14-4104-cv(L),

14-3589(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)

IN THE

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,

(For Continuation of Caption See Inside Cover)

On Appeal from the United States District Court
for the Southern District of New York

BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF APPELLEES AND AFFIRMANCE

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May 27, 2015

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, MIRRIAM 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, 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, 1-100, 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.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the Chamber of Commerce of the United States of America states that it is a nonprofit corporation organized under the laws of the District of Columbia. It has no parent company and has issued no stock.

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INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America ("Chamber") respectfully submits this brief as *amicus curiae* pursuant to Federal Rule of Appellate Procedure 29(a).

The Chamber is the world's largest business federation, representing more than 300,000 direct members and an underlying membership of more than three million businesses and trade and professional organizations. One of the Chamber's most important functions is to represent its members' interests in matters before Congress, the Executive Branch, and the courts.

The Chamber has a direct and substantial interest in the issues presented in this case. Its members regularly transact business around the world, and many of them have been targeted by plaintiffs suing under the Alien Tort Statute (ATS), 28 U.S.C. § 1350. The culpable conduct alleged in these cases was committed by third parties outside the United States with only an attenuated connection to the defendant companies (putting it mildly); yet plaintiffs have targeted these defendants in the hopes of taking advantage of the United States legal system to extract a settlement. This "tort tourism" threatens injury to the reputations of the Chamber's members and mires them in protracted and expensive litigation by

[1] No party or counsel for a party authored this brief in whole or in part. No party, counsel for a party, or person other than *amicus curiae*, its members, or counsel made any monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

unfairly attempting to tie them to the acts of the customers of distinct and distant subsidiaries. Those costs threaten to deter U.S. investment in developing countries, which, in addition to interfering with U.S. foreign policy, would harm both the national economy and the developing countries themselves. That is why the Chamber has filed *amicus* briefs in numerous ATS cases in the Supreme Court, this Court, and the other Courts of Appeals. *See* Nat'l Chamber Litig. Ctr., *Alien Tort Statute (ATS) Cases* (collecting *amicus* submissions).[2]

The Chamber unequivocally condemns human-rights violations. But the question in these cases is not whether human-rights violations occurred somewhere in the world. The question in these cases is whether foreign plaintiffs can circumvent the important limits on ATS jurisdiction set by this Court and the Supreme Court simply by asserting that routine acts of corporate governance make U.S. companies liable for the independent acts of foreign subsidiaries, which are in turn alleged to have contributed to human rights violations. This Court should hold that the ATS does not support jurisdiction in these circumstances.

[2] http://www.chamberlitigation.com/cases/issue/foreign-affairs-international-commerce/alien-tort-statute-ats.

SUMMARY OF ARGUMENT

This case has visited this Court twice before. When these cases were last on appeal, this Court held that *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013), foreclosed any argument that Ford and IBM could be held vicariously liable under the ATS for the actions of their South African subsidiaries. *Kiobel* held that the ATS did not apply extraterritorially. Because the subsidiaries' relevant conduct had occurred outside the United States, this Court reasoned, that conduct was not actionable under the ATS following *Kiobel*, and Ford and IBM thus could not be held vicariously liable for it. *Balintulo v. Daimler AG*, 727 F.3d 174, 192 (2d Cir. 2013).

On remand, plaintiffs lodged proposed amended complaints, seeking to evade this Court's prior holding in two ways:

First, plaintiffs strained to impute the actions of the South African subsidiaries to Ford and IBM and to tie those actions to the United States. In service of that effort, they added allegations that Ford and IBM "directed and controlled" certain activities of their South African subsidiaries from the United States. According to plaintiffs, those new allegations meant that Ford and IBM could be found *directly*—not just vicariously—liable for their subsidiaries' conduct. And, plaintiffs contended, because Ford and IBM undertook that

"direction and control" in the United States, plaintiffs' claims against the companies were no longer barred by *Kiobel*.

Ford and IBM have cogently explained why plaintiffs' proposed amended complaints still run afoul of *Kiobel*. For even assuming Ford and IBM took the steps they are alleged to have taken in the United States, plaintiffs' superficial contentions still do not "touch and concern the territory of the United States . . . with sufficient force to displace the presumption against extraterritorial application." *Kiobel*, 133 S. Ct. at 1669; *see* Appellees' Br. 24-38.

