App. 1

United States Court of Appeals
for the Second Circuit

AUGUST TERM 2017
No. 17-424-cv

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

Petitioner-Appellee,

v.

CRAVATH, SWAINE & MOORE LLP

Respondent-Appellant.[1]

ARGUED: SEPTEMBER 12, 2017
DECIDED: JULY 10, 2018

Before: JACOBS, CABRANES, AND WESLEY, *Circuit Judges*.

Petitioner-Appellee Esther Kiobel seeks documents belonging to Royal Dutch Shell (a foreign company) from Shell's United States counsel, Respondent-Appellant Cravath, Swaine & Moore LLP. The documents were transferred to Cravath for the purpose of responding to discovery requests in a prior case over which the court was ultimately found to lack jurisdiction. The United States District Court for the Southern District of New York (Hellerstein, *J.*) granted Kiobel's petition seeking leave to subpoena Cravath. We reverse: it is an abuse of discretion for a district court to grant a 28 U.S.C. § 1782 petition where the documents sought from a foreign company's U.S. counsel would

[1] The Clerk of Court is respectfully directed to amend the official caption as set forth above.

be "unreachable in a foreign country," because this threatens to jeopardize "the policy of promoting open communications between lawyers and their clients." *Application of Sarrio, S.A.*, 119 F.3d 143, 146 (2d Cir. 1997).

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JACOBS, *Circuit Judge*:

Petitioner-Appellee Esther Kiobel filed a petition in the United States District Court for the Southern District of New York to subpoena documents under 28 U.S.C. § 1782 from Respondent-Appellant Cravath, Swaine & Moore LLP ("Cravath"), in aid of her lawsuit against Royal Dutch Shell ("Shell") in the Netherlands. Cravath is holding the documents because it represented Shell in prior litigation brought by Kiobel against Shell in that district. It was ultimately decided that United States courts lacked jurisdiction over that suit. *See Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010), aff'd, 569 U.S. 108 (2013).

On this appeal from the district court's grant of Kiobel's petition, Cravath argues (1) that the district court lacked jurisdiction under Section 1782 to grant the petition, and (2) that in any event, it was an abuse of discretion to do so.

We conclude that while the district court had jurisdiction over Kiobel's petition, it was an abuse of discretion to grant it. As we cautioned in *Application of Sarrio, S.A.*, 119 F.3d 143 (2d Cir. 1997), an order compelling American counsel to deliver documents that would not be discoverable abroad, and that are in

counsel's hands solely because they were sent to the United States for the purpose of American litigation, would jeopardize "the policy of promoting open communications between lawyers and their clients." *Id.* at 146.

I

In 2002, Kiobel and eleven other Nigerian plaintiffs brought suit in the Southern District of New York against four defendants affiliated with Shell. *See Kiobel v. Royal Dutch Petroleum Co.*, 456 F. Supp. 2d 457 (S.D.N.Y. 2006), aff'd in part, rev'd in part, 621 F.3d 111 (2d Cir. 2010), aff'd, 569 U.S. 108 (2013). Kiobel invoked the district court's jurisdiction under the Alien Tort Statute, 28 U.S.C. § 1350, and alleged that the defendants were complicit in human rights abuses in Nigeria.

For the purpose of pretrial discovery, the district court consolidated Kiobel's case with other Alien Tort Statute cases arising out of the same events in Nigeria, the *Wiwa* cases. *See Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000). The consolidated cases generated a large volume of discovery, including depositions and documents. The discovery materials were subject to a stipulated confidentiality order entered into in the *Wiwa* cases, and signed by Kiobel. Most of the documents produced by Shell were marked "confidential," meaning that they were to be used "solely for purposes" of the then-pending *Kiobel* and *Wiwa* litigations. Joint App'x at 58-59, 74. The parties agreed to

destroy or return each other's confidential material not later than thirty days after the respective cases' conclusions, and that the order would survive the end of litigation. Any de-designation of confidential documents or modification of the confidentiality order required agreement by the parties to the confidentiality order, or could be ordered by the district court. Cravath attorneys signed the stipulation in their capacity as Shell's counsel.

After consolidation, the *Wiwa* cases were settled. In *Kiobel*, the district court dismissed some of the claims under the Alien Tort Statute for lack of subject-matter jurisdiction, and we dismissed the suit in full for lack of subject-matter jurisdiction. *Kiobel*, 621 F.3d at 149. The Supreme Court, observing that "all the relevant conduct took place outside the United States," affirmed on the ground "that the presumption against extraterritoriality applies to claims under the" Alien Tort Statute. *Kiobel*, 569 U.S. at 124.

Years after the Supreme Court's decision, Kiobel prepared to file suit against Shell in the Netherlands, advancing the same allegations made in her Alien Tort Statute suit. Kiobel now wants to deploy the discovery from her American litigation in her Dutch lawsuit, but is impeded by the confidentiality order which limits its use to only the U.S. *Kiobel* and *Wiwa* Alien Tort Statute cases. On October 12, 2016, Kiobel filed the pending Section 1782 petition to subpoena Cravath and obtain "[a]ll deposition transcripts from the *Kiobel* and *Wiwa* cases," as well as "[a]ll discovery documents and communications produced to the plaintiffs by Shell and

other defendants in *Kiobel* and the *Wiwa* cases." Joint App'x at 10.

Section 1782 "provide[s] federal-court assistance in gathering evidence for use in foreign tribunals." *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 247 (2004). The pertinent statutory text is as follows:

> 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 or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation. The order may be made . . . upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court. . . . To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure. A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege.

28 U.S.C. § 1782(a). Section 1782 states that a court "*may* order" such discovery; so even if a court has jurisdiction under the statute to grant a petition, the decision to grant it is discretionary. *See In re Metallgesellschaft*, 121 F.3d 77, 79 (2d Cir. 1997) ("The permissive language of § 1782 vests district courts with

discretion to grant, limit, or deny discovery."); *see also In re Esses*, 101 F.3d 873, 875 (2d Cir. 1996) (per curiam) ("A review of a district court's decision under § 1782, therefore, has two components: the first, as a matter of law, is whether the district court erred in its interpretation of the language of the statute and, if not, the second is whether the district court's decision to grant discovery on the facts before it was in excess of its discretion.").

