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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.
FORD MOTOR CO., INTERNATIONAL BUSINESS MACHINES CORP.,
DEFENDANTS-MOVANTS,
GENERAL MOTORS CORP.,
DEFENDANT.

LUNGISILE NTZEBESA, ET AL.,
PLAINTIFFS-APPELLANTS,
SIGQIBO MPENDULO, ET AL.,
PLAINTIFFS,
HANS LANGFORD PHIRI,
ADR PROVIDER-APPELLANT,
v.
SULZER AG, ET AL.,
DEFENDANTS-APPELLEES,
RHEINMATALL GROUP AG, BARCLAYS BANK PLC,
DEFENDANTS.

On Appeal from the United States District Court
for the Southern District of New York
Case Nos. 1:02-md-01499-SAS and 1:03-cv-04524-SAS
Honorable Shira A. Scheindlin, U.S. District Judge

BRIEF OF AMICUS CURIAE ELECTRONIC FRONTIER FOUNDATION IN SUPPORT OF PLAINTIFFS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Amicus Curiae Electronic Frontier Foundation states that it does not have a parent corporation and that no publicly held company owns 10% or more of its stock.

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STATEMENT OF INTEREST¹

Amicus curiae submits this brief pursuant to Federal Rule of Appellate Procedure 29. All parties have consented to the filing of this brief.

The Electronic Frontier Foundation is a San Francisco-based, non-profit, member-supported civil liberties organization working to protect rights in the digital world. We actively encourage and challenge industry, government, and the courts to support free expression, privacy, and openness in the information society. Founded in 1990, EFF has nearly 26,000 dues-paying members from across the United States.

As recognized experts focusing on the intersection of civil liberties and technology, we promote innovation while also calling for the responsible deployment of technology. We are proud of the role technology companies play in spreading the benefits of the digital age around the world. We are, therefore, sensitive to the implications of holding technology companies liable for violations of international law under the Alien Tort Statute (“ATS”) based solely on their provision of general-purpose technologies to governments or others who misuse them. However, we believe it is possible, appropriate and important to ensure that

¹ No party’s counsel authored this brief in whole or in part. Neither any party nor any party’s counsel contributed money that was intended to fund preparing or submitting this brief. No person other than *amicus*, its members, or its counsel contributed money that was intended to fund preparing or submitting this brief.

liability is preserved for those who build and provide ongoing support for customized technologies with the clear purpose of enabling and assisting governments in committing human rights violations.

We highlight on many fronts the serious problem of technology companies facilitating governmental human rights abuses.² We participated as *amicus curiae* in cases where plaintiffs alleged that the technology giant Cisco specially built surveillance and censorship technologies for the Chinese government that targeted religious minorities, who were thereafter subjected to unlawful detention, torture and other recognized human rights abuses.³ We testified before the European Parliament on the sale of surveillance equipment to repressive regimes.⁴ We conducted research to identify those technology companies that facilitate governmental human rights abuses.⁵ We created a “Know Your Customer” framework for technology companies to follow before closing a deal with a

² All websites were last accessed Feb. 3, 2015.

³ “EFF Supports Human Rights Case Against Cisco for Selling Surveillance Technologies to China” (Aug. 15, 2013), <https://www.eff.org/deeplinks/2013/08/eff-supports-human-rights-case>; “Court Lets Cisco Systems Off the Hook for Helping China Detain, Torture Religious Minorities” (Sept. 19, 2014), <https://www.eff.org/deeplinks/2014/09/court-lets-cisco-systems-hook-helping-china-detain-torture-religious-minorities>.

⁴ “Time to Act on Companies Selling Mass Spy Gear to Authoritarian Regimes” (February 7, 2012), <https://www.eff.org/deeplinks/2012/02/time-act-companies-selling-mass-spy-gear-authoritarian-regimes>.

⁵ See “Mass Surveillance Technologies,” <https://www.eff.org/issues/mass-surveillance-technologies>.

government where there is a possibility the technology could be used to facilitate human rights violations.⁶

EFF has a particular interest in this case given that the ATS claims against IBM focus on the creation of the South African national identification system that “aided and abetted” the apartheid regime in the “denationalization” of the country’s black population. EFF has consistently been a vocal opponent of national ID systems, including here in the United States where we raised concerns about the federal government’s “Trusted Identities in Cyberspace” initiative⁷ and the REAL ID Act passed by Congress after the 9/11 terrorist attacks to create more secure state driver’s licenses.⁸ We have also vocally opposed national ID initiatives in foreign countries.⁹ The human rights abuses facilitated by the South African national ID system during apartheid are one of the primary reasons why we are concerned about similar systems being considered around the world.

⁶ “*Know Your Customer*” *Standards for Sales of Surveillance Equipment* (Oct. 24, 2011), <https://www.eff.org/deeplinks/2011/10/it%E2%80%99s-time-know-your-customer-standards-sales-surveillance-equipment>.

⁷ “Real ID Online? New Federal Online Identity Plan Raises Privacy and Free Speech Concerns” (July 20, 2010), <https://www.eff.org/deeplinks/2010/07/real-id-online-new-federal-online-identity-plan>.

⁸ “Electronic Frontier Foundation and World Privacy Forum Comments to DHS on REAL ID Act Regulations” (May 8, 2008), <https://www.eff.org/document/comments-electronic-frontier-foundation-and-world-privacy-forum-dhs-real-id-regulations>.

⁹ *See, e.g.*, “In Japan, National ID Proposal Spurs Privacy Concerns” (June 13, 2012), <https://www.eff.org/deeplinks/2012/06/japan-national-id-proposal-spurs-privacy-concerns>.

INTRODUCTION

Plaintiffs have provided significant allegations of U.S.-based behavior by IBM. Amicus provide additional historical and current context to assist the court in its evaluation of those allegations. Yet this case is not merely about apartheid, a single dark chapter of world history. There is a broader context – both backward in time and forward to today.