Plaintiffs' claims face insurmountable problems of corporate structure as well as geography. To hold Ford and IBM *directly responsible* for the actions of their South African subsidiaries based on plaintiffs' allegations would be to contravene fundamental principles of corporate law, which treat subsidiaries as legally separate entities from their parents. To be sure, courts on rare occasion "pierce the corporate veil" and disregard a subsidiary's separate corporate status. But plaintiffs have not come close to alleging the kind of extraordinary acts of corporate domination required for veil piercing. On the contrary, they allege the kinds of ordinary administrative acts all parents take with respect to their subsidiaries. That is no doubt why plaintiffs themselves do not actually ask this Court to pierce the corporate veil separating defendants from their subsidiaries. Instead, Plaintiffs simply posit that, having engaged in a level of supervision

insufficient to establish veil piercing, defendants can nonetheless be held responsible for the acts of legally distinct corporate entities. Plaintiffs cite no authority for this "veil piercing lite," and none exists.

Plaintiffs' novel theory is particularly unfounded given the Supreme Court's instruction that, in deciding whether to recognize a cause of action under the ATS, federal courts should consider "the practical consequences of making that cause available to litigants." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732-733 (2004). Conflating the separate corporate identities of Ford's and IBM's South African subsidiaries would have real and significant "practical consequences": It would upend how American corporations conduct business abroad, and it would deter those corporations from investing in developing countries, lest they face crippling "direct" liability under the ATS. That, in turn, would harm the U.S. economy, interfere with U.S. foreign policy, and hurt developing countries, which depend heavily on foreign trade. Courts should not recognize a putative cause of action that entails such consequences.

Second, plaintiffs on remand also sought to hold Ford and IBM liable for the alleged acts of their subsidiaries by diluting beyond recognition the *mens rea* requirement for accomplice liability set by this Court.[3] This Court has held that

[3] *Amicus* agrees with Ford and IBM that aiding and abetting is not a viable theory of liability under customary international law, *see* Appellees' Br. 58-60, but assumes *arguendo* the availability of accomplice liability for purposes of this brief.

"the *mens rea* standard for aiding and abetting liability in ATS actions is purpose rather than knowledge alone." *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 259 (2d Cir.2009). But plaintiffs alleged (at most) only that Ford and IBM knew their subsidiaries were selling products to the South African government, which, in turn, was using those products to commit human-rights abuses. In other words, plaintiffs alleged mere knowledge and labeled it purpose.

Each of these defects in the proposed amended complaints is dispositive. But plaintiffs' claims are infected by another fundamental flaw. Plaintiffs continue to contend that private corporations can be liable for violations of the law of nations. But this Court has held that customary international law does not recognize corporate liability—and as this Court recently explained, that holding survived *Kiobel*. This Court should reject plaintiffs' complaints on the two grounds addressed above, and should *re*-reaffirm its prior holding that corporations cannot be liable under the ATS.

The District Court's judgment should be affirmed.

ARGUMENT

I. IMPUTING TO FORD AND IBM THE ACTIONS OF THEIR SOUTH AFRICAN SUBSIDIARIES WOULD CONTRAVENE FUNDAMENTAL PRINCIPLES OF CORPORATE LAW.

Plaintiffs' proposed amended complaints sought to bolster their claims against Ford and IBM by alleging that Ford's and IBM's South African subsidiaries were mere "agents and alter egos" of their U.S.-based corporate parents. *See* A0551-A0553, ¶¶ 162-163. It is unclear what plaintiffs meant by the term "agent." If they intended to refer to common-law principles of agency, their allegations fail to state a claim: A principal's liability for the acts of its agent is a form of *vicarious* liability, *see Meyer v. Holley*, 537 U.S. 280, 285 (2003), and this Court has already held that Ford and IBM cannot be held vicariously liable for the extraterritorial acts of their subsidiaries, *Balintulo*, 727 F.3d at 192.

Nor do plaintiffs even attempt to allege facts that would make one company the true alter-ego of another. Calling one corporation the "alter ego" of another is a corporate-law term of art. *See* 1 Fletcher Cyclopedia of the Law of Corporations § 41.10 (2015). And to find one corporation to be the "alter ego" of another, a court must identify a variety of factors that justify "piercing the corporate veil" separating the subsidiary from its parent. Here, plaintiffs have not remotely alleged the factors necessary to establish a real "alter ego" theory. Instead, they appear simply to assume that alleging some lesser amount of "direction and

control" somehow imputes to the defendant companies their subsidiaries' alleged acts of support for the South African government to create a viable ATS claim. That is the only theory of liability left to plaintiffs in the wake of this Court's prior *Balintulo* decision, and it finds no support in law or policy.

This Court has held that a defendant aids and abets a violation of the law of nations when it "(1) provides practical assistance to the principal which has a substantial effect on the perpetration of the crime, and (2) does so with the purpose of facilitating the commission of that crime." *Talisman*, 582 F.3d at 259. But the foreign subsidiaries are the ones who allegedly provided "practical assistance" (purportedly in the form of vehicles and identification systems) to the South African government. That presented a problem for plaintiffs, because, again, this Court had already held that Ford and IBM cannot be held *vicariously* liable for alleged acts of aiding and abetting occurring overseas.