Kiobel argued that the documents that Cravath holds for Shell are needed to prepare her case because Dutch courts require a higher evidentiary standard at the filing stage than do U.S. courts.[2] Further, rather than starting discovery from scratch after over ten years in U.S. courts, access to the prior discovered materials is said to be the most efficient course of action. Kiobel did not subpoena Shell, only Cravath.

The district court agreed with Kiobel. After oral argument on December 20, 2016, the district court found that the cheapest and easiest thing to do was to grant Kiobel's petition and get the documents from Cravath. In view of the existing confidentiality order, Kiobel was directed to represent that the documents

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[2] A declaration from Kiobel's Dutch attorney stated that the Dutch court system has no procedure for the preparatory phase of a case, so he "must complete" the collection of evidence prior to filing the writ of summons. Joint App'x at 86. Once a lawsuit is pending, Kiobel can then submit additional evidence, and can file an "exhibition request" to gain discovery, though this is time consuming and, in the view of Kiobel's counsel, unnecessary since the pertinent evidence is already available in the U.S. *Id.*

would only be used for drafting court papers in the contemplated Dutch proceedings, not for publicity, and the parties were required to sign a new stipulation. The parties complied with the court's directive, though Cravath advised that, under the terms of the prior stipulation, it lacked authority to de-designate documents because it was not a party to the original Alien Tort Statute suit, and Shell was not before the court.

Under the new stipulation, Shell has no right to enforce a breach of confidentiality. In the event of disputes, Cravath and Kiobel can return to the district court, but because the district court has no authority over proceedings in the foreign forum, the parties may only "request" confidential treatment for the documents in the Netherlands. Joint App'x at 241.

The district court's subsequent opinion first concluded that it had jurisdiction to consider Kiobel's petition. The court rejected Cravath's argument that it was not the real party from whom discovery was sought, deeming it irrelevant because Section 1782 asks only whether the respondent resides in the district in which discovery is sought, as Cravath does. Finding that it had jurisdiction to consider Kiobel's petition, the district court granted it because Kiobel required the documents to file suit, and it would not be burdensome for Cravath to provide them.

On appeal, Cravath challenges both the district court's finding that it had jurisdiction and its discretionary grant of the petition. As to jurisdiction, Cravath argues, *inter alia*, that: the documents Kiobel

seeks belong to Shell; Cravath holds them only as counsel; and Shell neither resides nor is found in the Southern District of New York. As to the discretionary grant of the petition, Cravath argues: that Kiobel's petition is an attempted end-run around the more limited discovery procedures of the Netherlands where Shell is found and being sued; and granting discovery of materials Shell produced in reliance on confidentiality orders in prior litigation would undermine confidence in court protective orders.

II

A district court possesses jurisdiction to grant a Section 1782 petition if:

> (1) . . . the person from whom discovery is sought reside[s] (or [is] found) in the district of the district court to which the application is made, (2) . . . the discovery [is] for use in a proceeding before a foreign tribunal, and (3) . . . the application [is] made by a foreign or international tribunal or any interested person.

Esses, 101 F.3d at 875 (internal quotation marks omitted). We review *de novo* a district court's ruling that a petition satisfies Section 1782's jurisdictional requirements. *See Certain Funds, Accounts and/or Inv. Vehicles v. KPMG, L.L.P.*, 798 F.3d 113, 117 (2d Cir. 2015). Cravath's statutory challenge on appeal is only to the first jurisdictional requirement.

The district court observed that Cravath unsuccessfully made the argument that a foreign client

(Deutsche Telekom) and not Cravath was the actual party from which discovery was sought in *In re Schmitz*, 259 F. Supp. 2d 294 (S.D.N.Y. 2003). *Schmitz* ruled that "[a]pplication of section 1782 does not involve an analysis of . . . why a respondent has the documents. It is sufficient that respondents reside in this district[.]" *Id.* at 296.

The district court also relied on *Ratliff v. Davis Polk & Wardwell*, 354 F.3d 165, 170-71 (2d Cir. 2003), which ruled discoverable under Section 1782 documents that were held by a law firm in the U.S. on behalf of a foreign client and voluntarily produced to a third party. The district court drew an analogy between Shell's previous production of documents to Kiobel and the previous production (to the SEC) in *Ratliff*. Lastly, the district court relied on Federal Rules of Civil Procedure 34(a)(1) and 45(1)(A)(iii) for the proposition that "relevant documents within the 'possession, custody, or control' of the recipient of a discovery request are generally discoverable, regardless of who owns or created those documents." Joint App'x at 280.

On appeal, Cravath raises two jurisdictional challenges:

> • Since jurisdiction under Section 1782 is subject to established limits on federal courts' power to compel production of privileged materials, a district court cannot order a law firm to produce client documents that would fall beyond the statutory reach of a subpoena if the documents had instead been maintained by the client. Since documents here are not

> discoverable from Shell at this stage under both the protective order and the Netherlands' more restrictive discovery practices, they are similarly not discoverable from Cravath.
>
> • A court cannot compel a law firm to produce a client's documents when (as here) the client is not subject to the court's personal jurisdiction.

We are not persuaded.

The first statutory requirement for jurisdiction is that the "person from whom discovery is sought resides or is found in the district of the district court to which the application is made." *Schmitz v. Bernstein Liebhard & Lifshitz, LLP*, 376 F.3d 79, 83 (2d Cir. 2004) (alteration and internal quotation marks omitted). There is no express mandate to consider a principal-agent relationship, or whether documents being held by the subpoenaed party belong to a foreign party. *See Mees v. Buiter*, 793 F.3d 291, 298 (2d Cir. 2015) ("in several other contexts we and the Supreme Court have declined to read into [Section 1782] requirements that are not rooted in its text"). A law firm's representation of a foreign client is a factor worth considering; but it is a discretionary factor, not a jurisdictional requirement. *Schmitz*, 376 F.3d at 85. The district court correctly determined that it possessed jurisdiction over Kiobel's petition.

