had possession of these very documents for years," Dkt. 24 at 6, is correct but beside the point. Cravath ignores the confidentiality orders in the underlying litigation, which prohibit the undersigned counsel from disclosing any confidential discovery for the purpose of the Dutch litigation. *See* Dkt. 4-3, Ex. 3 ¶ 7. Ms. Kiobel's Dutch counsel have never had access to the documents at issue. It is irrelevant that the undersigned counsel once had access to that discovery, when there is no question that that information could not be used for the very purpose of this petition: the Dutch action.

2. The public interest favors denial of the stay.

Cravath argues that the public has "no interest" in the production of documents prior to the completion of appellate proceedings. *See* Dkt. 24 at 7. But the public does have an interest in justice being done, and presumably little interest withholding indisputably relevant evidence from use in a foreign tribunal. Indeed, Congress's very purpose in enacting Section 1782 was to assist with foreign proceedings.

Courts in the Section 1782 context have repeatedly found that the public interest weighs in the favor of *permitting* discovery pending appeal. Public interests taken into consideration in these contexts have included: supporting truth in foreign actions, encouraging open disclosure among shareholders and corporations, providing international litigants with an efficient way to obtain discovery, encouraging reciprocal assistance by foreign countries, and prompt and efficient resolution of discovery matters. *See, e.g.*, *See, e.g.*, *In re Gushlak*, No. 11-MC-218, 2012 U.S. Dist. LEXIS 60349, at *23-24 (E.D.N.Y. Jan. 30, 2012) (holding that a stay pending appeal would be against the public interest, and reasoning that "Congress empowered federal courts to issue orders of judicial assistance so that litigants in international litigation would have an efficient way to get the discovery they need and to encourage foreign countries by example to provide similar means of assistance to our courts (citing *In re Microsoft Corp.*, 428 F. Supp. 2d 188, 193 (S.D.N.Y. 2006)); *In re Procter & Gamble Co.*, 334 F. Supp. 2d at 1118 (noting that "the public interest favors allowing the discovery because doing so furthers the search for the truth in the foreign actions . . . ."); *Republic of Ecuador v. Bjorkman*, 2012 U.S. Dist. LEXIS 171087 at *3 (holding that "because the public interest lies in having discovery matters dealt with promptly and efficiently, the final factor also militates against a stay." (citing *Copic Ins. Co. v. Wells Fargo Bank*, No. 09-cv-00041, 2010 U.S. Dist. LEXIS 36476, *1 (D. Colo. Mar. 11, 2010))).

The public interest factors analyzed in other cases also apply to this one. There is a pressing

need for truth in the Dutch action. The potential for justice has already been delayed decades, and a stay would mean that Petitioner cannot complete the writ of summons necessary to file her case in the Netherlands. *See* Samkalden Decl. ¶ 2. Ms. Kiobel's Dutch counsel fears that further delay could result in complications that bar her from access to justice. *Id.* And providing efficient assistance and encouraging reciprocal treatment from foreign countries are not only public interest factors – they are the twin aims of Section 1782. *See Schmitz*, 376 F.3d at 84 (quotation omitted). Cravath seems to suggest that these twin aims would not be served here, in part because Petitioner has the ability to petition a Dutch court to order Shell to produce the documents. Dkt. 24 at 8, 8 n.5. But this issue has already been briefed, and this Court has already acknowledged that the discovery at issue may in fact "be unobtainable absent Section 1782 aid." Dkt. 21 at 10. Indeed, this Court noted that it is "both defensible and logical" that Petitioner is waiting for discovery from Cravath to commence her action. Dkt. 21 at 6.

Cravath argues that the public interest favors a stay to avoid discovery of a foreign client's documents that are in the custody of a U.S. law firm as a result of orders by a court that lacked jurisdiction, and maintained for the purpose of obtaining further legal services. *See* Dkt. 24 at 9. As noted above, however, the notion that these documents were produced only in an action where jurisdiction was lacking is simply false. And Cravath's citation to *Ratliff* once again ignores that the Second Circuit there was referring to a scenario in which a client "sends documents to its law firm to obtain legal advice" – not for a purpose such as document production. 354 F.3d at 170. This Court has already generally highlighted that it is a creative, but misguided approach to focus on the fact that Cravath is a custodian of documents that belong to a foreign client. *See* Dkt. 21 at 4.

Cravath raises other matters that the briefs, and this Court, have already dealt with. It suggests that because the Supreme Court determined that Petitioner's claims against Shell under the ATS could not be litigated on the merits in U.S. courts, and because the Dutch government

supported this result, somehow that should militate against this Court providing assistance to allow Ms. Kiobel to litigate her claims in the Netherlands.[4] Dkt. 24 at 7-8. It once again tries to elevate the late Prof. Hans Smit's view of Section 1782, which is inapposite here anyway, over the statutory text and authoritative caselaw.[5] Dkt. 24 at 8. Relitigating these arguments, which the Court already rejected in ordering discovery, does not establish that the public interest favors a stay.

It is difficult to see how the public interest could be harmed when a petitioner is simply accessing documents she previously had access to. To the contrary, the public interest favors of production, and does not justify a stay given the important expediency, efficiency, truth, and human and civil rights issues at play.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court deny Cravath's Motion to Stay, and order document production as soon as possible.