So plaintiffs attempted on remand to claim that Ford and IBM were *directly* responsible for their subsidiaries' conduct, and that they took enough additional actions in the United States in furtherance of that conduct such that Plaintiffs' claims sufficiently "touch and concern" this country. *Kiobel*, 133 S. Ct. at 1669. Hence plaintiffs' contentions that Ford and IBM "directed and controlled" their subsidiaries' activities from the United States—allegations designed both to impute the subsidiaries' conduct to Ford and IBM and to tie that conduct to U.S. territory.

To countenance this theory, however, this Court would have to ignore fundamental principles of corporate law. Parent corporations and their subsidiaries are separate legal entities. Although courts will on rare occasion disregard a subsidiary's separate status and hold its parent responsible for its actions, courts take that extraordinary step only when a parent fails to respect the subsidiary's corporate form—for example, by undercapitalizing the subsidiary or intermingling its funds with the subsidiary's. Plaintiffs have alleged nothing close to that. They have alleged, at best, only ordinary acts of administration by Ford and IBM with respect to their South African subsidiaries—the kinds of acts that *all* parents take with respect to their subsidiaries. Disregarding the corporate form based on such allegations—which would not remotely justify veil piercing in other contexts—would not only introduce a considerable new wrinkle into corporate law; it would upset the settled expectations of U.S. corporations, interfere with U.S. foreign policy, and harm the citizens of developing countries.

A. Ford And IBM Exercised Only Ordinary Corporate Control Over Their South African Subsidiaries.

"A basic tenet of American corporate law is that the corporation and its shareholders are distinct entities." *Dole Food Co. v. Patrickson*, 538 U.S. 468, 474 (2003). That is equally true when a corporation's controlling shareholder is itself another corporation. Thus, "[g]enerally speaking, a parent corporation and its subsidiary are regarded as legally distinct entities." *Carte Blanche (Sing.) Pte.*,

Ltd. v. Diners Club Int'l, Inc., 2 F.3d 24, 26 (2d Cir. 1993). And just as any other shareholder in a corporation is generally not liable for the corporation's debts (beyond its investment in the corporation), so "[i]t is a general principle of corporate law deeply ingrained in our economic and legal systems that a parent corporation . . . is not liable for the acts of its subsidiaries." *United States v. Bestfoods*, 524 U.S. 51, 61 (1998) (internal quotation marks omitted).

A parent does not easily forfeit this limited liability: Before a court will pierce the corporate veil and hold a parent liable for the actions of its subsidiary, the parent must so dominate the subsidiary that the two function essentially as a single entity. The Supreme Court has made clear just how high a bar that is: "Dominion may be so complete, interference so obtrusive, that by the general rules of agency the parent will be a principal and the subsidiary an agent." *NLRB v. Deena Artware, Inc.*, 361 U.S. 398, 403 (1960) (internal quotation marks omitted). And this Court has warned that "[c]ourts must be extremely reluctant to disregard corporate form, and should do so only when the corporation *primarily* transacts the business of the dominating interest rather than its own." *United States v. Funds Held in the Name or for the Benefit of Wetterer*, 210 F.3d 96, 106 (2d Cir. 2000) (emphasis in original).

Courts accordingly employ demanding tests to decide whether to pierce the corporate veil and hold a parent liable for the acts of its subsidiary. For example,

under Delaware law (Ford's state of incorporation), a court can pierce a subsidiary's corporate veil only "where there is fraud or where [it] is in fact a mere instrumentality or alter ego of its owner." *Fletcher v. Atex, Inc.*, 68 F.3d 1451, 1457 (2d Cir. 1995) (internal quotation marks omitted). New York (IBM's state of incorporation) basically turns Delaware's disjunctive test into a conjunctive one, requiring a plaintiff to show that "(1) the parent corporation dominates the subsidiary in such a way as to make it a 'mere instrumentality' of the parent; (2) the parent company exploits its control to 'commit fraud or other wrong'; *and* (3) the plaintiff suffers an unjust loss or injury as a result of the fraud or wrong." *N.Y. State Elec. & Gas Corp. v. FirstEnergy Corp.*, 766 F.3d 212, 224 (2d Cir. 2014) (emphasis added) (internal quotation marks omitted).