III

Once a district court is assured that it has jurisdiction over the petition, it "may grant discovery under § 1782 in its discretion." *Mees*, 793 F.3d at 297 (internal citation omitted). We review the decision to grant a Section 1782 petition for abuse of discretion. *See In re Edelman*, 295 F.3d 171, 175 (2d Cir. 2002).

To guide district courts in the decision to grant a Section 1782 petition, the Supreme Court in *Intel*, 542 U.S. 241, discussed non-exclusive factors (the "*Intel* factors") to be considered in light of the "twin aims" of Section 1782: "providing efficient means of assistance to participants in international litigation in our federal courts and encouraging foreign countries by example to provide similar means of assistance to our courts." *Metallgesellschaft*, 121 F.3d at 79 (internal quotation marks omitted). The four *Intel* factors are:

> (1) whether "the person from whom discovery is sought is a participant in the foreign proceeding," in which event "the need for § 1782(a) aid generally is not as apparent as it ordinarily is when evidence is sought from a nonparticipant in the matter arising abroad";
>
> (2) "the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign government or the court or agency abroad to U.S. federal-court judicial assistance";

> (3) "whether the § 1782(a) request conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States"; and
>
> (4) whether the request is "unduly intrusive or burdensome."

Intel, 542 U.S. at 264-265.

The district court determined that Kiobel's petition should be granted because: Cravath is not a party to the Dutch litigation; not all of the documents Kiobel sought were likely to be still in Shell's possession over a decade after litigation began in the U.S.; the Netherlands does not prohibit or restrict parties from gathering evidence similar to what is sought from Cravath in the U.S., and there was no evidence that the courts of the Netherlands would be unreceptive to U.S. discovery; and the production would be minimally burdensome for Cravath.

Cravath contends on appeal that the district court abused its discretion because: the petition in effect seeks discovery from Shell, which is subject to jurisdiction in the foreign tribunal; use of a Section 1782 petition to discover these documents is opposed by the Netherlands; the petition attempts to circumvent the more limited Dutch rules of discovery; and the petition threatens the confidentiality of the materials sought.

We conclude that the district court erred in its analysis and application of the four *Intel* factors. As the district court acknowledged in its opinion, under existing precedent in this Circuit, when the real party from

whom documents are sought (here, Shell) is involved in foreign proceedings, the first *Intel* factor counsels against granting a Section 1782 petition seeking documents from U.S. counsel for the foreign company. *See Schmitz*, 376 F.3d at 85 ("Although technically the respondent in the district court was Cravath, for all intents and purposes petitioners are seeking discovery from DT, their opponent in the German litigation. *Intel* suggests that because DT is a participant in the German litigation subject to German court jurisdiction, petitioner's need for § 1782 help 'is not as apparent as it ordinarily is when evidence is sought from a nonparticipant in the matter arising abroad.' " (quoting *Intel*, 542 U.S. at 264)). Further, under the third *Intel* factor, statements made by Kiobel's counsel demonstrate that Kiobel is trying to circumvent the Netherlands' more restrictive discovery practices, which is why they are seeking to gather discovery from Cravath in the U.S.[3]

The *Intel* factors are not to be applied mechanically. A district court should also take into account any other pertinent issues arising from the facts of the particular dispute. *See Intel*, 542 U.S. at 264-65 ("We note below factors that bear consideration in ruling on a § 1782(a) request. . . . We decline, at this juncture, to adopt supervisory rules. Any such endeavor at least

[3] In a declaration, Kiobel's counsel stated that while Kiobel may "request" copies of documents from Shell under section 843a of the Dutch Code of Civil Procedure, "it is hardly possible for a party to obtain evidence from another party pre-trial" in the Netherlands. Joint App'x at 196. So to bypass Dutch discovery restrictions and gain access to documents she could not otherwise acquire, Kiobel is turning to Section 1782.

should await further experience with § 1782(a) applications in the lower courts."). Looking at the facts of this dispute reinforces our conclusion that the district court abused its discretion in granting the petition. We consider in particular two cases that analyzed Section 1782 petitions seeking documents from U.S. legal counsel: *Sarrio*, 119 F.3d 143 and *Ratliff*, 354 F.3d 165.

Sarrio militates in favor of the right of Cravath to invoke its client's rights under the confidentiality order. In *Sarrio*, the plaintiff in a foreign lawsuit filed a Section 1782 petition to discover documents of the opposing party from Chase Bank. The Bank, which held the documents in its capacity as a lender to the defendant, had sent the documents to the U.S. for review by its in-house counsel. The district court's denial of the petition was reversed on appeal after Chase withdrew its claim of attorney-client privilege. But *Sarrio's* discussion of privilege in the Section 1782 context is instructive. Sarrio followed *Fisher v. United States*, 425 U.S. 391 (1976), which determined that when a client is privileged from producing documents, so too is the client's counsel. *Id.* at 404. Building on this, Sarrio explained that while "*Fisher* was expressed in terms of . . . common law or constitutional privilege," its reasoning also applied to protect a foreign party's documents that are not amenable to a subpoena in the hands of the foreign party, even if the court can subpoena the documents from the foreign party's U.S. counsel under Section 1782. *Sarrio*, 119 F.3d at 146. This is because the principle articulated in *Fisher*:

> arose from the policy of promoting open communications between lawyers and their clients. That policy would be jeopardized if documents unreachable in a foreign country became discoverable because the person holding the documents sent them to a lawyer in the United States for advice as to whether they were subject to production.

Id.

Ratliff followed *Sarrio*. U.S. plaintiffs suing a Dutch company for securities fraud in the U.S. sought documents from the defendant's accounting firm in the Netherlands. *Ratliff*, 354 F.3d at 167. When the Dutch court denied access, the plaintiffs invoked Section 1782 to obtain the documents from the accounting firm's U.S. counsel, Davis Polk & Wardwell. *Id.* The documents sought had previously been voluntarily turned over to the Securities and Exchange Commission. *Id.* In response to the petition, Davis Polk argued that documents cannot be subpoenaed from counsel if the court does not have jurisdiction over the owner. *Id.* The district court agreed and denied the petition.

