14-4104(L)

14-3590(CON), 14-3607(CON), 14-4129(CON), 14-4130(CON), 14-4131(CON), 14-4132(CON), 14-4135(CON), 14-4136(CON), 14-4137(CON), 14-4138(CON), 14-4139(CON)

United States Court of Appeals

for the

Second Circuit

SAKWE BALINTULO, as personal representative of SABA BALINTULO, *et al.*,
Plaintiffs-Appellants,

v.

(For Continuation of Caption See Following Page)

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

SCHONBRUN, DESIMONE, SEPLOW,
HARRIS & HOFFMAN, LLP
Paul L. Hoffman
723 Ocean Front Walk
Venice, CA 90291
Telephone: (310) 396-0731
Facsimile: (310) 399-7040

HAUSFELD
Michael D. Hausfeld
Kristen M. Ward
1700 K Street, N.W.
Suite 650
Washington, D.C. 20006
Telephone: (202) 540-7200
Facsimile: (202) 540-7201

NAGEL RICE, LLP
Diane E. Sammons, Esq.
Roseland, New Jersey, 07068
(973) 618-00400

Attorneys for Plaintiffs-Appellants

INTERNATIONAL HUMAN RIGHTS CLINIC
HARVARD LAW SCHOOL
Tyler R. Giannini
6 Everett Street, Third Floor
Cambridge, MA 02138
(617) 496-7368

FORD MOTOR CO., INTERNATIONAL BUSINESS MACHINES CORP.,

Defendants-Movants,

GENERAL MOTORS CORP.,

Defendant.

LUNGISILE NTZEBESA, DOROTHY MOLEFI, TOZAMILE BOTHA, MNCEKELELI HENYN SIMANGENTLOKO, SAMUEL ZOYISILE MALI, MSITHELI WELLINGTON NONYUKELA, MPUMELELO CILIBE, WILLIAM DANIEL PETERS, JAMES MICHAEL TAMBOER, NONKULULEKO SYLVIA NGCAKA, individually and on behalf of her deceased son, NOTHINI BETTY DYONASHE, individually and on behalf of her deceased son, MIRIAM MZAMO, individually and on behalf of her deceased son, LESIBA KEKANA, DENNIS VINCENT FREDERI BRUTUS, MARK FRANSCH, ELSIE GISHI, THOBILE SIKANI, REUBEN MPHELA, CATHERINE MLANGENI, ARCHINGTON MADONDO, MICHAEL MBELE, THULANI NUNU, MAMOSADI MLANGENI, THANDIWE SHEZI, SAKWE BALINTULO,

Plaintiffs-Appellants,

SIGQIBO MPENDULO, NYAMEKA GONIWE, THEMBA MEQUBELA, ANDILE MFINGWANA, F.J. DLEVU, unlawfully detained and tortured during period 1964/4, LWAZI PUMELELA KUBUKELI, unlawfully forced to flee into exile in 1985, FRANK BROWN, P.J. OLAYI, SYLVIA BROWN, H. DURHAM, M.D., WELLINGTON BANINZI GAMAGU, Violations of Pass Laws, unlawful detention 1981/1983, torture subjected to discriminatory labor practices 1981, HERMINA DIGWAMAJE, SAKWE BALINTULO KHULUMANI,

Plaintiffs,

HANS LANGFORD PHIRI,

ADR Provider-Appellant,

-v-

SULZER AG, DAIMLERCHRYSLER NORTH AMERICA HOLDING CORPORATION, DEBEERS CORPORATION, SCHINDLER HOLDING AG, NOVARTIS AG, ANGLO-AMERICAN CORPORATION, BANQUE INDO SUEZ, CREDIT LYONNAIS, and Unknown officers and directors of DANU INTERNATIONAL, STANDARD CHARTERED BANK PLC,

CITIGROUP AG, J.P. MORGAN SECURITIES INC., as successor to Morgan Guaranty, MANUFACTURERS HANOVER, CHEMICAL BANK & CHASE MANHATTAN BANK, CORPORATE DOES, COMMERZBANK AG, CREDIT SUISSE, CITIGROUP INC., DEUTSCHE BANK AG, UBS AG, DRESDNER BANK AG, UNISYS CORPORATION, SPERRY CORPORATION, BURROUGHS CORPORATION, ICL, LTD., JOHN DOE CORPORATION, AMDAHL CORP., COMPUTER COMPANIES, FORD MOTOR COMPANY, HOLCIN, LTD., HENRY BLODGET, MERRILL LYNCH & CO., INC., KIRSTEN CAMPBELL, KENNETH M. SEYMOUR, JUSTIN BALDAUF, THOMAS MAZZUCCO, VIRGINIA SYER GENEREUX, SOFIA GHACHEM, JOHN DOE, Defendants 1 through 10, EDWARD MCCABE, DEEPAK RAJ, CORPORATE DOES 1 through 100, their predecessors, successors and/or assigns, OERLIKON CONTRAVES AG, EXXON MOBIL CORPORATION, OERLIKON BUHRLE AG, SHELL OIL COMPANY, SHELL PETROLEUM, INC., ROYAL DUTCH PETROLEUM CO., SHELL TRANSPORT & TRADING COMPANY PLC, NATIONAL WESTMINSTER BANK PLC, MINNESOTA MINING AND MANUFACTURING COMPANY/3M COMPANY, FUJITSU LTD., BARCLAYS NATIONAL BANK LTD., DAIMLER AG, GENERAL MOTORS CORPORATION, INTERNATIONAL BUSINESS MACHINES CORPORATION, UNION BANK OF SWITZERLAND AG,

Defendants-Appellees,

RHEINMATALL GROUP AG, BARCLAYS BANK PLC,

Defendants.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

Defendants' opposition brief ignores the actual allegations and theories of liability in Plaintiffs' proposed Second Amended Complaints in favor of recycling tired arguments. Defendants misstate not only the Plaintiffs' specific allegations but also the legal standards articulated in prior decisions of this Court and the Supreme Court concerning jurisdiction, aiding and abetting, and corporate liability in the Alien Tort Statute ("ATS") context. Plaintiffs' proposed amended complaints plainly meet the requirements set by new case law since the previous complaints were filed in 2008. The proposed complaints overcome the *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) ("*Kiobel II*") presumption against extraterritoriality, as interpreted by this Court in *Mastafa v. Chevron Corp.*, 770 F.3d 170 (2d Cir. 2014), and satisfy the Second Circuit's requirements for pleading aiding and abetting claims, including a *mens rea* of purpose. In addition, under the ATS, corporations can be held liable for violations of international law.