First, the claims here – about IBM’s New York headquarters’ technology development and deployment strategy and its close control of actions ostensibly taken by its South African subsidiary beginning in the 1950s – remarkably resemble notorious conduct of IBM New York a decade earlier. Through the mid-1940s, IBM New York was intimately involved with providing and supporting IBM technology that facilitated gross human rights abuses by the Third Reich. In fact, the famous five-digit number tattooed on the arms of Auschwitz inmates was a punch card system identification number.¹⁰ This history was gathered in a well-regarded book by historian Edwin Black, entitled *IBM and the Holocaust*, relevant portions of which we discuss below. While IBM has challenged some of Mr.

¹⁰ Edwin Black, *IBM and the Holocaust: Expanded Edition* (Dialog Press 2012) at 352 (“Black”).

Black's conclusions,¹¹ and of course this Court need not agree with all of them, his research has been generally recognized as exhaustive and authoritative.¹²

Equally important, these issues also press forward to today. Plaintiffs' allegations that IBM New York "aided and abetted" apartheid are also strikingly similar to public revelations that many of IBM's existing peer technology companies have provided highly customized tracking and surveillance technologies that assist repressive governments. This includes technologies provided to China that have been customized to target religious minorities, and technologies provided to several Middle Eastern countries to assist them in locating and tracking democracy activists, journalists and other political enemies.

Here, plaintiffs should not need to publish a 450-page book to defeat a motion to dismiss. Plaintiffs also do not need to have every detail of their evidence against IBM ready at the pleading stage. Enough public information exists such that, if plaintiffs are permitted to amend their complaints, they will plead plausible allegations that IBM New York purposefully "aided and abetted" the South African apartheid regime. Indeed, Black's efforts were advanced after IBM New York was pressured to publicly disclose about 1,000 pages of internal records of its

¹¹ "Addendum to IBM Statement on Nazi-era Book and Lawsuit," IBM News Releases (March 29, 2002),

<http://www-03.ibm.com/press/us/en/pressrelease/828.wss>.

¹² *See, e.g.,* Richard Bernstein, "I.B.M. and the Holocaust': Assessing the Culpability," *New York Times* (March 7, 2001), <http://www.nytimes.com/2001/03/07/arts/07BERN.html>.

activities in the 1930s and 40s, suggesting it is plausible that plaintiffs will find similarly helpful information if permitted to conduct discovery about IBM's South African activities starting in the 1950s.¹³

Additionally, in considering whether plaintiffs' ATS "aiding and abetting" claim against IBM New York could be successfully pled, amicus strongly urges this Court to consider the affirmative steps IBM New York took to enable its foreign subsidiary or others to service the apartheid regime – just as IBM New York previously did to enable IBM Europe to service to the Nazi one. In particular, IBM New York's own actions to circumvent U.S. governmental efforts to isolate and limit the harm caused by repressive regimes should be deemed relevant to an "aiding and abetting" claim under the ATS, and the "touch and concern" element specifically.

Placed within the context of IBM New York previously assisting the Nazis with tracking groups targeted for persecution and the growing record of today's technology companies providing similar assistance, plaintiffs' ATS "aiding and abetting" claim against IBM, including their allegations regarding the extent to which IBM's activities "touch and concern" the United States, are plausible and should survive a motion to dismiss.

¹³ Black at 445.

ARGUMENT

I. The Affirmative Steps a U.S.-Based Parent Company Took to Enable Its Foreign Subsidiary or Others to Service an Abusive Foreign Client Are Legally Relevant to an “Aiding and Abetting” Claim Under the ATS

The district court erred in denying the motion to amend and dismissing the complaints with prejudice by characterizing plaintiffs’ ATS claim against IBM New York as amounting to no more than vicarious liability, rather than a properly pled “aiding and abetting” claim.

In *Mastafa v. Chevron Corp.*, 770 F.3d 170 (2d Cir. 2014), this Court held that to properly plead an “aiding and abetting” claim under the ATS, plaintiffs must allege facts that meet three key elements.¹⁴ The first element is that the ATS claim must “touch and concern” the United States “with sufficient force to displace the presumption against extraterritorial application” of the ATS.¹⁵ Plaintiffs must thus allege facts showing that the defendant corporation – IBM New York – engaged in conduct *in the United States* that had a “clear link” to the human right

¹⁴ As a threshold matter, plaintiffs must allege that their rights under customary international law were violated, which includes violations of human rights such as crimes against humanity. *Mastafa*, 770 F.3d at 181. The South African government’s apartheid regime was universally considered a crime against humanity. G.A. Res. 2396 (XXIII), U.N. GAOR, 23rd Sess., Supp. No. 18, U.N. Doc. A/7348, at 19 (Dec. 2, 1968), http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/2396%28XXIII%29. Plaintiffs must also rely upon a theory of liability that is recognized under customary international law, and this Court has recognized that “aiding and abetting” a human rights violation is a valid theory of liability under the ATS. *Mastafa*, 770 F.3d at 181.

¹⁵ *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669 (2013).

abuses that occurred in South Africa.¹⁶ Second, plaintiffs must allege facts showing that IBM New York provided “practical assistance to the principal” (the South African government) that had “a substantial effect on the perpetration of the crime.”¹⁷ Third, plaintiffs must allege facts showing that IBM New York provided such practical assistance “with the *purpose* of facilitating the commission of that crime.”¹⁸ Allegations must support a reasonable inference that IBM New York intended to assist the South African government client’s commission of human rights abuses.¹⁹

Relying on this Court’s decision *Balintulo v. Daimler AG*, 727 F.3d 174 (2d Cir. 2013), the district court denied the motion to amend and dismissed the complaints with prejudice, holding that plaintiffs’ allegations that IBM New York directed the policies and operations of IBM South Africa and circumvented U.S. sanctions equated to merely vicarious liability and so did not sufficiently show that the ATS claim against IBM “touches and concerns” the U.S.²⁰ Mere corporate presence or corporate citizenship is, of course, insufficient to meet the “touch and concern” standard set for by the Supreme Court in *Kiobel*.²¹ However, *the affirmative steps a U.S.-based parent company purposefully took to enable its*

¹⁶ *Mastafa*, 770 F.3d at 185.