When Davis Polk on appeal relinquished its claim of privilege, it was unclear whether the disclaimed privilege was attorney-client privilege or "the protection discussed in *Sarrio* that would protect documents regardless of their content." *Id.* at 170. The issue as to which privilege was relinquished was obviated, however, because the accounting firm had voluntarily authorized Davis Polk to disclose the documents to a third party, making the documents unprotected from

discovery and thus amenable to a Section 1782 petition.

Therefore, although our Court in *Ratliff* held that Davis Polk was subject to appellant's subpoena, *Ratliff* did not disturb *Sarrio's* suggestion that a district court should not exercise its discretion to grant a Section 1782 petition for documents held by a U.S. law firm in its role as counsel for a foreign client if the documents are undiscoverable from the client abroad, because this would disturb attorney-client communications and relations. *Sarrio*, 119 F.3d at 146; *Ratliff*, 354 F.3d at 170.

Moreover, *Ratliff's* holding that third-party disclosure vitiated Davis Polk's privilege argument does not apply in this case. Although Shell produced the documents at issue to its adversaries in the Alien Tort Statute litigation, that disclosure was not "public," as the *Ratliff* court found E&Y's disclosure in that case to have been. *See Ratliff*, 354 F.3d at 170 ("In light of the strong policy considerations favoring full and complete discovery we are hard pressed to suppress documents that have already seen the bright light of public disclosure."). Rather, Shell disclosed the documents under a confidentiality order that expressly barred Kiobel from using the documents in any other litigation. As a practical matter, the combination of the confidentiality order and the more restrictive Dutch discovery practices makes the documents at issue undiscoverable from Shell in the Netherlands. To now modify the confidentiality order that Shell and Kiobel agreed to, and thereby provide access to the documents, would be

perilous for multiple reasons, a feature of this case that makes it extraordinary, and possibly unique.

To begin, the district court's ruling would undermine confidence in protective orders. Protective orders "serve the vital function . . . of secur[ing] the just, speedy, and inexpensive determination of civil disputes . . . by encouraging full disclosure of all evidence that might conceivably be relevant. This objective represents the cornerstone of our administration of civil justice." *S.E.C. v. TheStreet.Com*, 273 F.3d 222, 229 (2d Cir. 2001) (internal quotation marks omitted, alterations in original). Without protective orders, "litigants would be subject to needless annoyance, embarrassment, oppression, or undue burden or expense." *Id.* (internal quotation marks omitted). This is why there is "a strong presumption against the modification of a protective order," and why, "absent a showing of improvidence in the grant of [the] order or some extraordinary circumstance or compelling need," we should not countenance such modifications. *Id.* at 229 (alteration in original). The decision to alter the confidentiality order without Shell's participation, and without considering the costs of disclosure to Shell, makes this case exceptional, and mandates reversal. *See Mees*, 793 F.3d at 302 (explaining that under *Intel*, district courts should apply the standard from Federal Rule of Civil Procedure 26 to assess when a discovery request is unduly burdensome); *see also In re Catalyst Managerial Servs., DMCC*, 680 Fed. App'x 37, 39 & n.1 (2d Cir. 2017) (discussing a party's argument about the burdens of

discovery on a third-party putative foreign defendant in the context of the fourth *Intel* factor).

Moreover, Kiobel did not (presumably because she cannot) provide the U.S. courts with assurance that Dutch courts will enforce the protective orders that safeguard the confidentiality of Shell's documents. It is perilous to override the confidentiality order; doing so would inhibit foreign companies from producing documents to U.S. law firms, even under a confidentiality order, lest Section 1782 become a workaround to gain discovery. This would entail several unintended consequences.

The Supreme Court has stressed the need for "full and frank communication between attorneys and their clients," which "promote[s] broader public interests in the observance of law and administration of justice." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981); *see also In re Grand Jury Subpoena Duces Tecum Dated Sept. 15, 1983*, 731 F.2d 1032, 1036–37 (2d Cir. 1984) ("The availability of sound legal advice inures to the benefit not only of the client who wishes to know his options and responsibilities in given circumstances, but also of the public which is entitled to compliance with the ever growing and increasingly complex body of public law."). If foreign clients have reason to fear disclosing all pertinent documents to U.S. counsel, the likely results are bad legal advice to the client, and harm to our system of litigation.

In order to avoid potential disclosure issues under Section 1782, U.S. law firms with foreign clients may

be forced to store documents and servers abroad, which would result in excessive costs to law firms and clients. Alternatively, U.S. law firms may have to return documents to foreign clients (or destroy them) as soon as litigation concludes. As amicus the New York City Bar Association notes, New York State Bar Ethics Opinion 780 states that law firms have an interest in retaining documents where needed to protect themselves from accusations of wrongful conduct. So U.S. law firms may be harmed if they must destroy or return a foreign client's documents as soon as possible once a proceeding is completed. Or foreign entities may simply be less willing to engage with U.S. law firms.

Therefore, in light of the *Intel* factors, the respect owed to confidentiality orders, and the concerns for lawyer-client relations raised in *Sarrio*, the district court abused its discretion in granting Kiobel's petition.

* * *

The order of the district court is **REVERSED**. We **REMAND** for the district court to revise its order to conform with this opinion.

UNITED STATES DISTRICT COURT
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	**OPINION AND ORDER GRANTING PETITION** 16 Civ. 7992 (AKH) (Filed Jan. 24, 2017)

ALVIN K. HELLERSTEIN, U.S.D.J.:

On October 12, 2016, Petitioner Esther Kiobel ("Kiobel") filed a petition pursuant to 28 U.S.C. § 1782 seeking leave to issue subpoenas to the law firm Cravath, Swaine & Moore LLP ("Cravath") for the production of documents in Cravath's possession. Kiobel seeks these documents for use in an anticipated civil action that Kiobel intends to file in the Netherlands against Cravath's client, Royal Dutch Shell ("Shell") and related entities. Oral argument was held on December 20, 2016. At the hearing, I advised the parties that Kiobel's petition would be granted upon the parties' submission of a stipulation that addressed Cravath's concerns regarding the confidentiality of the documents sought. On January 13, 2017, the parties submitted a confidentiality stipulation and proposed order. For the reasons stated herein, Kiobel's petition is granted.