First, Plaintiffs' proposed amended complaints plead new and non-conclusory facts that show their ATS claims "touch and concern" the United States with "sufficient force." *Kiobel II*, 133 S. Ct. at 1669. The complaints detail how Defendants' extensive activity *within* the United States unlawfully facilitated international law violations in South Africa. Under both *Kiobel II* and *Mastafa*, this U.S.-based activity by Ford and IBM—not their South African subsidiaries—

constitutes "relevant conduct" that squarely displaces the presumption against extraterritoriality. *Kiobel II*, 133 S. Ct. at 1669; *Mastafa*, 770 F.3d at 186. The District Court thus erred in focusing only on the actions of Defendants' subsidiaries in South Africa. The lower court's decision stemmed from a misreading of *Balintulo v. Daimler AG*, 727 F.3d 174 (2d Cir. 2013), which it misunderstood to foreclose aiding and abetting claims and adopt Justice Alito's concurrence in *Kiobel II*. *See* Aug. 28, 2014 Order at SA019. However, neither *Balintulo* nor *Kiobel II* bar claims against U.S. parent corporations for their own wrongful conduct in the United States.

Second, as required by *Mastafa*, Plaintiffs plausibly and specifically state a claim for aiding and abetting violations of the law of nations, alleging that Ford and IBM provided practical assistance that had a substantial effect on the violations, and did so with the purpose of facilitating such abuses. 770 F.3d at 192. Defendants concede that if Plaintiffs allege aiding and abetting actions by the corporate parent from the United States, their claims can proceed. Opp. at 28. Plaintiffs meet this standard. For example, the amended complaints allege that Defendants designed specialized products specifically for the unlawful purpose of committing apartheid by aiding the South African military and security forces. Defendants had the expertise and authorized the manufacture and sale of restricted products and technology, and adaptations to such products, in circumvention of

international sanctions. Defendants' centralized organization required that decisions to specially design and sell products to the apartheid government were made in the United States. Given existing sanctions, Defendants understood their actions to make and sell specialized equipment for the apartheid state provided practical assistance that had a substantial effect on violations, yet Defendants still arranged for sales and services to continue in contradiction of those sanctions in order to assist violations. These pleadings meet the *mens rea* of purpose applicable in this Court.

Third, as the District Court correctly ruled, corporations, like natural persons, can be held liable for international law violations under the ATS. This Court's decision in *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010) ("*Kiobel I*") was implicitly rejected by the Supreme Court in both *Kiobel II* and *Daimler v. Bauman*, 134 S. Ct. 746 (2014). As the *Licci* panel recognized, the Supreme Court's decision in *Kiobel II* left the question of corporate liability unresolved in this Court. *Licci ex rel. Licci v. Lebanese Can. Bank, SAL*, 732 F.3d 161, 174 (2d Cir. 2013). The principle of corporate liability is well established under international law and federal common law. *See, e.g.*, Brief for the United States as *Amicus Curiae* Supporting Petitioners, *Kiobel II*, 2011 WL 6425363 at *7 (Dec. 21, 2011). All other appellate courts to consider the question before and

after *Kiobel II* have held, like the District Court below, that corporations may be sued under the ATS.

Accordingly, the District Court's order denying Plaintiffs' motion for leave to amend should be reversed.

ARGUMENT

I. The District Court Erred in Denying Plaintiffs' Motion to Amend Their Complaints.

A. Alien Tort Statute Claims Are Permitted to Proceed When Plaintiffs Plead Relevant Conduct in the United States that Aids and Abets an International Law Violation.

This Court permits aiding and abetting claims under the ATS. *Mastafa*, 770 F.3d at 171, 186; *see also Presbyterian Church of Sudan v. Talisman Energy, Inc.,* 582 F.3d 244, 258 (2d Cir. 2009). In order to plead a viable aiding and abetting claim, plaintiffs must allege that defendants acted with the purpose to facilitate the resulting violations, but are not required to show that the wrongdoer acted with specific intent. *Talisman*, 582 F.2d at 259; *Mastafa*, 770 F.3d at 193. Defendants' proposed specific intent standard, Opp. at 38-39, 45, in which the aider and abettor must share the intent of the principal,[1] would transform aiding and abetting into something it is not. Such a specific intent standard is not recognized by

[1] Defendants argue that the aider and abettor must share the same purpose as the principal. Opp. at 38, 45. This is not the correct standard. *Talisman*, 582 F.3d at 258.

international law or the law of this Circuit. *See, e.g.*, *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, Judgment, ¶245 (Dec. 10, 1998); *Prosecutor v. Brima, et al.*, SCSL-04-16-A, Appeal Judgment, ¶¶242-43 (Feb. 22, 2008); *Prosecutor v. Popović, et. al*, Case No. IT-05-88-A, Appeal Judgment, ¶¶1732, 1758 (Jan. 30, 2015); *Prosecutor v. Šainović*, Case No. IT-05-87-A, Appeal Judgment, ¶1649 (Jan. 23, 2014)*; Prosecutor v. Blé Goudé*, Case No. ICC-02/11-2/11, Decision on the confirmation of charges against Charles Blé Goudé, ¶¶167, 170 (Dec. 11, 2014); *Prosecutor v. Taylor,* Case No. SCSL-03-01-A, Appeal Judgment, ¶¶403, 440, 483 (Sept. 26, 2013); Brief of Ambassador David J. Scheffer as *Amicus Curiae* in Support of Appellants, *Balintulo et al. v. Ford et al.* (Feb. 4, 2015) at 4-14; *Talisman*, 582 F.3d at 259; *Mastafa*, 770 F.3d at 193 (adopting *Talisman*); *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 277 (2d Cir. 2007) (Katzmann, J., concurring).