¹⁷ *Id.* at 192.

¹⁸ *Id.* (emphasis in original; internal quotations omitted).

¹⁹ *Id.* at 194.

²⁰ *In re South African Apartheid Litigation*, 2014 WL 4290444, *5.

²¹ *Balintulo*, 727 F.3d at 189.

foreign subsidiary to service the customer in violating human rights must be considered in the “touch and concern” analysis of an “aiding and abetting” claim under the ATS.

It is critically important to distinguish the legal theories of “vicarious liability” and “aiding and abetting” to show that plaintiffs pled more than vicarious liability in the proposed amended complaints. At its most basic, “vicarious liability” is the “liability that a supervisory party ... bears for the actionable conduct of a subordinate ... because of the relationship between the two parties.”²² In the employment context, for example, “[I]t is well established that traditional vicarious liability rules ordinarily make principals or employers vicariously liable for acts of their agents or employees in the scope of their authority or employment.”²³ Vicarious liability is predicated upon a finding of an agency relationship between the two parties, meaning that one party will be liable for the actions of another even when the first party itself took no actions that violated the law.²⁴

By contrast, “aiding and abetting” means taking steps “to assist or facilitate the commission of a crime, or to promote its accomplishment” by the lead

²² Black’s Law Dictionary, Second Pocket Edition.

²³ *Meyer v. Holley*, 537 U.S. 280, 285 (2003).

²⁴ *Cleveland v. Caplaw Enterprises*, 448 F.3d 518, 522 (2d Cir. 2006).

perpetrator.²⁵ Plaintiffs clearly pled “aiding and abetting” in the proposed amended complaints. They do not wish to attach culpability to IBM New York simply based on its corporate relationship with IBM South Africa. Rather, plaintiffs seek to allege that IBM New York itself took *affirmative steps* – thereby “touching and concerning” the United States – to enable its South African subsidiary or others to service a major client, the South African government, in using IBM’s technology to violate plaintiffs’ human rights. Thus, while a U.S.-based parent company may not be able to service a foreign client directly by virtue of factors such as geography or foreign laws that require local subsidiaries to transact business, affirmative steps that the parent company took in the U.S. to enable its in-country subsidiary or others to service the foreign account should be legally relevant. This is the conduct of IBM New York that “aided and abetted” the crimes arising from apartheid.

II. Plaintiffs’ Proposed Amended Complaints Present Plausible Factual Allegations that IBM New York “Aided and Abetted” Apartheid

All factual allegations in support of the ATS “aiding and abetting” elements must be “plausible,” not probable.²⁶ And a complaint “does not need detailed

²⁵ Black’s Law Dictionary, Second Pocket Edition. *See also Rosemond v. U.S.*, 134 S. Ct. 1240, 1245 (2014).

²⁶ *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

factual allegations”²⁷ particularly when facts are within “the possession and control of the defendant.”²⁸ Plaintiffs would plead a plausible ATS “aiding and abetting” claim against IBM New York for facilitating human rights abuses by the South African apartheid regime if granted leave to amend their complaints. First, the affirmative steps IBM New York took to enable its foreign subsidiary or others to service the South African government in its human rights violations are legally relevant. Second, plaintiffs’ proposed amended complaints should survive in light of historical and current contexts of this case and because many relevant facts are in the exclusive possession and control of the company.²⁹

A. Plaintiffs’ “Touch and Concern” Allegations Are Plausible

When considering that the ATS “aiding and abetting” claim must “touch and concern” the United States or that IBM New York must have engaged in conduct in the U.S. that had a “clear link” to the human right abuses that occurred in South Africa, it is relevant that IBM had a long, notorious history of directly managing its subsidiaries from its U.S. headquarters in New York. As discussed in more detail below (*infra* Section III.A.1), through the end of World War II in 1945 IBM

²⁷ *Id.* at 555.

²⁸ *Arista Records v. Doe 3*, 604 F.3d 110, 120 (2d Cir. 2010).

²⁹ IBM New York rebuffed the author of *IBM and the Holocaust* for months after he requested access to the corporate archives. Black at 444. Although the IBM website encourages the public to submit access requests, its terms and condition prevent any use of such archival information against IBM. IBM Archives, Terms and Conditions, <http://www-03.ibm.com/ibm/history/request2/terms.html>.

president Thomas J. Watson managed virtually every aspect of the German subsidiary's business from IBM's New York headquarters despite strong U.S. government efforts to prevent companies like IBM from trading with the enemy.

Thus plaintiffs' allegations are plausible that the company acted similarly in directing and managing South African activities from New York just a few years later. The South African government ordered its first punch card machine in 1952.³⁰ Watson was succeeded by his son, Thomas J. Watson, Jr., in 1956,³¹ adding to the plausibility that IBM's centralized management style continued.³² Yet by 1950 the world community had begun to condemn apartheid, such that as with the Nazis, it is more than plausible that IBM New York knew how its technologies were used by the South African government.³³

Similarly, just as Watson, Sr., took affirmative steps to circumvent U.S. laws forbidding American companies from doing business with Axis powers by working through IBM's European headquarters in neutral Switzerland (*infra* Section III.A.1), plaintiffs plausibly allege that IBM New York worked diligently to circumvent U.S. sanctions against the apartheid regime. Specifically, plaintiffs

³⁰ *Balintulo v. Ford Motor Co.*, [Proposed] Third Amended Complaint (District Court Document 280-1) ¶ 140 ["PAC1"].