BACKGROUND

In the early 1990s, Kiobel and her husband, Dr. Barinem Kiobel, were actively involved in an organization called the Movement for the Survival of the Ogoni People, which opposed Shell's activities in a region of Nigeria known as Ogoni. The Nigerian military launched a violent campaign to suppress this opposition movement, and in 1995, Kiobel's husband was executed by the Nigerian military.

In 2002, Kiobel filed a class action lawsuit in the Southern District of New York against Shell and related entities under the Alien Tort Statute. 28 U.S.C. § 1350. Kiobel alleged that Shell and its Nigerian subsidiary were liable for gross violations of civil liberties and human rights committed by the Nigerian military against Kiobel, Kiobel's husband, and other Nigerians who opposed Shell's activities in Ogoni. Kiobel alleged that Shell was directly complicit in the execution of her husband and other opposition leaders following a rigged and corrupt criminal trial, and further alleged that she was personally whipped, sexually assaulted, and detained for three weeks when she attempted to bring her husband food during his detention prior to execution. In addition to this action, *Kiobel v. Royal Dutch Petroleum Co.*, No. 02 Civ. 7618, three other lawsuits were filed in the Southern District of New York alleging Shell's complicity in the Nigerian government's campaign against the Ogoni people: *Wiwa v. Royal Dutch Petroleum Co.*, No. 96 Civ. 8386; *Wiwa v. Brian Anderson*, No. 01 Civ. 1909; and *Wiwa v. Shell Petroleum Development Corp. of Nigeria*, No. 04 Civ.

2665. Cravath represented Shell in each of these actions. During the course of these actions, Cravath gathered and produced numerous documents and engaged in other discovery-related activities.

In 2013, the U.S. Supreme Court dismissed the *Kiobel* action on the grounds that the Alien Tort Statute is subject to a "presumption against extraterritorial application." Applying that presumption, the Court held that Kiobel's claim could not proceed in a U.S. court because all relevant conduct had occurred outside of the United States. *See Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013).

Kiobel alleges, in the petition now before me, that she intends to file an action in the Netherlands against Shell alleging the same tortious conduct, namely, Shell's alleged involvement in the execution of her husband, as well as Shell's alleged complicity in violations of civil liberties and human rights against the Kiobels and other Nigerians who opposed Shell's activities in Nigeria in the 1990s. In anticipation of this Dutch proceeding, Kiobel seeks to obtain the documents and other discovery materials (for example, deposition transcripts) that Cravath produced on behalf of Shell and related entities in the *Kiobel* and *Wiwa* actions. Kiobel believes this discovery would advance the foreign proceeding that she intends to initiate, and that she cannot obtain such discovery in the Netherlands because Cravath is outside the jurisdictional reach of the Dutch judiciary. Kiobel contends that 28 U.S.C. § 1782 is therefore the proper mechanism to obtain this discovery.

DISCUSSION

I. Statutory Requirements

To prevail in a Section 1782 petition, a petitioner must first satisfy three statutory requirements: "(1) that the person from whom discovery is sought reside (or be found) in the district of the district court to which the application is made, (2) that the discovery be for use in a proceeding before a foreign tribunal, and (3) that the application be made by a foreign or international tribunal or 'any interested person.' " *In re Application of Esses*, 101 F.3d 873, 875 (2d Cir. 1996). Cravath concedes that the third requirement has been satisfied, but contends that Kiobel has failed to satisfy the first two requirements.

a. The First Statutory Requirement is Satisfied

Under the first statutory requirement, the person from whom discovery is sought must reside in the district where the application is made. There is no dispute that Kiobel seeks discovery from Cravath, and that Cravath resides in the Southern District of New York. Cravath, however, argues that it is not the real "person from whom discovery is sought" because it is merely a custodian of documents that belong to Shell. Cravath suggests that the "real" person from whom discovery is sought is Shell, an entity that does not reside in this district. Consequently, Cravath argues, the first statutory element has not been met.

No authority supports this argument. To credit Cravath's argument would effectively exempt many law firms from having to respond to Section 1782 petitions. Cravath has made this argument before, without success. In *In re Application of Schmitz*, 259 F. Supp. 2d 294 (S.D.N.Y. 2003), Cravath argued that the first statutory requirement had not been satisfied because it was the custodian of documents "solely for the purposes of the U.S. Litigation," and that the true owner of the documents was its foreign client. The district court rejected the argument: "That argument is creative, but sails far wide of the mark. Application of section 1782 does not involve an analysis of . . . why a respondent has the documents. It is sufficient that respondents reside in this district, as they concededly do." *Id.* at 296. The Second Circuit did not disturb this ruling. *See Schmitz v. Bernstein Liebhard & Lifshitz, LLP.*, 376 F.3d 79, 83 (2d Cir. 2004).[1] Other courts are in accord. *See In re Mare Shipping Inc.*, 2013 WL 5761104, at *3 (S.D.N.Y. Oct. 23, 2013) ("Courts in this district have found that for purposes of a section 1782 claim, it is sufficient that a respondent law firm resides in this district, even if the real party in interest, the

[1] As the Second Circuit has recognized, the fact that a respondent represents a foreign client that is a party to the foreign proceeding is certainly a fact worth considering. *See Schmitz*, 376 F.3d at 85. Here, it is appropriate to consider that Cravath possesses these documents as a result of its prior representation of Shell, and that Shell will be named as a defendant in the foreign proceeding. However, as the Second Circuit's analysis in *Schmitz* makes clear, these facts are relevant to the first discretionary factor, not the first statutory requirement. *Id.*

client, resides elsewhere."); *In re Republic of Kazakhstan*, 110 F. Supp. 3d 512, 514 (S.D.N.Y. 2015) (granting Section 1782 petition seeking documents from law firm representing international client).