Mastafa instructs that the extraterritoriality inquiry necessary to overcome the *Kiobel II* presumption must focus on "relevant conduct" in the United States and is a fact-intensive determination. 770 F.3d at 182-83, 185-87, 189-93. *Mastafa* also affirms that aiding and abetting is, itself, "relevant conduct." *Id*. at 186. Defendants concede that, where acts that constitute aiding and abetting occur in the United States and the violations occur in South Africa, the presumption is

overcome. Opp. at 28.[2] At the time the previous complaints were filed in 2008, there was no need to plead this U.S. connection because the presumption against extraterritoriality had not yet been applied to the ATS. As discussed below, Plaintiffs now meet the new pleading requirements under *Mastafa*, and the allegations plainly overcome the presumption against extraterritoriality.

B. Plaintiffs Allege Conduct that Purposefully Facilitated the Commission of International Law Violations, Thus Establishing Aiding and Abetting Claims.

The fact-intensive inquiry about aiding and abetting claims is relevant to establishing jurisdiction under *Talisman* and *Mastafa*.[3] Both require that Plaintiffs plausibly plead conduct by the Defendants that "purpose[fully] facilitate[es] the commission of th[e] crime." *See Mastafa*, 770 F.3d at 192; *Talisman*, 582 F.3d at 263; *Khulumani*, 504 F.3d at 264 (Katzmann, J., concurring); *see also* AOB at 45.

Plaintiffs' proposed amended complaints contain sufficient facts to support the reasonable inference of U.S.-based actions by Defendants with the "purpose" to advance the apartheid government's international law violations. *Mastafa,* 770

[2] Defendants also implicitly advocate to overturn *Mastafa*'s holding with regards to aiding and abetting and adopt the position from Justice Alito's *Kiobel II* concurrence, *see* Opp. Part III, but this Court rejected that extreme position in *Mastafa* and should do so again here.

[3] Plaintiffs respectfully disagree with the holding in *Mastafa*, 770 F.3d at 181-82, that extraterritoriality is a question of subject matter jurisdiction. Regardless, Plaintiffs allege sufficient facts to establish jurisdiction.

F.3d at 193; *Talisman*, 582 F.3 at 259. *Talisman* instructs this Court to look to international law, and in particular to the Rome Statute, to interpret the purpose requirement. *Id.* International law has never adopted a specific intent *mens rea* requirement except with regard to specific intent crimes like genocide. For example, a Pre-Trial Chamber of the International Criminal Court recently stated that aiding and abetting would be established if a defendant's actions:

> were intentional and were performed for the purpose of *facilitating* the commission of the crimes. In addition, they were performed in the *knowledge* that the crimes were committed as part of a widespread and systematic attack against the civilian population . . . .

Blé Goudé, ¶170 (emphasis added). *See also supra* Section I.A. The case law in this Circuit confirms that purpose can be inferred from circumstances. *See, e.g.*, *Talisman* at 582 F.3d at 264, *Mastafa*, 770 F.3d at 193; *Khulumani*, 504 F.3d at 277 n.11.

Defendants' arguments that Plaintiffs' allegations of purpose are insufficient fail. First, Defendants' efforts to undermine Plaintiffs' allegations as pleading solely "knowledge" miss the mark. Plaintiffs' allegations that Defendants had advanced knowledge and thus were on notice of their role in committing international law violations do not mean that Plaintiffs allege mere knowledge. Rather, Plaintiffs plead, and the relevant inquiry must focus upon, whether Defendants took intentional action to facilitate international law violations after

acquiring the requisite knowledge that they were aiding and abetting such violations by their actions. Purpose is established here because there is advanced knowledge combined with subsequent intentional action. Indeed, international sanctions and condemnation were premised on the connection between the provision of specific materials and services provided by the Defendants *expressly* aiding and abetting (by furthering, fostering, and enabling) the commission of human rights abuse by the apartheid state in violation of international law.

Second, Defendants attempt to heighten the aiding and abetting standard in two ways. They first propose a *mens rea* standard of specific intent that does not exist in international law or this Court's precedent. *See supra* Section I.A. They further suggest that the proper *actus reus* is "specific direction" rather than substantial assistance, Opp. at 28-29, a position undermined by this Court's precedent. *Talisman,* 582 F.3d at 258. Defendants' effort to argue that *Prosecutor v. Perišić*, Case No. IT-04-81-A, Appeal Judgment (Feb. 28, 2013) is representative of international jurisprudence, Opp. at 29, is clearly erroneous. *Perišić*'s "specific direction" standard has been rejected as an outlier. *See, e.g.*, *Šainović*, ¶¶1649-50 (rejecting *Perišić* as "in direct and material conflict with the prevailing jurisprudence on the actus reus of aiding and abetting liability and with customary international law"); *Taylor,* ¶¶473-82; *see also* Scheffer Amicus at 4-14.

Plaintiffs' pleadings more than meet the actual aiding and abetting elements that are controlling in this Court.

1. Otherwise Legitimate Acts, Such as Technology or Vehicle Sales, Were Unlawful in the Context of Apartheid Sanctions Regimes that Indicated Such Actions Aided and Abetted International Law Violations.

The Court's inquiry must focus on the Defendants' relevant conduct, which includes an analysis of the context in which Defendants acted. *See Talisman*, 582 F.3d at 264. Here, the context included an international sanctions regime making clear to the Defendants that specialized vehicle and technology sales to South Africa were substantially contributing to apartheid and associated harms. AOB at 48-51. Ford and IBM, from the United States, nonetheless, made repeated and intentional decisions to continue to supply specialized products that would assist the apartheid authorities to carry out international law violations. Ford and IBM did not simply place vehicles and computer technology into the stream of commerce. AOB at 46-51. *See, e.g.*, *Mastafa*, 770 F.3d at 193 n.24 (simply placing items into stream of commerce insufficient to demonstrate purpose). Rather, sanctions put the Defendants on specific notice that their products were restricted precisely because they made a substantial contribution to apartheid and associated violations of international law, including denationalization, extrajudicial killings, and torture. Underscoring that they purposefully aided such abuses in this context, the Defendants circumvented sanctions regimes in order to continue to

make specific sales of restricted goods and services to South African authorities to assist in the suppression, intimidation, control, and denationalization of the black population.[4]