In determining whether a parent excessively "dominates" its subsidiary, courts consider a number of factors. New York courts, for instance, consider "(1) the absence of the formalities and paraphernalia that are part and parcel of the corporate existence . . . [;] (2) inadequate capitalization[;] (3) whether funds are put in and taken out of the corporation for personal rather than corporate purposes[;] (4) overlap in ownership, officers, directors, and personnel[;] (5) common office space, address and telephone numbers of corporate entities[;] (6) the amount of business discretion displayed by the allegedly dominated corporation[;] (7) whether the related corporations deal with the dominated corporation at arms

length[;] (8) whether the corporations are treated as independent profit centers[;] (9) the payment or guarantee of debts of the dominated corporation by other corporations in the group[;] and (10) whether the corporation in question had property that was used by other of the corporations as if it were its own." *Id.* at 224 (internal quotation marks omitted).

Tellingly, plaintiffs do not even attempt to allege the existence of many of these factors. They do not allege that the subsidiaries failed to observe corporate formalities, or that they were undercapitalized, or that they shared office space with their parents. Nor do they allege that Ford and IBM intermingled their funds with those of their subsidiaries, or failed to treat their subsidiaries as independent profit centers, or paid or guaranteed their subsidiaries' debts, or used their subsidiaries' property as if it were their own.

Instead, the factors plaintiffs *do* allege fall far short of establishing that Ford's and IBM's subsidiaries were "mere instrumentalit[ies]" of their parents. *Id.* Plaintiffs contend that both companies "*closely* controlled" the operations of their South African subsidiaries. Appellants' Opening Br. 34, 36 (emphasis added). But that is nothing more than pleading by adverb: The alleged acts of control are the same kinds of acts *all* corporations take with respect to their subsidiaries. *See Thomson-CSF, S.A. v. Am. Arbitration Ass'n*, 64 F.3d 773, 778 (2d Cir. 1995)

(declining to pierce the corporate veil even where parent "actually controlled" its subsidiary).

Plaintiffs' new allegations suggest that, while Ford's and IBM's South African subsidiaries supplied the South African government with products that were allegedly used to enforce apartheid, Ford and IBM themselves made so many of the "key" decisions regarding their subsidiaries' activities that the subsidiaries were effectively functioning as internal divisions of their parents, rather than separate corporations. *See* A0504, ¶ 69 (Ford); A0528, ¶ 127 (IBM).

By that logic, however, nearly *every* subsidiary is the alter ego of its parent, for every parent controls the main business activities of its subsidiaries. That is, after all, the whole point of owning subsidiaries, rather than doing business through unaffiliated corporations. To see just how broadly plaintiffs' theory of liability would sweep, consider each alleged act of "control" in turn.

Plaintiffs alleged in their proposed amended complaints that Ford and IBM selected some of their South African subsidiaries' executives, that Ford approved the transfer of some of its personnel to its subsidiary, and that the head of IBM's South African subsidiary "reported and answered to" IBM. A0504-A0505, ¶ 71 (Ford); A0528, ¶ 128 (IBM). All of these allegations describe typical parent-subsidiary relations. Of course a parent will select its subsidiary's executives; its voting power ensures that it controls the subsidiary's board, which chooses the

executives. A parent will also permit some of its employees to go and work for the subsidiary, in order to lend its expertise to its other ventures. Indeed, even "a duplication of some or all of the directors or executive officers" of the parent and subsidiary (which Plaintiffs do not allege here) is not "fatal." *Bestfoods*, 524 U.S. at 61-62. And it would be surprising indeed if the head of a subsidiary did not "report and answer to" the parent—the subsidiary's controlling owner.

Plaintiffs also allege that Ford and IBM exercised control over some of their subsidiaries' business decisions. In particular, Ford and IBM allegedly decided which investments their subsidiaries should make and which contracts they subsidiaries should bid on, A0505, ¶ 72 (Ford); A0528, ¶ 129 (IBM); which employment policies they should institute, A0505-A0506, ¶ 73 (Ford); A0507-A0508, ¶ 75 (Ford); A0529, ¶ 130 (IBM); and which products they should sell and which suppliers they should use, A0506-A0507, ¶ 74 (Ford); A0529-A0530, ¶ 131 (IBM). Ford and IBM also allegedly monitored their subsidiaries' activities. A0508-A0509, ¶ 76 (Ford); A0530-A0531, ¶ 132 (IBM). Again, these are things *any* parent corporation would do. Why own a controlling stake in a corporation if you cannot determine which products the corporation sells and with whom the corporation does and does not do business? *See Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771-772 (1984) ("[I]n reality a parent and a wholly owned subsidiary always have a 'unity of purpose or a common design.'