The question is whether Cravath is in possession of the documents, not whom the documents "belong" to. Unless a court instructs otherwise, document productions made in response to a Section 1782 petition are governed by the Federal Rules of Civil Procedure. *See* 28 U.S.C. § 1782(a). Under those rules, relevant documents within the "possession, custody, or control" of the recipient of a discovery request are generally discoverable, regardless of who owns or created those documents. *See*, *e.g.*, Fed. R. Civ. P. 34(a)(1); 45(1)(A)(iii). This is true notwithstanding Cravath's attorney-client relationship with Shell. "[D]ocuments 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. Documents obtain no special protection because they are housed in a law firm; '[a]ny other rule would permit a person to prevent disclosure of any of his papers by the simple expedient of keeping them in the possession of his attorney.'" *Ratliff v. Davis Polk & Wardwell*, 354 F.3d 165, 170–71 (2d Cir. 2003) (quoting *Colton v. United States*, 306 F.2d 633, 639 (2d Cir. 1962)). Here, there is no concern that privileged materials will be disclosed because Kiobel seeks only documents that Cravath has previously produced, which therefore have already been vetted for privilege.

Thus, the first statutory requirement has been satisfied.

b. The Second Statutory Requirement is Satisfied

Under the second statutory requirement, the discovery sought must be "for use" in a foreign proceeding. "A § 1782 applicant satisfies the statute's 'for use' requirement by showing that the materials she seeks are to be used at some stage of a foreign proceeding." *Mees v. Buiter*, 793 F.3d 291, 295 (2d Cir. 2015). Cravath argues that Kiobel has failed to satisfy this element because she has yet to commence an action against Shell in the Netherlands, and the representation that she "expects" to file the action shortly is too speculative to warrant discovery pursuant to Section 1782.

In situations such as this, where there is no pending foreign proceeding, the "for use" requirement is still satisfied if the foreign proceeding is within "reasonable contemplation." *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 259 (2004) (foreign proceeding must "be within reasonable contemplation," but need not be "pending" or "imminent."). To demonstrate that the action is within reasonable contemplation, a petitioner "must provide some objective indicium that the action is being contemplated. . . . At a minimum, a § 1782 applicant must present to the district court some concrete basis from which it can determine that the contemplated proceeding is more than just a twinkle in counsel's eye." *Certain Funds, Accounts and/or*

Inv. Vehicles v. KPMG LLP, 798 F.3d 113, 123-24 (2d Cir. 2015).

Kiobel has provided objective indicia demonstrating that the Dutch proceeding is within reasonable contemplation. Dutch counsel has (1) drafted a writ of summons, which is the initiating document in Dutch proceedings; (2) applied for and obtained legal aid on behalf of Kiobel from the Dutch Legal Aid Board, which required a showing that meaningful steps had been taken to prepare for the action; and (3) sent "liability letters" to Shell, which had the effect of tolling the statute of limitations. *See* Samkalden Reply Decl. ¶¶ 3-6. This case is therefore distinguishable from *Certain Funds*, in which the petitioner had done nothing more than retain counsel and discuss "the possibility of initiating litigation." 798 F.3d at 124.

Kiobel further emphasizes that in the Netherlands, a plaintiff must present a certain amount of evidence at the outset of the action in order to proceed. Given that Kiobel seeks discovery from Cravath in order to collect evidence that may be necessary for the Dutch action to survive, the fact that Kiobel has yet to commence the action is both defensible and logical. In this sense, Kiobel's filing of this petition is itself an important step in preparing for the Dutch action, and helps to show that the action is within reasonable contemplation. In *Application of Consorcio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA), Inc.*, 747 F.3d 1262 (11th Cir. 2014), the Eleventh Circuit held that the "for use" requirement was met in light of petitioner's "facially legitimate and detailed

explanation of its ongoing investigation, its intent to commence a civil action against its former employees, and the valid reasons for [petitioner] to obtain the requested discovery under the instant section 1782 application before commencing suit." *Id.* at 1271. Here, Kiobel has offered valid reasons for delaying the Dutch proceeding until after it obtains discovery from Cravath.

Thus, the second statutory requirement has also been satisfied.

II. Discretionary Factors

Once the statutory requirements are met, as they are here, "a district court may grant discovery under § 1782 in its discretion." Mees, 793 F.3d at 297.

In assessing whether or not to exercise that discretion, a court must consider four discretionary factors: "(1) whether 'the person from whom discovery is sought is a participant in the foreign proceeding,' in which case 'the need for § 1782(a) aid generally is not as apparent'; (2) 'the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign government or the court or agency abroad to U.S. federal-court judicial assistance'; (3) 'whether the § 1782(a) request conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States'; and (4) whether the request is 'unduly intrusive or burdensome.'" *Id.* at 298 (2d Cir. 2015) (quoting *Intel*, 542 U.S. at 264–265). A court must also consider the "twin

aims of the statute: providing efficient means of assistance to participants in international litigation in our federal courts and encouraging foreign countries by example to provide similar means of assistance to our courts." *Id.* at 297–98 (internal quotation marks and citation omitted).

a. The First Discretionary Factor Weighs in Favor of Granting the Petition

Under the first discretionary factor, a court is to consider whether "the person from whom discovery is sought is a participant in the foreign proceeding." *Intel*, 542 U.S. at 264. On a technical level, the discovery is sought from Cravath, which is not, and is not expected to become, a party to the Dutch proceeding. However, Cravath again argues that Kiobel is "effectively" seeking discovery from Shell, which will be a defendant in the anticipated Dutch litigation. For all intents and purposes, Cravath argues, Kiobel seeks discovery from a Dutch entity for use against that same Dutch entity in a Dutch proceeding. In such situations, the need for assistance via Section 1782 "is not as apparent as it ordinarily is when evidence is sought from a nonparticipant in the matter arising abroad." *Id.*

Although courts have rejected this argument with respect to the first *statutory* factor, courts have been more receptive to it when considered in the context of the first *discretionary* factor. For example, in *Schmitz v. Bernstein Liebhard & Lifshitz, LLP.*, 376 F.3d 79 (2d Cir. 2004), a German petitioner sought discovery from

Cravath, which represented a German client in U.S. litigation, for use in a German proceeding against that same German client. The Second Circuit noted that "although technically the respondent in the district court was Cravath, for all intents and purposes petitioners are seeking discovery from DT, their opponent in the German litigation. *Intel* suggests that because DT is a participant in the German litigation subject to German court jurisdiction, petitioner's need for § 1782 help 'is not as apparent as it ordinarily is when evidence is sought from a nonparticipant in the matter arising abroad.'" *Schmitz*, 376 F.3d at 85 (quoting *Intel*, 542 U.S. at 264). Similarly, in *Mare Shipping*, the court reasoned that the "first factor . . . does not weigh in favor of granting the application" because although "the named Respondents are not party to a foreign action, Spain, respondent's client, is a participant in the foreign proceeding." 2013 WL 5761104, at *4. *See also In re Kreke Immobilien KG*, 2013 WL 5966916, at *5 (S.D.N.Y. Nov. 8, 2013) (denying petition on discretionary grounds where respondent was parent company of foreign defendant because "discovery is fundamentally being sought from a participant in the [foreign] proceeding.").