Defendants nevertheless argue that sales of vehicles to security forces or creating an identity card system, cannot amount to international law violations since these actions could have a legitimate purpose. Opp. at 39-40. Defendants' proposed rule would, in essence, allow any legitimate purpose to negate criminal activity. Defendants' reliance on *Zyklon B* demonstrates the failure in their logic. Defendants posit that their actions are unlike selling gas to the Nazis because there were legitimate reasons for Defendants' sales to the apartheid state. Opp. at 46. But under the Nazi regime, gas had a legitimate use—to kill lice that could spread typhus. *See Trial of Bruno Tesch and Two Others (The Zyklon B Case)*, 1 Law Reports of Trials of War Criminals 93, 98, 101 (1947) (British Military Ct., Hamburg, Mar. 1-8, 1946). Indeed, the chemical was used for both purposes by the Nazis. *See Zyklon B*, 1 Law Reports of Trials of War Criminals 93, 98, 101.

[4] The Defendants misunderstand Plaintiffs' argument regarding the relevance of the international and U.S. sanctions. Plaintiffs do not argue that sanctions overcome the presumption against extraterritoriality. *See* Opp. at 11. Rather, sanctions placed the Defendants on notice of the harms in question, and thus are particularly relevant to the aiding and abetting *mens rea* inquiry (and may also be a factor in the "touch and concern" analysis).

At Nuremberg, the defendants were nonetheless convicted. *Id.*[5] Moreover, as in *Zyklon B,* where the defendant trained the S.S. to use poison gas to kill, IBM instructed the apartheid state about how to use their products to accomplish denationalization. *Ntsebeza* Compl., ¶¶139(H), 150, 152(D), 152(G); AOB at 41-43.

Similarly, Defendants' argument that the Bophuthatswana identity documents were not inherently criminal or illegitimate goes too far. The fact that the documents were specifically printed with a new nationality is wrongful because it deprived the bearer of the fundamental right of citizenship. AOB at 14, 24. The context changes what seems like a neutral act into an unlawful one. Just as a tattoo might be innocent in one setting, in the context of sorting prisoners in concentration camps, it is unlawful. Similarly, selling a car may normally be

[5] Defendants' argument about *Direct Sales Co. v. United States*, Opp. at 46, is unpersuasive. There, the Supreme Court held that the sale of restricted goods with a capacity for harm, when combined with other contextual factors (such as the quantity of goods sold), can amount to purpose. 319 U.S. 703, 711 (1943). Here, the sanctions regime made clear that Defendants' restricted goods contributed to international law violations. Thus, *Direct Sales* supports the reasonable inference of purpose, which is clearly established here. *See also* AOB at 41-45.

Similarly, Defendants' analogy to the facts in *Talisman*, Opp. at 46-47, is misguided. In *Talisman,* the infrastructure was not a restricted good and, accordingly, the Court found insufficient evidence that defendants acted with an improper purpose. In contrast, IBM's bid to provide a specialized product to denationalize black South Africans is on its face unlawful. *See also* AOB at 43-45.

lawful, but selling a specialized vehicle to a bank robber knowing he needs to make a fast getaway makes it unlawful.

The question is not whether there were both legitimate and illegitimate uses for Ford and IBM's products in South Africa, but whether Defendants purposefully assisted the South African government's illegal acts with full awareness that providing specialized vehicles and technology would have a substantial effect on the commission of the violations. Importantly, at this stage in the proceedings, the factual allegations must be taken as true. The only inquiry is whether an inference of purpose is plausible. Given sanctions regimes that specifically pronounced that products provided by these Defendants to the apartheid state contributed to human rights violations, the inference of purpose is clear.

2. The Allegations Indicate Far More than Mere, Routine Corporate Control Over Subsidiaries but Rather Tight, Purposeful Involvement by Parent Corporations in the Relevant Unlawful Acts.

Defendants err when they suggest that Plaintiffs allege no more than a "control theory" and routine corporate control over foreign subsidiaries. Opp. at 2, 16, 33, 35. Defendants' actions in the United States demonstrate direct involvement in purposeful unlawful actions emanating from the United States, not just agency or vicarious liability.

For example, with respect to IBM, Plaintiffs allege U.S.-based decisions and actions that demonstrate the purposeful facilitation of apartheid violations. IBM

did not have research and development or manufacturing facilities in South Africa. *Ntsebeza* Compl., ¶131(A). Its operations in South Africa were highly dependent on direction and expertise from IBM's U.S. headquarters, particularly given the state of hardware and software and the need for customization during the relevant time period. *Id.* ¶¶140-53. IBM, from the United States, oversaw technology, customized and for years provided support for both hardware and software that contributed directly to denationalization. *Id.* Although Defendants suggest otherwise, *see* Opp. at 42-45, the complaints allege that IBM in the United States specifically bid on and obtained the contract to create the Bophuthatswana identity book, and developed both hardware and software systems used to produce that document. *Id*. ¶152. IBM South Africa's dependence on the corporate parent was so strong that, even after IBM's formal divestment from South Africa in the 1980s, operations there still relied on IBM's U.S.-based expertise to troubleshoot problems with products, *id.* ¶141(C), which was an essential service to keep technology operating. AOB at 10, 48. Through its bids and contracts, training of employees, troubleshooting, and other technical support, IBM in the United States purposefully assisted and actively participated in denationalization, knowing the consequences of its actions. AOB at 9-15.