They share a common purpose whether or not the parent keeps a tight rein over the subsidiary; the parent may assert full control at any moment if the subsidiary fails to act in the parent's best interests."). And a parent would be derelict not to monitor its subsidiary's activities.[4]

What is missing from plaintiffs' proposed amended complaints is any allegation that Ford and IBM *directly* operated their subsidiaries' businesses, completely circumventing the subsidiaries' independent corporate structures. Again, a parent does not "control" its subsidiary with respect to any given transaction for purposes of veil piercing unless the parent "take[s] immediate direction of the transaction through its officers . . . , ignoring the subsidiary's paraphernalia of incorporation, directors and officers. The test is therefore rather in the form than in the substance of the control." *Kingston Dry Dock Co. v. Lake Champlain Transp. Co.*, 31 F.2d 265, 267 (2d Cir. 1929). Plaintiffs have alleged (at most) the usual level of corporate control on the part of Ford and IBM, not any disregard for their subsidiaries' separate corporate forms.

In short, the actions that plaintiffs have alleged are the kinds of actions that parents ordinarily take with and for their subsidiaries. Indeed, plaintiffs

[4] Plaintiffs also allege that Ford and IBM used their special expertise to design the products that their subsidiaries supposedly then sold to the South African government. A0506-A0507, ¶ 74 (Ford); A0529, ¶¶ 130, 131 (IBM); A0546-A0547, ¶ 152 (IBM). These allegations do not even go to Ford's and IBM's control over their subsidiaries, as a completely unaffiliated corporation could design a product for the corporation that ultimately sells it.

acknowledge as much. *See* A0504, ¶ 70 (suggesting that Ford, "[l]ike other U.S.-based multinationals," controlled its South African subsidiaries). That should be the end of the matter.

Because plaintiffs have alleged no basis for disregarding the separate corporate existence of Ford's and IBM's South African subsidiaries, there is no basis for imputing the subsidiaries' actions to Ford and IBM. That means that the alleged acts of aiding and abetting the apartheid regime—supplying vehicles and information systems—were performed by entities other than Ford and IBM outside the United States. And because that is so, then we are back to *Kiobel*, which makes clear that plaintiffs have failed to allege a cognizable cause of action under the ATS.

B. Attributing To Ford And IBM The Conduct Of Their South African Subsidiaries Would Harm The U.S. Economy And Developing Countries.

Because a court necessarily makes federal common law in recognizing a private cause of action under the ATS for violations of a given norm of international law, the Supreme Court has held that courts should consider the "practical consequences of making that cause available to litigants in the federal courts." *Sosa*, 542 U.S. at 732-733. Not only would it contravene basic principles of corporate law to pierce the corporate veils of Ford's and IBM's South African subsidiaries; disregarding the subsidiaries' separate corporate statuses would have

deleterious "practical consequences" for American corporations, the U.S. economy, and developing countries alike.

American corporations take limited liability and the separateness of parents and subsidiaries as givens when structuring their business activities. As the Supreme Court has long recognized, "[l]imited liability is the rule, not the exception; and on that assumption large undertakings are rested, vast enterprises are launched, and huge sums of capital attracted." *Anderson v. Abbott*, 321 U.S. 349, 362 (1944). And in another ATS case, the Solicitor General explained that "[c]ommercial and investment activity in this country relies on a widely shared understanding, now firmly embodied in law, that parent and subsidiary corporations possess separate juridical personalities." Brief for the United States as *Amicus Curiae* Supporting Petitioner, *DaimlerChrysler AG v. Bauman*, 2013 WL 3377321, at *29 (U.S. 2013) (No. 11-965).

That, of course, is precisely the point of limited liability. The law treats corporations as separate from their shareholders in order to "encourage[] and promote[] business and industry" by protecting shareholders from some of the risks associated with investing in productive enterprises. 13 Fletcher Cyclopedia of the Law of Corporations § 6213.50 (2014). And the law expects investors to take account of this protection in structuring their business activities. "Indeed, a corporation may properly be organized and conducted for the avowed purpose of

maintaining it as a separate entity free from shareholder responsibility for the corporation's debts." 1 Fletcher Cyclopedia of the Law of Corporations § 14 (2015).

The protection afforded by limited liability plays a particularly important role in encouraging U.S. companies to invest in developing countries. Such investment comes with significant risks, given the political instability and rudimentary legal systems in those countries. *See* U.S. Chamber of Commerce, *A Conversation Behind Closed Doors: Inside the Boardroom: How Corporate America Really Views Africa* 6 (2009) [hereinafter *Behind Closed Doors*].[5] Those risks increase the costs of doing business abroad—particularly the rates American corporations must pay to obtain loans to finance their foreign activities and the premiums they must pay for risk insurance. *See* Overseas Private Inv. Corp., 2010 Annual Report at 2-3.[6]

In part to reduce these risks and attendant costs, U.S. corporations typically conduct their business activities in developing countries through subsidiaries. That makes good sense: Few corporations would participate in developing markets if that meant putting all their corporate assets on the line. *See* James J. White,

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[5] *Available at* https://www.uschamber.com/sites/default/files/legacy/international/africa/files/abi_ceo_suvey.pdf.