Cravath contends that these cases show that the first factor weighs against granting this petition because the documents are best obtained directly from Shell in the Dutch proceeding. However, the question of whether the respondent is a party to the foreign proceeding is not the only relevant consideration. Rather, the respondent's connection to the foreign proceeding

is part of a broader inquiry: whether the discovery is "outside the foreign tribunal's jurisdictional reach," and thus "unobtainable absent § 1782(a) aid." *Intel*, 542 U.S. at 264. In *In re Microsoft Corp.*, 428 F. Supp. 2d 188, 192 (S.D.N.Y. 2006), for example, the court described the first *Intel* prong as "whether the documents or testimony sought are within the foreign tribunal's jurisdictional reach, and thus accessible absent § 1782 aid." If a law firm's client is party to the foreign proceeding, then the documents are presumably within the foreign tribunal's reach, and assistance via Section 1782 is presumably unnecessary. But as this case illustrates, that is not always the case. Thus, "[i]t is the foreign tribunal's ability to control the evidence and order production, not the nominal target of the Section 1782 application, on which the district court should focus." *In re Application of OOO Promnefstroy*, 2009 WL 3335608, at *5 (S.D.N.Y. Oct. 15, 2009).

Here, Shell may be in possession of some of the documents Kiobel seeks, but there are several reasons why the discovery may not be obtainable "absent § 1782 aid." First, as discussed above, the Dutch action cannot proceed unless Kiobel presents sufficient evidence at the outset. Kiobel seeks documents from Cravath in order to collect evidence prior to filing suit. Absent that discovery, Kiobel's contemplated action may be foreclosed before there is any opportunity to obtain this discovery directly from Shell in the Dutch proceeding. Second, even if Kiobel was able to obtain discovery from Shell in the Dutch proceeding, not all of the materials that Kiobel seeks are likely to be in

Shell's possession. For example, Kiobel is particularly interested in obtaining deposition transcripts, which Shell may not possess. Kiobel has also represented that in other litigation Kiobel's Dutch counsel has brought against Shell arising out of Shell's activities in Nigeria during the 2000s, Shell has represented that it is no longer in possession of many requested documents. Samkalden Reply Decl. ¶ 9. Since Kiobel's action arises out of conduct that occurred in the 1990s, Kiobel believes Cravath may be the only source for some of these documents.

Section 1782 assistance may not be warranted in all situations where the respondent is a law firm representing a foreign client that is a defendant in the foreign proceeding. However, on balance, under the particular circumstances of this case, this factor weighs in favor of granting the petition because these documents may be unobtainable absent Section 1782 aid.

b. The Second Discretionary Factor Weighs in Favor of Granting the Petition

Under the second discretionary factor, a court is to consider "the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign government or the court or agency abroad to U.S. federal-court judicial assistance." *Intel*, 542 U.S. at 264. In evaluating this factor, courts "should consider only *authoritative proof* that a foreign tribunal would reject evidence obtained with

the aid of section 1782." *Euromepa S.A. v. R. Esmerian, Inc.*, 51 F.3d 1095, 1100 (2d Cir. 1995) (emphasis added). Cravath, as the party opposing the application, "bears the burden of proving the non-receptivity of the foreign tribunal." *In re Application of Gorsoan Ltd*, 2014 WL 7232262, at *7 (S.D.N.Y. Dec. 10, 2014) (citing *In re Esses*, 101 F.3d 873, 876 (2d Cir. 1996)).

Cravath offers no authoritative proof that the Dutch courts are unreceptive to receiving assistance pursuant to Section 1782. Cravath points out that when the *Kiobel* case was before the U.S. Supreme Court, the Government of the Netherlands submitted an amicus brief in which it argued that U.S. courts should not interfere with its right to adjudicate disputes among its own nationals. In so arguing, the Netherlands expressed concern over American "plaintiff-favoring rules," including "the generally broader discovery available to plaintiffs in the U.S." Moskowitz Decl., Ex. A at 27. This is not authoritative proof that the Netherlands is unreceptive to Section 1782 discovery. Such proof is typically "embodied in a forum country's judicial, executive or legislative declarations that specifically address the use of evidence gathered under foreign procedures." *Euromepa S.A. v. R. Esmerian, Inc.*, 51 F.3d 1095, 1100 (2d Cir. 1995) (internal quotations omitted). The amicus brief referenced by Cravath addressed whether Kiobel's claim should be heard in a U.S. court, but it did not discuss Section 1782 or otherwise address whether Dutch courts accept evidence "gathered under foreign procedures." It is therefore not an authoritative declaration that Dutch courts are

hostile to receiving discovery pursuant to statutes such as Section 1782.

The other cases relied upon by Cravath only further illustrate that "where courts have found that analysis of the second *Intel* factor weighs against a Section 1782 discovery request, evidence demonstrating the non-receptiveness of the foreign tribunals to U.S. discovery has been explicit." *Gorsoan*, 2014 WL 7232262, at *7. In *In re Microsoft Corp.*, 428 F. Supp. 2d 188, 194 (S.D.N.Y. 2006), for example, the court denied the petition because the European Commission had "explicitly stated that it opposes the discovery sought by Microsoft and is not receptive to U.S. judicial assistance." Similarly, in *Schmitz*, 376 F.3d 79, 84 (2d Cir. 2004), the German Ministry of Justice sent "specific requests" to the district judge that the petition be denied.

The Netherlands has done nothing of the sort here. On the contrary, in *Mees v. Buiter*, a fairly recent case in which the petitioner sought documents for use in a Dutch proceeding, the Second Circuit noted that the respondent did "not contend that Dutch courts reject the use in litigation of materials obtained through § 1782." 793 F.3d at 303 n.20.