Similarly, Plaintiffs allege that the sanctions regime made clear that specialized vehicle sales to South African security forces substantially contributed

to apartheid and associated violations. AOB at 48-51. Ford's U.S. management nevertheless repeatedly and explicitly decided to continue such sales. Ford's U.S. headquarters was intimately and actively involved in the details of these sales, including those related to design and approval of specialized vehicles for the security forces. *Ntsebeza* Compl., ¶¶70-74. Indeed, Ford South Africa did not manufacture the vehicles or their parts and could not make special modifications without U.S. approval. *Id.* ¶¶74(D) 84(D), 85(E). Ford's specialized sales to the South African security forces were dependent on U.S. activities. *Id.* ¶¶70-74.[6] Ford in the United States also made critical decisions about other aspects of policies and operations in South Africa, "including investments, policy, management (including the hiring of the managing director), . . . and parts procurement and supplies." *Id.* ¶69; *see also id.* ¶¶9, 66, 69, 71(A), 71(C). Ford was in constant communication with its managers in South Africa, who "had to report to Ford headquarters in the United States daily, weekly, and monthly in

[6] Defendants argue that they did not have a purpose to assist harms because, for example, they supported the Sullivan Principles. *See* Opp. at 45. Defendants conveniently omit that these statements were not consistent with their unlawful conduct and actual intent. *Ntsebeza* Compl., ¶¶11, 98. In other words, the statements obscured the Defendants' true purpose, which was to intentionally assist the apartheid state's international law violations. *Id*. ¶¶11, 98. Ford continued its unlawful sales to solidify its relationship with the South African government, because doing otherwise might have harmed Ford's business interests. *Id.* ¶82.

writing on forms regarding production and other operations, through processes developed by Ford in the United States." *Id.* ¶75(A). Ford in the United States exercised substantial control over employee treatment in South Africa and the relationship of its management to the apartheid government. *Id.* ¶73. Ford in the United States did far more than would be routine for a parent corporation in making and controlling key decisions about policies, products, and operations in South Africa related to unlawful activity. AOB at 15-23.

C. Plaintiffs Allege Relevant Conduct in the United States to Overcome *Kiobel II*'s Presumption Against Extraterritoriality.

Defendants concede, as they must, that in ATS cases where Plaintiffs plead a "U.S.-based defendant itself committed violations of international law through its U.S.-based conduct," Opp. at 37, the claims have proceeded. Plaintiffs' amended complaints meet this threshold, providing extensive and detailed allegations with respect to both Ford and IBM's relevant U.S.-based actions, and accordingly should be allowed to proceed. The allegations here are significantly different from those deemed lacking in *Kiobel* and far more detailed that those considered sufficient to meet the touch and concern test in *Mastafa*, 770 F.3d at 191 (finding defendants' "multiple domestic purchases and financing transactions" and "numerous New York-based payments and 'financing arrangements'" constituted "non-conclusory conduct that appears to 'touch[] and concern[]' the United States

with sufficient force to displace the presumption against extraterritoriality and establish our jurisdiction under the ATS.").

1. Relevant Conduct in the United States by the Parent Corporations Themselves Constitutes Aiding and Abetting, Not Simply Vicarious Liability for Actions of Subsidiaries.

The complaints allege with great specificity wrongful acts by Defendants that took place *in the United States* and caused abuses in South Africa. Defendants' assertion that aiding and abetting was only "undertaken in South Africa by the Companies' subsidiaries," Opp. at 28, ignores Plaintiffs' actual allegations that these Defendants, *not just their subsidiaries*, committed acts on U.S. soil with consequences in South Africa. *See supra* Sections I.B.1. and B.2.

The District Court erred when it disregarded Defendants' U.S-based conduct and focused solely on the resulting harms in South Africa. Although Plaintiffs were harmed in South Africa, the Defendants' aiding and abetting conduct took place *in the United States*, as well as in South Africa. The District Court misread *Balintulo,* which it misunderstood to adopt Justice Alito's concurrence in *Kiobel II*. However, neither *Balintulo* nor *Kiobel II* foreclose aiding and abetting claims against U.S. parent corporations for their conduct in the United States.

Defendants replicate the lower court's analytical errors, failing to engage with Plaintiffs' extensive new facts and theories that meet the *Mastafa* standard. Defendants scarcely address Plaintiffs' allegations that stem from Defendants' *own*

wrongful conduct in the United States, Opp. at 34-35, focusing instead on attacking vicarious liability. Defendants seek to reduce plaintiffs' theories and the law into a simplistic and superficial concept—that violations occurring on sovereign soil are extraterritorial, so no further discussion or evaluation is necessary or warranted.[7] This approach neglects the Supreme Court's guidance regarding "touch and concern" and "relevant conduct" considerations, and the *Mastafa* holding that Defendants' U.S.-based actions must be evaluated. 770 F.3d at 185-86.

Plaintiffs allege that IBM in the United States made key decisions and took actions that led to violations of international law in South Africa. AOB at 9-13, 34-35. Specifically, IBM bid on contracts, developed hardware and software, leased, sold, and provided technology services and support directly facilitating denationalization. *Ntsebeza* Compl., ¶¶131(A), 142. Research, development, and manufacturing for IBM's South Africa operations took place in the United States. *Id.* ¶131(A). For example, with respect to the Bophuthatswana identity book used to denationalize black South Africans, IBM bid on and won the contract to develop the hardware and software system to produce that document. *Id.* ¶¶152(A)–(B).

[7] For example, Defendants' effort to distinguish these cases from *Al Shimari v. CACI Premier Tech, Inc*., 758 F.3d 516 (4th Cir. 2014), *Sexual Minorities Uganda v. Lively*, 960 F. Supp. 2d 304 (D. Mass. 2013), and *Krishanti v. Rajaratnam,* 2014 WL 1669873 (D.N.J. Apr. 28, 2014), Opp. at 37, is unconvincing. In fact, these three cases support Plaintiffs' position that defendants can be held liable for their own U.S.-based conduct.

IBM in the United States made critical decisions regarding that contract and its implementation, and provided practical assistance that was essential to ensuring effective use of its product. *Id.* ¶152(B). IBM in the United States provided ongoing support and expertise to the South African and homeland governments to implement the identity book system, including through an internal network that allowed South Africans to directly consult U.S. experts even after divestment, when problems arose with the identity book system. *See, e.g.*, *id.* ¶152(A)–(I). Thus, Defendants misstate Plaintiffs' allegations when they assert that no relevant acts took place in the United States and that it was only the Defendants' South African subsidiaries that facilitated international violations.