[6] *Available at* https://www.opic.gov/sites/default/files/docs/annualreport_2010.pdf.

Corporate Judgment Proofing: A Response to Lynn Lopucki's the Death of Liability, 107 Yale L.J. 1363, 1390 (1998). Limited liability thus encourages more investment in developing countries than would otherwise occur. That investment, in turn, promotes economic growth in the developing countries. *See U.S.-Africa Trade Relations: Creating a Platform for Economic Growth: Joint Hearing Before the H. Comm. on Energy and Commerce and the H. Comm. on Foreign Affairs*, 111th. Cong. (2009) (statement of Florizelle B. Liser, Assistant U.S. Trade Representative for Africa). And thus ensues a beneficial cycle for the developing countries: the more foreign investment and economic growth, the more institutional development; and the more institutional development, the more foreign investment and economic growth. *See* Nat'l Security Council, *The National Security Strategy of the United States of America* 17 (2002). This also redounds to the benefit of the United States, which depends on developing countries to supply raw materials and to serve as markets for American exports. *See Behind Closed Doors*, *supra*, at 5.

The United States derives particular benefits from its trade relationships with African countries—relationships the Administration has pronounced a "vital element for stimulating the U.S. economy." *An Overview of U.S. Policy in Africa: Hearing Before the Subcomm. on Africa and Global Health and the H. Comm. on Foreign Affairs*, 111th Cong. (2010) (statement of Leocadia L. Zak, Acting

Director, U.S. Trade and Development Agency). Yet all of these benefits depend on the continued willingness of U.S. corporations to invest in developing countries. If the risks become too great, U.S. corporations will curtail their activities in foreign countries, to the detriment of the countries themselves and the U.S. economy.

That will be the result if U.S. courts start piercing the corporate veils of the foreign subsidiaries of U.S. corporations based on the kinds of ordinary acts of corporate control that plaintiffs have alleged here. The United States has already warned that recognizing any corporate liability under the ATS "would create uncertainty for those [corporations] operating in countries where [human rights] abuses might occur." Brief for the United States as *Amicus Curiae* in Support of Petitioners, *Am. Isuzu Motors, Inc. v. Ntsebeza*, 2008 WL 408389, at *20 (U.S. 2008) (No. 07-919). Such uncertainty would only be compounded by adding veil piercing to the equation, given the vague, multi-factor tests courts employ for deciding whether to disregard the corporate form. By establishing a foreign subsidiary and exercising even minimal control over the subsidiary's activities, an American corporation would be putting its corporate treasury in jeopardy. Rational corporations would naturally be less likely to invest when doing so requires that gamble. The result would be lose-lose-lose: less investment for developing countries, less business for American corporations, and less of a market

for American exports. Those "practical consequences" counsel strongly against recognizing a cause of action under the ATS in this case. *Sosa*, 542 U.S. at 732.

II. PLAINTIFFS' ALLEGATIONS OF "PURPOSE" ARE MERE ALLEGATIONS OF KNOWLEDGE.

As noted, this Court has held that a defendant is complicit in a violation of the law of nations when it "(1) provides practical assistance to the principal which has a substantial effect on the perpetration of the crime, and (2) does so with the *purpose* of facilitating the commission of that crime." *Talisman*, 582 F.3d at 259 (emphasis added). Thus, the defendant must have *intended* to aid the principal's violation of the law of nations, as opposed to merely having had knowledge of the violation. *Mastafa v. Chevron Corp.*, 770 F.3d 170, 193 (2d Cir. 2014).

Plaintiffs, too, purport to accept that purpose, rather than knowledge, is the relevant standard. Appellants' Opening Br. 40-41 & n.19. But their new allegations of "purpose," such as they are, boil down to the contention that Ford and IBM *knew* that their subsidiaries were selling products to the South African government, which then used those products to perpetrate human rights violations. If those allegations are allowed to suffice, parent corporations will be on the hook for mere awareness of some of the consequences of their foreign subsidiaries' activities abroad—precisely the kind of liability that this Court's prior opinion precluded.