Thus, this factor also weighs in favor of granting the petition.

c. The Third Discretionary Factor Weighs in Favor of Granting the Petition

Under the third discretionary factor, courts must consider "whether the § 1782(a) request conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States." *Intel*, 542 U.S. at 264. Importantly, this factor does not impose a "foreign-discoverability requirement." *Mees v. Buiter*, 793 F.3d 291, 303 (2d Cir. 2015). As the Second Circuit recently summarized, "there is no requirement that evidence sought in the United States pursuant to § 1782(a) be discoverable under the laws of the foreign country that is the locus of the underlying proceeding." *Gorsoan Ltd. v. Bullock*, 652 F. App'x 7, 9 (2d Cir. 2016). Imposing a "foreign-discoverability rule" would "serve only to thwart § 1782(a)'s objective to assist foreign tribunals in obtaining relevant information that the tribunals may find useful but, for reasons having no bearing on international comity, they cannot obtain under their own laws." *Intel*, 542 U.S. at 261–62.

Similarly, a petitioner need not demonstrate that it attempted to obtain the discovery in the foreign tribunal before filing a Section 1782 petition. *See Mees*, 793 F.3d at 303 (there is "no support in the plain language of the statute" for a "quasi-exhaustion requirement.") (quoting *In re Metallgesellschaft*, 121 F.3d 77, 79 (2d Cir. 1997)); *In re Application of Bloomfield Inv. Res. Corp.*, 315 F.R.D. 165, 167 (S.D.N.Y. 2016) ("Bloomfield's failure to exhaust discovery procedures in the Netherlands Action is not a basis on which to reject

Bloomfield's discovery request."); *Gorsoan*, 2014 WL 7232262, at *9 (a "§ 1782 applicant need not exhaust foreign discovery remedies. Requiring Petitioner to wait for the outcome of the . . . discovery proceedings would amount to enforcing such an 'exhaustion' requirement.").

Cravath argues that Kiobel filed this petition in order to avoid a potentially unfavorable discovery ruling from the Dutch court. However, accepting this argument would require Kiobel to refrain from filing this petition until after it first tried to obtain this discovery in the Netherlands. This effectively imposes an exhaustion requirement, which the Second Circuit has rejected. *Mees*, 793 F.3d at 303.

The proper inquiry is not whether a Dutch court would grant the discovery Kiobel seeks here, but whether the Dutch judiciary imposes a proof-gathering restriction or some other prohibition that precludes use of these materials in the Dutch proceeding. As the Second Circuit explained in *Mees*, that "a country does not enable broad discovery within a litigation does not mean that it has a policy that restricts parties from obtaining evidence through other lawful means. 'Proof-gathering restrictions' are best understood as rules akin to privileges that *prohibit* the acquisition or use of certain materials, rather than as rules that *fail to facilitate* investigation of claims by empowering parties to require their adversarial and non-party witnesses to provide information." 793 F.3d at 303 n.20. Thus, a foreign tribunal may "limit discovery within its domain for reasons peculiar to its own legal practices,"

but this does "not necessarily signal objection to aid from United States federal courts." *Intel*, 542 U.S. at 261.

Here, Cravath has provided no evidence that the Netherlands prohibits or otherwise restricts parties from gathering evidence via Section 1782. Thus, this factor weighs in favor of granting the petition.

d. The Fourth Discretionary Factor Weighs in Favor of Granting the Petition

The final discretionary factor to consider is whether the request is "unduly intrusive or burdensome." *Intel*, 542 U.S. at 245. Cravath's burden is extremely minimal because it has previously produced all of the documents currently sought, and probably retained separately bundled copies of the productions it made. No additional collection or review is likely to be required.

Many of the arguments that Cravath initially raised with respect to burden have since been amicably resolved by the parties. Regarding the scope of the production, which Cravath argued was overbroad, Kiobel has agreed to limit its request to: (a) documents produced by the defendants in the *Kiobel* and *Wiwa* actions; and (b) deposition transcripts of the defendants' witnesses in those same actions. Cravath also initially argued that providing the documents would be unduly intrusive absent a mechanism to ensure that the documents' confidentiality is maintained. However, the

parties have since stipulated to a confidentiality agreement, which renders this issue moot.

Cravath's remaining argument with respect to burden is unpersuasive. Cravath argues that the documents might be subject to "other privileges governed by Dutch law," and that if the petition is granted, Cravath would have to conduct a "substantial and complex review" of the documents to ensure compliance with applicable foreign privileges. This argument is speculative. Absent "authoritative proof" of a "violation of the alleged privilege," a court should not refrain from granting a petition. *In re Metallgesellschaft*, 121 F.3d 77, 80 (2d Cir. 1997). Here, Cravath identifies no specific foreign privilege, let alone authoritative proof that production of the documents would violate that privilege, necessitating additional review prior to production.

Thus, the fourth and final discretionary factor weighs in favor of granting the petition.

CONCLUSION

For the foregoing reasons, and upon entry of the Stipulation and Order Regarding Confidentiality of Discovery Materials dated January 13, 2017, it is hereby:

ORDERED that the Petition of Esther Kiobel, Pursuant to 28 U.S.C. § 1782, for Leave to Issue Subpoenas to Cravath, Swaine & Moore LLP for the Production of Documents for Use in a Foreign Proceeding is granted;

ORDERED that Kiobel is authorized to issue a subpoena consistent with her submissions and counsel's and the Court's statements at the December 20, 2016, oral argument;

ORDERED that Kiobel shall serve the subpoena by January 27, 2017, and Cravath shall produce the responsive documents by February 27, 2017.

The Clerk shall mark the case closed.

SO ORDERED.

Dated:
January 24, 2017
New York, New York

/s/ Alvin K. Hellerstein
ALVIN K. HELLERSTEIN
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 30th day of August, two thousand eighteen.

Esther Kiobel, by her attorney-in-fact Channa Samkalden,

Petitioner-Appellee,

v.

Cravath, Swaine & Moore, LLP,

Respondent-Appellant.

ORDER

Docket No: 17-424

Appellee, Esther Kiobel, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

[SEAL]

/s/ Catherine O'Hagan Wolfe