Plaintiffs also allege that Ford in the United States made key decisions about sales to apartheid security forces, and that, without authorization from Ford management in the United States, the restricted specialized vehicles would not have been sold to South African security forces. AOB 15-22, 36-37; *Ntsebeza* Compl., ¶¶8, 9. Furthermore, Ford U.S.'s authorization for these sales and products was not a one-time decision; Ford management repeatedly authorized these products over decades, despite international sanctions regimes. *Id*. ¶¶81, 83. Ford in the United States made decisions regarding product line, design, and manufacture of vehicles for the South African security forces, with modifications required to be approved by Ford in the United States because they altered the

approved product plan. *Id.* ¶74(D). Ford in the United States controlled and directed shipments of vehicles and parts, including from Canada and England, to undermine U.S. sanctions that banned the supply of U.S.-made parts to South Africa. *Id.* ¶83(C).[8]

2. U.S.-Based Parent Involvement in International Law Violations Amounted to More Than Mere Corporate Oversight of a Subsidiary and Instead Involved Unlawful Acts in the United States.

Defendants contend that Plaintiffs' allegations suggest no more than routine control over foreign subsidiaries. Opp. at 16. In fact, Defendants' actions in the United States demonstrate direct liability for actions taken in the United States, rather than agency or vicarious liability. *See supra* Sections I.B.1. and B.2. For example, with respect to IBM, Plaintiffs allege U.S.-based control of technology that extended to decisions about customization, as well as ongoing support for both hardware and software, for IBM's operations in South Africa. *Ntsebeza* Compl., ¶131(A). Even after a putative divestment, IBM provided essential U.S.-based

[8] Ford in the United States also cooperated with the South African government, leading to the torture of black union and anti-apartheid employees. Ford in the United States established operations in which its South African managers, who were closely linked with the apartheid regime, punished black union and anti-apartheid activists. *Id.* ¶98(C). Ford's Detroit headquarters were in regular communication with and exercised oversight over its South African operations in a manner that enabled its U.S. operations to control details in South Africa, including through regular reports, investigations, and the involvement of U.S.-based management when major incidents arose involving human rights abuses. *Id.* ¶76.

expertise from the United States to assist when problems arose with products in South Africa. *Id*. ¶141(C). Similarly, Plaintiffs allege that Ford in the United States so actively participated operations in South Africa that it made key and repeated decisions about policies, products, and operations there, including those related to design and sale of specialized and restricted vehicles to the security forces. *Id.* ¶¶70-74.

II. There Is Corporate Liability Under the Alien Tort Statute.

A. *Kiobel I* is No Longer Binding Law on the Question of Corporate Liability.

The binding nature of *Kiobel I* was specifically questioned by the only Second Circuit panel decision to consider the issue in *Licci*, 732 F.3d at 174. Defendants' argument that *Licci*'s holding on this issue was "judicial prudence" makes no sense. If *Kiobel I* is still the law in this Circuit, every ATS claim against a corporation must be dismissed for lack of subject matter jurisdiction.[9] 621 F.3d at 120. To date, Plaintiffs are aware of no case that has been dismissed since the Supreme Court's decision in *Kiobel II* on this basis, including the cases Defendants cite for the binding nature of *Kiobel I*. *Licci*'s holding that *Kiobel I* has been

[9] Corporate liability is not properly a question of subject matter jurisdiction. *See* U.S. Amicus Br. at 8-10.

superseded by *Kiobel II* is the rule binding on this Court and is supported by the Supreme Court's *Kiobel II* and *Daimler* decisions.[10]

B. Corporations May Be Sued Under the Alien Tort Statute.

1. *Kiobel I* is the Only Appellate Decision Before or After *Kiobel II* to Reject Corporate Liability Under the Alien Tort Statute.

Every other circuit that has considered the issue of corporate liability, both before and after *Kiobel II*, has explicitly held that corporations may be sued under the ATS. The Seventh, Ninth, Eleventh, and D.C. Circuits have each independently concluded that corporate liability exists. *See Doe v. Nestle USA Inc.*, 766 F.3d 1013, 1049 (9th Cir. 2015); *Flomo v. Firestone Natural Rubber Co.*, 643 F.3d 1013, 1019, 1021 (7th Cir. 2011); *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 41 (D.C. Cir. 2011), *vacated on other grounds*, 527 Fed. Appx. 7 (D.C. Cir. 2013); *Romero v. Drummond Co.,* 552 F.3d 1303, 1315 (11th Cir. 2008); *see also Aldana v. Del Monte Fresh Produce, Inc.*, 416 F.3d 1242, 1242 (11th Cir. 2005).

---

[10] Defendants' assertion that the Circuit has "squarely" held that *Kiobel I* remains controlling precedent is erroneous. *See* Opp. at 51. Subsequent Second Circuit decisions made passing reference to the issue in dicta and did not resolve the question. *See, e.g.*, *Mastafa*, 770 F.3d at 179 n.5 (explicitly noting that panel had "no need" to address corporate liability); *Sikhs for Justice, Inc. v. Nath*, No. 14-1724-cv, 2014 WL 7232492, at *2-3 (2d Cir. Dec. 19, 2014) (same); *Chowdhury v. WorldTel Bangladesh Holding, Ltd.*, 746 F.3d 42, 55 n.2 (2d Cir. 2014) (noting corporate liability discussion "is not pertinent to our decision, and thus is dicta"). Defendants' reliance on *Balintulo*, Opp. at 1, 48, which was decided before *Licci*, is similarly unavailing. This Court denied the petition for a writ of mandamus, never took jurisdiction, and did "not wade into the merits" to address corporate liability. *Balintulo*, 727 F.3d at 188.

In holding there was no bar to corporate liability under the ATS, these circuits considered the text, history, and purpose of the statute and found nothing in federal common law or international law that would provide corporations with immunity from civil liability for ATS claims. This Court should affirm the District Court's decision recognizing corporate liability, thus bringing this Circuit in line with all other jurisdictions.

2. Corporate Liability is Recognized under Federal Common Law.

Corporate liability is a question of federal common law under the ATS,[11] and there is no reason for this Court to depart from centuries of tradition allowing tort suits against corporations. U.S. Amicus Br. at 7 (noting "well-settled" 'legal culture' of corporate liability and that "*Sosa*'s cautionary admonitions provide no reason to depart from the common law on this issue.").[12] *See also Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 747-54 (9th Cir. 2011) (addressing issue as matter of

[11] The U.S. Amicus brief in the Supreme Court in *Kiobel II* argued for the recognition of corporate liability under the ATS. This Court did not have the benefit of these arguments when it decided *Kiobel I*.