³¹ Thomas J. Watson biography, IBM website, <https://www-03.ibm.com/press/us/en/biography/10152.wss>.

³² PAC1 ¶¶ 134, 138, 171; PAC2 ¶¶ 19-20, 124-130, 132.

³³ PAC1 at ¶ 84; *Botha v. Ford Motor Co.*, 447 B.R. 150 (2011), Second Consolidated Amended Complaint (District Court Document 281-1) ¶ 51 ["PAC2"].

allege that IBM New York: 1) funneled equipment through a front organization that then transferred it to the South African government; 2) continued to supply the government with spare parts for its IBM systems by directing that they come from subsidiaries in other, non-sanctioned countries; and, most boldly, 3) ostensibly “divested” from South Africa while supplying technology to and remaining intimately involved in the new venture, including by shifting the former head of IBM South Africa to the role of chief of the new “independent” company.³⁴ Given this sequence of events, it is highly plausible that discovery will reveal even more ongoing involvement in South Africa by the U.S. portions of IBM.

Additionally, just as internal records show that Watson, Sr. initially provided the equipment for IBM’s German subsidiary to service the Nazi regime, and later granted the authorization and funding to IBM Germany and IBM Europe for the same ends (*infra* Section III.A.1), it is plausible that IBM New York’s internal records will show that it provided the technology, authorization and funding for IBM South Africa’s activities in servicing the apartheid regime.³⁵

B. Plaintiffs’ “Practical Assistance” Allegations Are Plausible

The “practical assistance” element is also plainly alleged and plausible. The primary claim against IBM in this case is that the company provided the technological backbone for the South African national identification system that

³⁴ PAC1 ¶¶ 134, 166-167, 202-203, 218-226; PAC2 ¶¶ 133-134, 139.

³⁵ PAC1 ¶¶ 134, 142; PAC2 ¶¶ 131, 140-141.

enabled the apartheid regime to efficiently implement “denationalization” of the country’s black population: the identification, forced segregation, and ultimate oppression of South African blacks by the white-run government.³⁶ This is strikingly similar to the fact that, in the 1930s and 40s, IBM New York took affirmative steps to ensure that its technology could automate the Third Reich, enabling the Nazis to identify and manage virtually all the people and things within its control, including groups targeted for persecution (*infra* Section III.A.2). It is not only plausible but also reasonable to assert that IBM New York took affirmative steps to provide the South African government with the technical means – a computerized national identification system – to easily identify the blacks and enforce their compliance with the apartheid system.³⁷

Indeed, the technological systems IBM provided to the Nazis to identify and track the Jews were the predecessors to the systems provided and supported by IBM in South Africa to identify the blacks and those, in turn, were the predecessors to the more complex systems provided by current U.S. companies to China and other countries to assist them in identifying and tracking disfavored minorities.

³⁶ PAC1 ¶¶ 34(e), 134, 174, 178, 194-195; PAC2 ¶¶ 15-16, 143-146, 150, 152.

³⁷ PAC1 ¶¶ 143-146; PAC2 ¶¶ 21, 140, 142. IBM’s argument that its equipment was not “essential” indicates a factual dispute demonstrating that dismissal at the pleading stage is inappropriate. PAC1 ¶ 165.

C. Plaintiffs' Purpose Allegations Are Plausible

The allegation of a “purpose” to facilitate human rights abuses is also plausible given the history of IBM. In the apartheid context, plaintiffs alleged in their proposed amended complaints that the national identification system was highly customized, requiring close collaboration with the South African government; racial classification was a primary identifying characteristic; and the equipment was leased.³⁸ Given this, it is certainly plausible that IBM New York understood that the national identification system was built for a client whose goal was to permanently segregate the blacks of the country and deprive them of their rights.³⁹ The plausibility of purpose gets stronger given IBM New York’s record of taking affirmative steps to enable IBM South Africa or others under IBM’s ambit to service the South African government despite increasing global knowledge and sentiment against the apartheid regime, U.S. sanctions and the growing public divestment movement.⁴⁰

In striking similarity, in the Nazi context, the machines were leased, not purchased, so that IBM New York retained knowledge of where they were thanks to detailed record keeping and reporting by its German subsidiary (*infra* Section III.A.4). The punch cards themselves were initially customized in the U.S.

³⁸ PAC1 ¶¶ 158, 206; PAC2 ¶¶ 17-21, 131(B), 132(D).

³⁹ PAC2 ¶ 59.

⁴⁰ PAC1 ¶¶ 116, 117, 119, 121, 134, 171; PAC2 ¶¶ 55, 135-137.

before IBM New York authorized and funded the creation of printing presses in Germany (*infra* Section III.A.4). IBM New York also made sure its global supply chain of card stock supplied the German subsidiary and its biggest client – Nazi Germany – even after the printing presses were up and running (*infra* Section III.A.1). Thus IBM New York surely knew the purpose of each customized project, whether it was identifying ancestral Jews in a census or managing concentration camp inmates.

III. The Historical and Current Contexts of this Case Support the Decision That Plaintiffs Should Be Allowed to Amend their Complaints

A. Historical Context: IBM Has a Well-Documented History of Facilitating Human Rights Abuses by Nazi Germany

To further assist this Court, amicus provides additional details about IBM's direct involvement with Nazi Germany.

IBM New York's behavior before and during World War II is instructive in evaluating whether plaintiffs' ATS "aiding and abetting" claim should be allowed to proceed. Sadly, IBM's record of assisting the Nazis in committing human rights violations during that time, and specifically the deep involvement of U.S. portions of the company in that assistance, resembles closely the claims brought against its behavior just a few years later during the apartheid regime: 1) close U.S. involvement, far more than mere "touch and concern," 2) direct assistance in

human rights abuses by the technology itself, and 3) clear indications of purpose by IBM New York.