Plaintiffs contend that Ford's and IBM's intent to aid and abet human rights violations can be inferred from their subsidiaries' sale of products to the South African government. *See* Appellants' Opening Br. 41-42. On that theory, however, literally *every* corporation that sold products to *any* government that commits human rights violations would be presumptively liable under the ATS—a result that plainly cannot be squared with the narrow scope the Supreme Court has given the statute. *See Sosa*, 542 U.S. at 729 (emphasizing that only a "narrow class of international norms" is actionable under the ATS).

Apparently recognizing the untenable implications of their theory, plaintiffs attempt to cabin the reach of their claims by asserting that "the products sold by Defendants were not in the regular stream of commerce but were specifically prepared for the apartheid authorities to enable them to commit human rights violations for which they were designed and sold." Appellants' Opening Br. 42-43. But as Ford and IBM explain, the proposed amended complaints contain no factual allegations (as opposed to conclusory assertions) supporting that contention. *See* Appellees' Br. 40-46. That leaves plaintiffs' bare allegations that Ford and IBM knew what the South African government was doing with the products it was purchasing from their subsidiaries. *See, e.g.*, A0497, ¶ 44 ("Defendants knew that this assistance was perpetuating the apartheid crimes that the Plaintiffs suffered but purposefully continued this assistance."); A0529,¶ 130B

("IBM knew about all end uses of its products."). To allow such "knowledge" allegations to satisfy the "purpose" element of an accomplice-liability claim would be tantamount to holding Ford and IBM liable for awareness of some of the consequences of their *subsidiaries'* actions—the very standard rejected by this Court in *Talisman*.

III. CORPORATE ATS LIABILITY HARMS THE U.S. ECONOMY, INTERFERES WITH U.S. FOREIGN POLICY, AND HURTS DEVELOPING COUNTRIES.

The preceding two sections assumed that private corporations can be liable under the ATS for violations of the law of nations. But this Court has already held that the law of nations does not recognize corporate liability. In addition to rejecting Plaintiffs' complaints for failure to allege conduct that touches and concerns the United States and failure to allege "purpose," the Court should also reaffirm that the law of nations does not recognize corporate liability.

The ATS grants federal courts jurisdiction over (among other things) claims for torts "committed in violation of the law of nations." 28 U.S.C. § 1350. This Court has interpreted the phrase "the law of nations" to refer to customary international law. *See Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 237 n.2 (2d Cir. 2003). And customary international law, this Court has held, "does not presently recognize corporate liability," *Balintulo*, 727 F.3d at 181 n.6—a position amicus advocated when these cases were last on appeal. *See* Supp. Br. of the

Chamber of Commerce of the United States of America as *Amicus Curiae* in Support of Appellants and Reversal, *Balintulo v. Daimler AG*, 2009 WL 8684203 (2d Cir. 2013) (No. 09-2779-cv).

Plaintiffs suggest that this holding somehow did not survive the Supreme Court's decision in *Kiobel*. *See* Appellants' Opening Br. 52-54. But this Court has already rejected that argument. *Kiobel*, this Court recently explained, "did not disturb" this Court's prior holding rejecting corporate liability. *Chowdhury v. Worldtel Bangl. Holding, Ltd.*, 746 F.3d 42, 49 n.6 (2d Cir. 2014), *cert. denied*, 135 S. Ct. 401 (2014). And last time these cases reached this Court—which was *after Kiobel*—the Court observed that "[t]he law of this Circuit already provides answers to some of those questions, including the principle that corporations are not proper defendants under the ATS in light of prevailing customary international law." *Balintulo*, 727 F.3d at 191 n.26. Plaintiffs' attempt to revive (or re-revive) that argument should suffer the same fate.

This Court has declined to recognize corporate liability for good reason: Such liability is used to target companies engaged in ordinary commercial transactions in the hopes of imposing de facto economic sanctions on disfavored states. Such targeting directly harms U.S. businesses and, more broadly, the U.S. economy. And in doing so, it deters foreign investment, which both interferes with U.S. foreign policy and hurts developing nations.

1. As this Court has recognized, ATS suits against corporations essentially attempt to prevent corporations from investing in, or doing business with, countries with poor human-rights records. *See Talisman*, 582 F.3d at 261 (plaintiffs' allegations "serve essentially as proxies for their contention that Talisman should not have made any investment in the Sudan" (internal quotation marks omitted)). In a case against Nestle and other corporations, for example, press releases were issued and demonstrations were held just before Halloween and Valentine's Day urging parents and children to refuse to purchase chocolate candy from the defendant corporations because it was allegedly the product of "child slavery"; the pending ATS litigation was cited as support for that claim. *See* Deborah Orr, *Slave Chocolate?*, Forbes, Apr. 24, 2006.[7] And in a case against Coca-Cola based on the alleged activities of its subsidiaries in Colombia, the plaintiffs and their lawyers launched protests at the company's shareholder meetings, prompting some shareholders to quickly dump Coca-Cola stock, even though the case was ultimately dismissed. Joshua Kurlantzick, *Taking Multinationals to Court: How the Alien Tort Act Promotes Human Rights*, 21 World Pol'y J. 60, 63 (2004); *see Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252 (11th Cir. 2009).