[12] Tort liability for juridical entities in the United States and England was known to the drafters of the ATS in 1789 and was applied to such entities before and after the ATS. *See, e.g.*, *The Case of Thomas Skinner, Merchant v. The East India Company*, (1666) 6 State Trials 710, 711, 719, 724-25 (H.L.). *See also Cook County, Ill. v. United States ex rel. Chandler*, 538 U.S. 119, 125-26 (2003) (citing sources dating to 1793 confirming "common understanding . . . that corporations were 'persons' in the general enjoyment of the capacity to sue and be sued"); 1 William Blackstone, Commentaries, *463 (1765) (among capacities of corporation are "[t]o sue and be sued").

federal common law); *Flomo*, 643 F.3d at 1015-21 (same); *Exxon*, 654 F.3d at 40-57 (same).[13]

Corporate liability does not depend on the existence of "a generally accepted and well-defined international law norm of corporate liability for law-of-nations violations." U.S. Amicus Br. at 6.[14] Indeed, *Sosa* made clear that each state in the international legal system is responsible for implementing its international law obligations in accordance with its own domestic law and institutions. *Sosa v. Alvarez-Machain,* 542 U.S. 692, 714, 729-30 (2004).[15] *See* Brief of *Amici Curiae* International Law Scholars in Support of Petitioners, *Kiobel II*, 2011 WL 6780141, at *32-34 (Dec. 21, 2011) (discussing nations' obligations to enforce law of nations); Brief of *Amicus Curiae* Navi Pillay, the United Nations High

[13] Federal common law can be informed by international law. U.S. Amicus Br. at 7. In this situation, international law is consistent with federal common law; there should not be a difference between natural and juridical persons.

[14] *Sosa* mandates looking to international law to evaluate the "norm itself and not to whether (or how) that norm should be enforced in a suit under the ATS. The latter question is a matter to be determined by federal courts cautiously exercising their 'residual common law discretion.'" U.S. Amicus Br. at 7 (citation omitted).

[15] The absence of international enforcement mechanisms regarding corporations does not mean there is no corporate liability because international law leaves remedial enforcement issues to domestic legal systems. *See Sosa*, 542 U.S. at 714, 729-30; *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 777-78 (D.C. Cir. 1984) (Edwards, J., concurring) ("[T]he law of nations never has been perceived to create or define the civil actions to be made available by each member of the community of nations; by consensus, the states leave that determination to their respective municipal laws."); *Exxon*, 654 F.3d at 42 (quoting *Tel-Oren*, 726 F.2d at 778) (adopting Judge Edwards's concurrence).

Commissioner for Human Rights in Support of Petitioners, *Kiobel II*, 2011 WL 6780142, at *4-16 (Dec. 21, 2011) (same).

The text and history of the ATS indicate no reason to exclude corporate liability. *See, e.g.*, U.S. Amicus Br. at 7. The ATS explicitly limits the category of plaintiffs to "aliens," 28 U.S.C. § 1350, but it imposes no comparable limitation on the universe of defendants. *See Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 438 (1989) (observing that ATS "by its terms does not distinguish among classes of defendants"). By contrast, in other sections of the First Judiciary Act, Congress did restrict the universe of defendants. *See, e.g.*, An Act to Establish the Judicial Courts of the United States, ch. 20, § 9, 1 Stat. 73, 76-77 (1789); *see also Exxon*, 654 F.3d at 46 (noting "that the First Congress knew how to limit, or deny altogether, subject matter jurisdiction over a class of claims and declined to do so" with ATS claims). The history indicates that a central purpose of the statute was to provide a federal forum to adjudicate tort actions brought by aliens who had suffered damages attributable to violations of the law of nations. *Sosa*, 542 U.S. at 719-20, 724, 739. Given the remedial purpose of the ATS, there is no reasonable justification to exclude corporations, or any other category of tortfeasor, from its scope. *See Exxon*, 654 F.3d at 47.

3. Corporate Liability Is Recognized under International Law.

Whether to inform federal common law or as an independent basis, it cannot be controverted that corporate liability exists under international law. There is no "international-law norm of the sort identified in *Sosa* that distinguishes between natural and juridical persons," and corporations can violate international law "just as natural person can." U.S. Amicus Brief at 7.

The modern international system has also recognized that juridical entities are not immune from international sanction since at least Nuremberg. *See* Brief of *Amici Curiae* Nuremberg Scholars Omer Bartov et al. in Support of Petitioners, *Kiobel II*, 2011 WL 6813570, at *18-30 (Dec. 21, 2011) (discussing legal framework created at Nuremberg that provided for sanctions under international law against corporations); *see also* Brief of Yale Law School Center for Global Legal Challenges as *Amicus Curiae* in Support of Petitioners, *Kiobel II*, 2011 WL 6425362, at *11-15 (Dec. 21, 2011) (same); *Flomo,* 643 F.3d at 1017 (finding *Kiobel I*'s "factual premise" that "corporations have never been prosecuted, whether criminally or civilly, for violating customary international law" was "incorrect").[16]

[16] That the governing statutes of international criminal tribunals do not provide for corporate liability is inapposite to the question of whether corporations may be held *civilly* liable. *See* U.S. Amicus Br. at 28-29; *Flomo*, 643 F.3d at 1019.

Every modern legal system imposes some form of tort, administrative, or criminal liability on corporations for the types of harms alleged in this case. *See, e.g.*, International Commission of Jurists, *Report of the Expert Legal Panel on Corporate Complicity in International Crimes*, (2008); Brief of *Amici Curiae* International Human Rights Organizations and International Law Experts in Support of Petitioners, *Kiobel II*, 2011 WL 6780140, at *16-25 (Dec. 21, 2011); International Law Scholars *Amici* Br. at *15-16; Pillay *Amicus* Br. at *24-38. Courts determine the content of international law, in part, by reference to general principles, which are one of the primary sources of international law and derived from the content of national legal systems. *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 251 (2d Cir. 2003). The fact that all modern legal systems impose liability on corporations for wrongs assures that United States courts are applying universally accepted precepts and not merely American tort principles.