1. IBM New York Closely Managed Its European Operations

Mr. Black's research confirms that IBM's headquarters in New York was intimately involved in what its German subsidiary and other European subsidiaries were doing during the reign of the Third Reich.⁴¹ Thomas J. Watson, who became the company's president in 1915 and was based in the U.S., led this close management until he died in 1956.⁴²

Just weeks after Adolf Hitler came to power in January 1933,⁴³ for example, Watson invested more than one million U.S. dollars "to dramatically expand the German subsidiary's ability to manufacture machines" since prior to that all punch card machines were built in the U.S.⁴⁴ Moreover, even after the German factory was built in 1934, "certain highly technical parts would still be imported from the United States."⁴⁵ The highly customized punch cards themselves were only available from IBM in the U.S. until Watson began ordering the installation of

⁴¹ In 1922, IBM purchased 90 percent ownership of a German company that had previously licensed its punch card technology from IBM, creating the German subsidiary. Black at 44.

⁴² Thomas J. Watson biography, IBM website, <https://www-03.ibm.com/press/us/en/biography/10152.wss>.

⁴³ "Adolf Hitler: Rise to Power," *Encyclopedia Britannica* (last updated Nov. 9, 2014), <http://www.britannica.com/EBchecked/topic/267992/Adolf-Hitler/10115/Rise-to-power>.

⁴⁴ Black at 50.

⁴⁵ *Id.* at 67.

printing presses in Germany and other countries starting in 1935.⁴⁶ Watson would eventually authorize 59 card presses in Germany, with seven of the presses shipped from the U.S.⁴⁷ IBM New York was also the master overseer of the global paper stock needed for punch cards and was “constantly pooling its global paper resources, including its abundant North American suppliers, to meet the ever-increasing demand” for punch cards by the Nazis.⁴⁸

Some of Watson’s or IBM New York’s other key actions included:

- Watson set sales quotas for the German subsidiary.⁴⁹
- Watson sent the German subsidiary 10 boxes of machinery to further boost its data processing capacity.⁵⁰
- “Watson’s consent was required for even the smallest change in factory layout.”⁵¹
- Because IBM New York “wanted to maintain strict controls” over each leased machine, rebates and discounts for Nazi clients had to be first approved by IBM New York.⁵²
- In response to strict Nazi regulations for foreign-owned companies, Watson, with the help of IBM’s Maryland office, concocted an accounting scheme to funnel money to IBM New York from its German subsidiary as “loan” payments or “royalties” in order to hide profits and avoid paying taxes.⁵³

⁴⁶ *Id.* at 77, 98, 209.

⁴⁷ *Id.* at 117.

⁴⁸ *Id.* at 224.

⁴⁹ *Id.* at 44.

⁵⁰ *Id.* at 116.

⁵¹ *Id.* at 157.

⁵² *Id.* at 151.

⁵³ *Id.* at 59-60, 77, 120-23, 152-153.

- Every German subsidiary “invoice to every client for every machine and punch card was ... verified by financial supervisors in New York.”⁵⁴

As further evidence of Watson’s direct management, he received regular reports from and about IBM’s European subsidiaries:

- Watson regularly received translated copies of the German subsidiary’s board of directors meeting minutes.⁵⁵ Other translations of “voluminous memos, correspondence, even routine bureaucratic forms and applications, were continuously transmitted to IBM in New York for review and comment.”⁵⁶
- IBM’s European headquarters in Geneva “kept in continuous contact” with IBM New York and the European general manager “regularly flew back and forth from Switzerland to America conveying reports.”⁵⁷
- An FBI investigator unearthed “correspondence, typed and sometimes handwritten, detailing sales [and] installations ... Machine tool orders were itemized by factory, order date, and anticipated delivery date. Quarterly financial reports and monthly narratives from subsidiaries in enemy territory, received even after Pearl Harbor, relayed the latest business developments....”⁵⁸

Watson also required frequent travel by IBM employees between New York and Nazi Germany prior to World War II. In 1933, Watson sent the manager of IBM New York’s statistical department and a census expert to advise the German subsidiary and transferred four of IBM New York’s best engineers and managers

⁵⁴ *Id.* at 278-79.

⁵⁵ *Id.* at 67.

⁵⁶ *Id.* at 73.

⁵⁷ *Id.* at 209.

⁵⁸ *Id.* at 340.

to Berlin beginning in the late 1930s.⁵⁹ Watson also arranged for German subsidiary lawyers, salesmen, engineers and managers to come regularly to the U.S. for “training and exchange of expertise.”⁶⁰ Watson himself regularly traveled to Nazi Germany.⁶¹

Ultimately, as anti-Nazi sentiment grew in the U.S., IBM chose not to cease doing business with or supporting the Nazi regime, but instead chose to hide the involvement of its U.S.-based operations. In 1941, after President Roosevelt issued General Ruling 11, which forbid “any financial transactions with Nazi Germany without a special Treasury Department license involving written justifications,”⁶²

Watson sent a note to its European subsidiaries:

“In view of world conditions we cannot participate in the affairs of our companies in various countries as we did in normal times. Therefore you are advised that you will have to make your own decisions and not call on us for any advice or assistance until further notice.”⁶³

Watson conspicuously did not order his subsidiaries to cease all collaboration with Nazi Germany.⁶⁴

In truth, IBM New York remained intimately involved with its German subsidiary and the operations of the Nazis. “Throughout 1940 and 1941 the fluid

⁵⁹ *Id.* at 60-61, 117, 214.

⁶⁰ *Id.* at 55, 80-81, 116-117.

⁶¹ *Id.* at 73.

⁶² *Id.* at 284.

⁶³ *Id.* at 289.

