IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ESTHER KIOBEL, Petitoner-Appellee, v. CRAVATH, SWAINE & MOORE LLP, Respondent-Appellant.	No. 17-424-cv

CRAVATH, SWAINE & MOORE LLP'S RESPONSE TO ESTHER KIOBEL'S MOTION FOR JUDICIAL NOTICE

Esther Kiobel told the District Court that she needed the documents she sought to obtain from Cravath, Swaine & Moore LLP in this action to file suit in the Netherlands, and she told the District Court that a Dutch court could not order Shell[1] to produce them. She repeated those same arguments to this Court. Now she moves to have this Court take judicial notice of the fact that, despite those assertions, she has commenced a proceeding in the Netherlands against Shell, submitting a 138-page, 194-exhibit writ of summons, and urging the Dutch court that it can order Shell to produce the same documents at issue here.

Cravath does not object to the Court taking judicial notice of Kiobel's Dutch writ of summons against Shell. Cravath does object, however, to the Court taking

[1] "Shell" refers to Royal Dutch Shell and various foreign subsidiaries.

judicial notice of the declaration of Kiobel's Dutch attorney, Channa Samkalden, which Kiobel attached as an exhibit to her motion. Samkalden's declaration—her third so far in this litigation—is "a debatable assessment" of the writ's legal significance under Dutch law "rather than a statement of fact normally appropriate for the taking of judicial or administrative notice." *Ajdin v. Bureau of Citizenship and Immigration Servs.*, 437 F.3d 261, 265 (2d Cir. 2006). That kind of bare attorney argument is not entitled to judicial notice.

As for the effect of the writ of summons, it undermines the bases for the District Court's order and Kiobel's appellate arguments in three distinct ways.

First, the writ wholly undermines one of the principal stated reasons for the District Court's decision to order Cravath to produce Shell's documents to Kiobel—namely, the court's belief that without this material, Kiobel would not be able to commence proceedings in the Netherlands. A284; *see* Kiobel Br. 30-31. Kiobel has in fact commenced a Dutch proceeding without obtaining documents from Cravath. And her writ of summons informs the Dutch court that she decided not to await the outcome of this appeal before pursing litigation in the Netherlands because she "thinks [she] already ha[s] sufficient evidentiary material at [her] disposal to substantiate [her] claim." Writ of Summons 38 (¶ 130). Kiobel's actions undercut the District Court's reasoning.

Second, the writ moots Kiobel's argument (at Kiobel Br. 30-31) that the first factor set forth in *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004), supports her because she has not yet filed suit against Shell in the Netherlands. Kiobel has now done just that. Her Dutch attorney's new declaration asserts that Kiobel has "commenced proceedings" against Shell in the Netherlands (at ¶ 2) because "service of the writ of summons commences the lawsuit" (at ¶ 4). Although Samkalden argues (*id.*) that materials will technically only be filed in the court shortly before Shell must appear in October 2017, nothing in *Intel* turns on the formalities of another country's case-initiation procedure. Indeed, Samkalden's earlier declaration had acknowledged that "[u]nder Dutch procedural law, *a case is filed by serving a writ of summons*." A195 (¶ 3) (emphasis added). The relevant question for the first *Intel* factor is whether Shell is "a participant in the foreign proceeding." 542 U.S. at 264 (emphasis added). Kiobel's commencement of a foreign proceeding against Shell undoubtedly brings the first factor into play.

Finally, the writ contradicts Kiobel's argument (at Kiobel Br. 31 n.2) that the Dutch courts cannot order Shell's confidential documents produced from Shell under Dutch law. Kiobel's writ argues the Dutch court can order the same documents at issue here produced under the Dutch Code of Civil Procedure. Writ

of Summons 38 (¶ 130). That is the opposite of what she maintained in this Court and below. Kiobel Br. 31 n.2; A195-196 (¶¶ 7-8).

For all the reasons explained in Cravath's briefs, Kiobel's arguments were meritless even before she filed her writ of summons. With her writ, Kiobel has taken some of those arguments off the table altogether.

Respectfully submitted,

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I certify that on July 17, 2017, the foregoing was electronically filed through this Court's CM/ECF system, which will send a notice of filing to all registered users.

/s/ Neal Kumar Katyal
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