U.S. courts have recognized that the ability to sue corporations is a general principle of international law. *See First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 623, 633 (1983) ("FNCB") (discussing veil piercing as general principle of international law, which implies existence of corporate liability). *See also Exxon*, 654 F.3d 11, 53 (noting, as support for claim that corporate liability is general principle of international law, that "[c]orporate

personhood has been recognized by the ICJ (citing *Barcelona Traction, Light & Power Co.* (Belg. v. Spain), 1970 I.C.J. 3, 38-39 (Feb. 20))).[17]

Defendants mistakenly posit that the content of customary international law relies exclusively on "criminal law norms." Opp. at 52. There is no support for such a radical position. *See, e.g.*, *Kiobel I*, 621 F.3d at 129 (looking to international law generally); *Talisman*, 582 F.3d at 258 (same). Defendants misrepresent Judge Katzmann's concurrence in *Khulumani* as restricting the potential sources of customary law to criminal proceedings, Opp. at 52, but his opinion instead explicitly notes the relevance of both criminal and civil law, *Khulumani*, 504 F.3d at 270 n.5 (citations omitted). Defendants wrongly argue that the absence of corporations as criminal defendants means that the "law of nations" does not support corporate liability for human rights violations. Opp. at 53. *But see, e.g.*, U.S. Amicus Br. at 28-31 (discussing reasons why absence of criminal sanction against corporations in international tribunals does not mean no corporate liability); Brief of Ambassador David J. Scheffer, Northwestern University School of Law, as *Amicus Curiae* in Support of Petitioners, *Kiobel II*, 2011 WL 6813576, at *11 (Dec. 21, 2011) ("[N]o conclusion about customary

[17] Defendants also rely on *Ali Shafi v. Palestinian Authority*, 642 F.3d 1088, 1096 (D.C. Cir. 2011). Opp. at 54. However, Defendants' position that no corporation can be held liable for any international law violation is exactly the kind of categorical bar rejected in *Al Shafi.* 642 F.3d at 1096.

international law should be drawn regarding the exclusion of corporations from the jurisdiction of the Rome Statute.").

Thus, even if the statute's remedial framework is derived from international law, rather than federal common law, corporate liability is permissible under the ATS.

III. Claims for Aiding and Abetting Are Cognizable Under the Alien Tort Statute.

Following *Kiobel II*, this Court confirmed that ATS claims may be based on aiding and abetting liability. *Mastafa*, 770 F.3d at 181; *Talisman*, 582 F.3d at 256; *Khulumani*, 504 F.3d at 260. All other circuits that have addressed the issue since *Kiobel II* have reached the same conclusion. *See Drummond*, 782 F.3d at 597; *Nestle*, 766 F.3d at 1023. Defendants do not and cannot point to any authority to the contrary. Defendants' assertion that aiding and abetting liability under the ATS rests solely on the "divided panel" decision in *Khulumani*, Opp. at 58, simply ignores the applicable case law in this and other circuits.

Without authority, Defendants rely on a policy argument that is inconsistent with the analysis and holding of *Kiobel II*. In response to a concern with potential diplomatic strife arising out of ATS claims, the Supreme Court announced a presumption against extraterritoriality and limited ATS jurisdiction to cases that "touch and concern" the United States. *Kiobel II*, 133 S. Ct. at 1669. The Court constructed the presumption as a safeguard against potential foreign affairs

complications discussed in *United States v. La Jeune Eugenie*, 26 F. Cas. 832 (C.C. Mass 1822). *See* 133 S. Ct. at 1669. Referencing *Kiobel II*'s discussion of *La Jeune Eugenie*, Defendants argue that every case implicating the conduct of a foreign sovereign is precluded, Opp. at 59, but such a rule is overly broad and excludes situations, like this, where providing an ATS remedy creates no foreign policy concerns. *See* AOB at 26 n.12. Defendants fail to recognize that the Supreme Court specifically established the presumption against extraterritoriality as the remedy for the policy concerns discussed in *La Jeune Eugenie*. 133 S. Ct. at 1669. The applicability of aiding and abetting liability is settled law in this Circuit and should remain so.

CONCLUSION

For the foregoing reasons, the District Court's order denying Plaintiffs' motion for leave to amend should be reversed and the case remanded to the district court for further proceedings.

Dated: June 3, 2015

/s/ Michael D. Hausfeld
Michael D. Hausfeld
mhausfeld@hausfeld.com
Kristen M. Ward
kward@hausfeld.com
Hausfeld
1700 K St. N.W. Suite 650
Washington, D.C. 20006

(202) 540-7200
Counsel for *Balintulo* Plaintiffs

/s/ Paul L. Hoffman
Paul L. Hoffman, Esq.
Schonbrun DeSimone Seplow Harris & Hoffman LLP
723 Ocean Front Walk
Venice, CA 90291
Counsel for *Ntsebeza* Plaintiffs

Diane Sammons
Nagel Rice, L.L.P.
103 Eisenhower Parkway
Suite 101
Roseland, NJ 07068
(973) 535-3100
Fax: (973) 618-9194
Email: dsammons@nagelrice.com

Tyler R. Giannini
International Human Rights Clinic
Harvard Law School
6 Everett Street, Third Floor
Cambridge, MA 02138
(617) 496-7368

On the brief:

Susan H. Farbstein
International Human Rights Clinic
Harvard Law School
6 Everett Street, Third Floor
Cambridge, MA 02138
(617) 496-7368
Ariel Nelson (Harvard Law School, J.D. Candidate, ’15)
Brian Klosterboer (Harvard Law School, J.D. Candidate, ’16)

Peter Stavros (Harvard Law School, J.D. Candidate, ’16)

Judith Brown Chomsky
Law Office of Judith Brown Chomsky
P.O. Box 29726
Elkins Park, PA 19027
(215) 782-8367
Fax: (215) 782-8368
Email: jchomsky@igc.org
Counsel for *Ntsebeza* Plaintiffs

CERTIFICATE OF COMPLIANCE

I Certify that:

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 6,948 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5) and (a)(6) because it was prepared in Microsoft Office Word in 14-point, proportionally spaced Times New Roman font.

/s/ Kristen M. Ward
Kristen M. Ward