⁶⁴ *Id.* at 289.

decision to build new factories to supply Nazi Germany, the stocking of those factories, and the year-to-year ordering of expensive machine tools, these decisions were made by IBM NY ... Millions of punch cards were routinely shipped from IBM in America directly to Nazi-controlled sources in Poland, France, Bulgaria, and Belgium, or routed circuitously through Sweden or colonies in Africa.”⁶⁵

IBM also circumvented U.S. law forbidding “trading with the enemy” by seemingly relying on its Geneva office once America entered World War II.⁶⁶ In 1942, the head of IBM Europe admitted, “The European Headquarters in Geneva are ... a representative of the World Headquarters in New York ... the functions of the Geneva Office are purely administrative.”⁶⁷ The Geneva office always kept IBM New York informed. “They regularly sent IBM NY letters and reports. Some were simply handwritten notes. Others were dense sales and machine status reports, or meticulous monthly summaries, all sent from Axis-controlled subsidiaries to New York through neutral cities.”⁶⁸

2. IBM Technology Dramatically Improved Nazi Efficiency

Nor was IBM’s U.S.-developed technology itself used in neutral ways. In the 1930s and 40s, IBM’s punch card systems were early “computers” that helped

⁶⁵ *Id.* at 260.

⁶⁶ *Id.* at 287.

⁶⁷ *Id.* at 395.

⁶⁸ *Id.* at 259-60.

the Nazis locate and target Jews and other undesirable populations.⁶⁹ These systems automated the Nazi plan to swiftly persecute targeted groups with exclusion from professional, commercial, and social life; forced sterilization; confiscation of private property; forced ghettoization and relocation; slave labor; and, ultimately, extermination.⁷⁰

The two most important projects for IBM in assisting the Nazis were censuses. While Nazi Germany eventually had its own myriad agencies and statistical offices that leased punch card systems from IBM,⁷¹ the German subsidiary itself analyzed the census data collected by the German government. The first was the Prussian census in 1933, the contract for which Watson diligently worked to secure,⁷² and the second was a census of the entire country in 1939 that specifically sought to uncover not only religious Jews, but also so-called racial or ancestral Jews – even those people who were no more than one-sixteenth Jewish.⁷³ The Nazis were eager to automate the census process because “prior censuses were plagued by three to five years of hand sorting, rendering the results virtually

⁶⁹ IBM’s punch card systems were like today’s digitized database and analytics technologies, consisting of “hardware” machines and “software” customized cards. Data was stored on the punch cards, with each intersection of a column and row corresponding to a specific data point. The cards could be fed through different machines to efficiently count, identify, analyze, track, schedule and generally manage people and things throughout the Third Reich. *Id.* at 86.

⁷⁰ *Id.* at 93, 211, 444.

⁷¹ *Id.* at 88.

⁷² *Id.* at 55, 66.

⁷³ *Id.* at 55, 108, 142.

useless for enacting swift social policies.”⁷⁴ IBM knew this. In 1940, the IBM Europe general manager wrote to IBM New York that punch card machines ensured “speed in handling mass records and data. Such speed would be absolutely impossible by manual methods.”⁷⁵

To confidently identify racial Jews, IBM machines quickly and efficiently cross-referenced census data with birth, death, baptism, marriage and genealogical records.⁷⁶ To target those worthy of forced sterilization, census data was cross-referenced with information collected by doctors, insurance companies, nursing homes and sanitariums.⁷⁷ To facilitate the confiscation of Jewish private property, census data was cross-referenced with information from financial institutions.⁷⁸ The German subsidiary helped the Nazis develop a “coding system for virtually all raw materials and finished goods,” which “would make it possible for the Nazis to organize its seizures with stunning specificity.”⁷⁹

The ultimate application of IBM technology was the management of concentration camps. The famous five-digit number tattooed on the arms of Auschwitz inmates was a punch card system identification number.⁸⁰ IBM

⁷⁴ *Id.* at 55.

⁷⁵ *Id.* at 205.

⁷⁶ *Id.* at 90, 113.

⁷⁷ *Id.* at 93, 103.

⁷⁸ *Id.* at 113.

⁷⁹ *Id.* at 114-15.

⁸⁰ *Id.* at 352.

employees from the German subsidiary or other European subsidiaries trained the Nazis running the punch card systems at concentration camps.⁸¹ IBM technology enabled the Nazi camp managers to keep track of the slave labor assignments of individual inmates, including for those whose labor was sold to local businesses.⁸² The punch card systems enabled the monitoring of overall camp populations and the tracking of camp statistics including the number and manner of deaths.⁸³ The “special treatment” category on the punch cards usually meant death by gas chamber or bullet.⁸⁴

The punch cards kept detailed information on the inmates: religion, birth date, gender, marital status, children, profession or trade, nationality, previous camp assignments, town where the inmate was taken into custody, arrest date, and importantly: specific undesirable category and physical punishments associated with that category.⁸⁵

There is no doubt that IBM technology enabled the Nazis to achieve “undreamed of efficiencies.”⁸⁶ One Nazi official called the punch card systems

⁸¹ *Id.* at 355.

⁸² *Id.* at 352, 361.

⁸³ *Id.* at 352, 354.

⁸⁴ *Id.* at 365.

⁸⁵ *Id.* at 355, 362.

⁸⁶ *Id.* at 88, 131.

“indispensable.”⁸⁷ In short, as Mr. Black wrote, “Without IBM’s machinery ... Hitler’s camps could have never managed the numbers they did.”⁸⁸

3. Substantial Evidence Exists that IBM New York Had a Purpose to Assist Hitler in Human Rights Abuses

It is a serious claim that an individual or a company intended for human rights abuses to occur. But such *mens rea* can be inferred through circumstantial evidence or potentially proven directly through additional discovery and, sadly, such evidence exists here.