Dated: February 16, 2017

Respectfully submitted,

/s/ MARCO SIMONS
Marco Simons (pro hac vice)
Upasana Khatri (pro hac vice)

[4] Regarding the amicus brief submitted by the Government of the Netherlands in *Kiobel*, this Court's Order already resolved that the amicus brief is "not an authoritative declaration that Dutch courts are hostile to receiving discovery pursuant to statutes such as Section 1782." Dkt. 21 at 10-11.

[5] Cravath offers the same quote from Prof. Smit that it used in its original opposition (*see* Dkt. 7 at 17) to argue that a U.S. court should not use its resources to assist a foreign court where the foreign court can reach the same discovery itself. Petitioner already addressed this in full in her original reply: "[T]his declaration says nothing about this particular case. Prof. Smit was dealing with the scenario in which the documents at issue were within the ability of the foreign court to compel production; it is quite a stretch to say that Prof. Smit was anticipating the issue in this case. In any event, the Second Circuit has rejected Prof. Smit's views where his reasoning is "unpersuasive" and he does "not purport to rely upon any special knowledge concerning legislative intent." *NBC v. Bear Stearns & Co.*, 165 F.3d 184, 190 n. 6 (2d Cir. 1999). To the extent that Prof. Smit was suggesting that this factor should weigh against discovery where some of the documents at issue are ultimately derived from a party that is not yet, but will be, a participant in the foreign litigation – and is not currently before any foreign tribunal – that opinion would be unpersuasive." Dkt. 10 at 12.

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Attorneys for Petitioner

DECLARATION OF MARCO SIMONS

I, Marco Simons, declare as follows:

1. I am an attorney and a member of the bars of Washington, California and the District of Columbia, admitted *pro hac vice* in this matter. I am the General Counsel of EarthRights International (ERI), counsel for Petitioner. The facts stated herein are based on my personal knowledge. If called upon to do so, I could and would competently testify thereto.

2. In the course of negotiations over the stipulated confidentiality order in this action, counsel for Respondent Cravath, Swain & Moore LLP indicated that they understood that documents submitted to court in the Netherlands would not ordinarily be available to the public. Thus no restrictions on submission of documents to the Dutch court were included in the stipulated order.

3. After Respondent Cravath submitted its Motion to Stay, the parties conferred over an expedited schedule for briefing the motion. The parties had agreed to stipulate to a schedule in which Petitioner's opposition brief would be due February 16, followed by Respondent's reply brief on February 21. Before the parties submitted the stipulation, however, the Court issued its order setting a briefing schedule. Nonetheless, in the interests of moving this to a speedy resolution, Cravath's counsel agreed to submit their reply brief seven days after Petitioner's opposition brief.

I declare under penalty of perjury that the foregoing is true and correct.

Signed on this 16th day of February, in Silver Spring, Maryland.

By: 

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Prakken d'Oliveira

Supplemental declaration of Channa Samkalden, Attorney-at-law in The Netherlands

Pursuant to 28 U.S.C. § 1746, I, Channa Samkalden, declare as follows:

1. I am the attorney of Esther Kiobel in the upcoming litigation arising from human rights violations carried out by Shell in Nigeria; I refer to my previous declarations of 4 October 2016 and 14 November 2016. I understand that Cravath, Swaine & Moore LLP ("Cravath") seek to stay the Order of the United States District Court of the Southern District of New York until a decision has been reached in the appellate proceedings. In this declaration I want to elucidate on the necessity of a swift transfer of the confidential documents.

2. Since my client settled in the United States after the events giving rise to this case, she has incessantly tried to bring her case before a court. She turned to the Netherlands when - 18 years after those events - the Supreme Court of the United States dismissed her case for lack of jurisdiction. The preparation of her case in the Netherlands has taken considerable time for the reasons set out in my previous declaration. At this moment, a full draft of the summons has been completed and discussed with my client. This draft should now be supplemented with the evidence marked as confidential in the American procedure. My client has urged me to file her case as soon as possible as she fears that further delay may result in unforeseen complications permanently barring her access to justice.

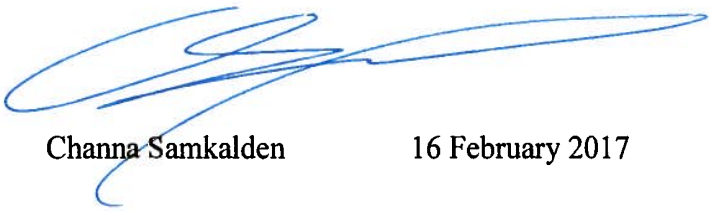
3. The myriad of procedural arguments Shell made in the case of *Milieudefensie c.s. v. Shell* further underlines the urgency of filing this case as soon as possible. I have no doubt that Shell would try to use the delay to its advantage if it thought it could argue that my client's claim is, for example, barred by the statute of limitations.

4. As I have explained in my previous declaration, any evidence filed with the Dutch court does not, therewith, become part of the Dutch public domain. Although the confidentiality order allows the documents to be shared with some outside parties (such as expert witnesses) if they sign the order as well, I am prepared to refrain from giving copies of the documents to anyone not within my direct control - with the exception of the court - until a judgment in the U.S. appeal is delivered. This effectively means that no one other than the attorneys and the competent court would have access to the confidential material,

eliminating any risk of leaks or publication thereof. If Cravath is successful in its appeal, I am also prepared to return the documents, to request that the Dutch court return any documents submitted, and to request that the Dutch court not rely on these documents in its decisions.

5. I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct to the best of my knowledge and belief.

Signed in Amsterdam, the Netherlands



Channa Samkalden 16 February 2017