Prior to World War II, Watson was open about his support for the goals of Nazi Germany. In 1937, Watson wrote a letter to Nazi Economics Minister Hjalmar Schacht in which he discussed the “necessity of extending a sympathetic understanding to the German people and their aims under the leadership of Adolf Hitler.”⁸⁹ That same year, Hitler bestowed upon Watson a national medal to commemorate the help that IBM had given Nazi Germany: the Merit Cross of the German Eagle.⁹⁰

There is also no doubt that Watson and his colleagues at IBM New York understood Hitler’s aims, especially with regard to the Jews. From the months after Hitler came to power in January 1933 through to the 1940s, the front page of the

⁸⁷ *Id.* at 225.

⁸⁸ *Id.* at 352.

⁸⁹ *Id.* at 43.

⁹⁰ *Id.* at 131.

New York Times was constantly filled with stories of Hitler's hatred toward the Jews: the newspaper reported on his book *Mein Kampf*, the existence of at least 65 concentration camps and plans to build more as early as 1933, and on various indignities and atrocities that Nazi Germany was perpetrating against the Jews and other populations.⁹¹ In September 1939, after Hitler invaded Poland,⁹² the *New York Times* ran an article with the headline "Nazis Hint Purge of Jews in Poland."⁹³ In addition to the general public evidence, Watson himself was told by one of IBM New York's attorneys in 1940 that, during a trip to Germany on behalf of headquarters, several German subsidiary employees had mentioned "concentration camps."⁹⁴

4. IBM Customized Its Technology To Facilitate Human Rights Violations

IBM's purpose in assisting Hitler was also evident from the deployment of the punch card technology itself. The Nazis did not purchase off-the-shelf statistical technology that they could easily implement themselves – the punch card systems "were not delivered ready to use like typewriters, adding machines, or even machine guns."⁹⁵ On the contrary, the Nazis *leased* the punch card systems

⁹¹ *Id.* at 65.

⁹² "World War II," *Encyclopedia Britannica* (last updated Oct. 28, 2014), <http://www.britannica.com/EBchecked/topic/648813/World-War-II>.

⁹³ Black at 180.

⁹⁴ *Id.* at 260-61.

⁹⁵ *Id.* at 49.

from IBM meaning that the company always knew where its machines were.⁹⁶ In 1940, for example, IBM New York received a 13-page inventory report of all its machines being used by the German government, which “identified each machine by client, location, type, serial number, and value.”⁹⁷

Additionally, each punch card system had to be highly customized in accordance with the goals of the client agencies.⁹⁸ As Watson’s Berlin attorney explained, even before a lease contract was signed, “a thorough study of the [client] company, or business enterprise which wants to have the machines, is made from the point of view whether the use of the machines fits into the system of the prospect, whether the use of them is advantageous, and how the business must be organized to use the machines to the greatest possible advantage. There can be no doubt that this method ... secures ... insight into the big business of the nation superior to any other company.”⁹⁹

Each customization project required “intense collaboration” and “a constant back and forth” between IBM engineers and Nazi officials.¹⁰⁰ As with customized software, the customization process for the punch card systems “began with a protracted investigation of the precise data needs of the project, as well as the

⁹⁶ *Id.* at 9.

⁹⁷ *Id.* at 207

⁹⁸ *Id.* at 22, 208, 341.

⁹⁹ *Id.* at 227.

¹⁰⁰ *Id.* at 209-10.

people, items, or services being tabulated. ... Different data gathering and card layouts were required for each type of application.”¹⁰¹ IBM engineers and Nazi officials “jointly designed mock-up punch cards to be compatible with the registration forms, and then ensured that the plug and dial tabulators could be configured to extract the information. Only after careful approval by both IBM technicians and the client did the cards finally go to press.”¹⁰²

Thus every punch card order was different – and IBM knew what the cards were to be used for, whether to identify religious and racial Jews, manage slave labor, or run the trains carrying human cargo to concentration camps.¹⁰³ IBM New York was the only exporter of customized punch cards to Nazi Germany up until 1935, when Watson authorized the installation of punch card printing presses in Germany and other European countries.¹⁰⁴

B. Current Context: IBM’s Alleged Participation in Apartheid and Nazi Germany Are Just Two Examples of a Global Trend of Technology Companies Facilitating Governmental Human Rights Abuses

The allegations of IBM’s complicity in apartheid and Nazi Germany do not exist in a vacuum: sadly they appear to be early incidents in a now growing trend of U.S. and European technology companies providing and customizing electronic

¹⁰¹ *Id.*

¹⁰² *Id.* at 210.

¹⁰³ *Id.* at 10, 209.

¹⁰⁴ *Id.* at 209.

equipment to governments used to facilitate human rights violations.¹⁰⁵ In the past few years, evidence has emerged of Western-provided surveillance technologies assisting in the harassment, arrests, and torture of disfavored minorities such as the Falun Gong in China, journalists, human rights advocates, and democratic activists. As with the IBM examples, these technology companies also often appear to actively circumvent U.S. sanctions regimes.

For instance, internal documents from Cisco revealed that it marketed technology to the Chinese government specifically designed and developed, in part, for conducting surveillance on religious minorities and political dissidents.¹⁰⁶ Similarly, oppressive regimes in the Middle East receive substantial technical assistance from Western, often American, companies. Reports indicate that the Syrian regime restricts speech and online activities using Western surveillance tools, including technology from U.S. company Blue Coat.¹⁰⁷ As of May 2013,

¹⁰⁵ See, e.g., Jennifer Valentin-Devries, Julia Angwin and Steve Stecklow, "Document Trove Exposes Surveillance Methods," *Wall St. J.* (Nov. 11, 2011), <http://online.wsj.com/article/SB10001424052970203611404577044192607407780.html>; *Wired for Repression*, Bloomberg, <http://topics.bloomberg.com/wired-for-repression>.

¹⁰⁶ John Markoff, "Suit Claims Cisco Helped China Pursue Falun Gong," *New York Times* (May 22, 2011), http://www.nytimes.com/2011/05/23/technology/23cisco.html?_r=0. See also Michael Gordon, "Chinese Ask Kerry to Help Tear Down a Firewall," *New York Times* (Feb. 15, 2014), http://www.nytimes.com/2014/02/16/world/asia/chinese-ask-kerry-to-help-tear-down-a-firewall.html?_r=0.

¹⁰⁷ Hamed Aleaziz, "Syria Uses US Technology in Cyber Crackdown," *Mother Jones* (Oct. 19, 2011), <http://www.motherjones.com/politics/2011/10/blue-coat-systems-internet-blocking-syria>. See also Leila Nachawati, "BlueCoat: US

after the U.S. enacted sanctions in 2011,¹⁰⁸ evidence suggested that the Syrian government was using 34 Blue Coat servers for mass online surveillance.¹⁰⁹

The Silicon Valley company Narus, now owned by Boeing,¹¹⁰ provided Egypt Telecom with technology that allowed network managers to track and filter content from Internet users and mobile phones.¹¹¹ Narus' other customers included national telecommunications authorities in Pakistan and Saudi Arabia, both of which share Egypt's poor track record on human rights.¹¹²

News reports covering the Tunisian revolution explained how the Tunisian government purchased technology products developed by Western companies to intercept and monitor mobile and online communications, including from two

Technology Surveilling Syrian Citizens Online,” GlobalVoices (Oct. 10, 2011), <http://advocacy.globalvoicesonline.org/2011/10/10/bluecoat-us-technology-surveilling-syrian-citizens-online>; Jillian York, “Blue Coat: Concern for Criminal Penalties, Not Human Rights” (October 29, 2011), <https://www.eff.org/deeplinks/2011/10/blue-coat-acknowledges-syrian-government-use-its-products>.

¹⁰⁸ U.S. State Department, “Syria Sanctions”

<http://www.state.gov/e/eb/tfs/spi/syria/>.

¹⁰⁹ “A Warning to Know Your Customer: Computerlinks Fined for Dealing Blue Coat Surveillance Technology to Syria,” (May 28, 2013), <https://www.eff.org/deeplinks/2013/05/blue-coat-syria-scandal-next-shoe-drops-computerlinks-fzco>.

¹¹⁰ “Boeing Completes Acquisition of Narus,” Boeing News Releases/Statements (July 29, 2010), <http://boeing.mediaroom.com/2010-07-29-Boeing-Completes-Acquisition-of-Narus>.

¹¹¹ Jenn Ettinger, “Questions Raised About U.S. Firm’s Role in Egypt Internet Crackdown,” FreePress (Jan. 28, 2011), <http://www.freepress.net/press-release/2011/1/28/questions-raised-about-us-firms-role-egypt-internet-crackdown>.

¹¹² “Narus: Security Through Surveillance,” Berkman Ctr. for Internet & Soc. at Harv. Univ. (Nov. 11, 2008), <http://blogs.law.harvard.edu/surveillance/2008/11/11/narus-security-through-surveillance/>.

Silicon Valley companies, Blue Coat Systems and NetApp.¹¹³ In Bahrain, Bloomberg reported: “a monitoring system sold and maintained by European companies had generated text-message transcripts used in the interrogation of a human rights activist tortured in Bahrain.”¹¹⁴

This backdrop of other companies engaging in similar behaviors should assist this Court in evaluating whether the claims that IBM New York engaged in similar behaviors with respect to South Africa – providing specially designed tools for oppression to a government known for such oppression – should survive a motion to dismiss.

CONCLUSION

Plaintiffs should be allowed to amend their complaints. There is a global problem of technology companies, including American companies, providing customized technology solutions to oppressive governments – starting with IBM’s own behavior following the rise of Nazi Germany in 1933. However, plaintiffs do not need a 450-page book’s worth of citations to plead plausible factual allegations. We believe that if plaintiffs are permitted to amend their complaints, they will sufficiently show that IBM New York directly “aided and abetted” the

¹¹³ Vernon Silver, “Post-Revolt Tunisia Can Alter E-Mail with ‘Big Brother’ Software,” Bloomberg (Dec. 12, 2011), <http://www.bloomberg.com/news/2011-12-12/tunisia-after-revolt-can-alter-e-mails-with-big-brother-software.html>.

¹¹⁴ Vernon Silver, “EU May Probe Bahrain Spy Gear Abuses,” Bloomberg (Aug. 24, 2011), <http://www.bloomberg.com/news/2011-08-24/eu-legislators-ask-for-inquiry-into-spy-gear-abuses-in-bahrain.html>.

South African government's implementation and maintenance of apartheid. This is especially the case if, as it should, this court considers the affirmative steps IBM New York itself took to enable its foreign subsidiary or others to service the South African government client in order to circumvent U.S. government policy.

EFF believes that U.S. corporations should not enjoy immunity for their purposeful assistance, technological or otherwise, in gross human rights violations. This Court should not deem itself blind to those activities merely because of the use of a subsidiary controlled from the U.S. or because the technology, when not customized for repression, has potentially legitimate uses. Technology has the capacity to protect human rights but it also can be customized to make violations ruthlessly efficient, as IBM's history sadly demonstrates.

IBM should be required to participate in the normal litigation discovery processes so that the actual extent of its U.S. involvement can be made clear and evaluated by the district court. Only then can justice be served.

Dated: February 4, 2015

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Dated: February 4, 2015

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CERTIFICATE OF SERVICE

I hereby certify that on February 4, 2015, a true and correct copy of the foregoing Brief of Amicus Curiae Electronic Frontier Foundation in Support of Plaintiffs was served on all counsel of record in this appeal via CM/ECF pursuant to Second Circuit Rule 25.1(h)(1)-(2).

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