[7] http://www.forbes.com/forbes/2006/0424/096.html.

2. Such politically motivated lawsuits harm U.S. companies and the national economy in several ways.

First, the mere filing of an ATS lawsuit, even a frivolous one, can severely harm a corporation's reputation and cause its stock values and debt ratings to plunge. *See* Kurlantzick, *supra*, at 63. Indeed, that is often the avowed objective of ATS plaintiffs' lawyers and human-rights advocates seeking to dissuade corporations from investing in countries with poor human-rights records. *See* Jonathan C. Drimmer & Sarah R. Lamoree, *Think Globally, Sue Locally: Trends and Out-of-Court Tactics in Transnational Tort Actions*, 29 Berkeley J. Int'l L. 456 (2011).

Second, if they proceed past the threshold stages, ATS suits typically involve expensive and onerous discovery. *See* Gary Clyde Hufbauer & Nicholas K. Mitrokostas, *International Implications of the Alien Tort Statute*, 7 J. Int'l Econ. L. 245, 253 (2004) [hereinafter *International Implications*]. Many documents are in foreign languages, and key witnesses often reside overseas in remote locations. Jack Auspitz, *Issues in Private ATS Litigation*, 9 Bus. L. Int'l 218, 221 (2008). The result is "delays, increased costs, a narrower scope of discovery, and loss of control of the process, all of which may prove prejudicial to [d]efendants." L.J. Dhooge, *A Close Shave in Burma*, 24 N.C. J. Int'l L. & Com. Reg. 1, 54 (1998).

Third, those ensuing delays can be quite substantial. It took ten years to obtain a jury verdict in *Bowoto v. Chevron Corp.*, 621 F.3d 1116 (9th Cir. 2010). It took more than five years for the district court just to rule on the defendants' motion to dismiss in *Doe v. Nestle, S.A.*, 748 F. Supp. 2d 1057 (C.D. Cal. 2010), *rev'd*, 766 F.3d 1013 (9th Cir. 2014). Such protracted litigation imposes substantial costs on defendants.

In addition to harming U.S. companies directly, ATS suits also injure the national economy by deterring others from doing business in the United States. Even when U.S. companies are willing to assume the risk of being sued under the ATS when they invest in developing countries, developing countries might not be willing to take their business. No other country has a statute like the ATS. *See Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 115 (2d Cir. 2010). And it is easier to establish jurisdiction in the U.S. over a U.S. corporation than a foreign one because the U.S. corporation will be considered "at home" in one state or another. *Daimler Chrysler AG v. Bauman*, 134 S. Ct. 746, 751 (2014). When developing countries do business with U.S. corporations, then, they risk being dragged into protracted human-rights litigation in the United States, which will lead them to partner with corporations from other countries instead. *See* Alan O. Sykes, *Transnational Forum Shopping as a Trade and Investment Issue*, 37 J. Legal Stud. 339, 372 (2008). And that is exactly what has happened. For

example, after U.S. companies divested from Sudan, other foreign companies—particularly Chinese ones—stepped in to fill the void. *See* Council on Foreign Relations, *U.S.-China Relations: An Affirmative Agenda, a Responsible Course* 45 (2007).[8]

The specter of liability under the ATS could also dissuade foreign companies from investing in the United States. *See* Gary Clyde Hufbauer & Nicholas K. Mitrokostas, *Awakening Monster: The Alien Tort Statute of 1789*, at 42 (2003) [hereinafter *Awakening Monster*]. Such investment is critical to the U.S. economy. *See* U.S. Dep't of Commerce, *The U.S. Litigation Environment and Foreign Direct Investment: Supporting U.S. Competitiveness by Reducing Legal Costs and Uncertainty* 2 (2008). Appreciating this fact, the Supreme Court has rejected doctrines that would deter foreign investment in this country. For example, in *Stoneridge Investment Partners LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 163-164 (2008), the Court refused to extend securities liability partly on the ground that "overseas firms with no other exposure to our securities laws could be deterred from doing business here," which would, in turn, "shift securities offerings away from domestic capital markets." Corporate liability under the ATS poses the same threat. If a foreign corporation does enough business in the United States, it could become subject to the general (or all-purpose) jurisdiction of U.S.

[8] *Available at* http://www.cfr.org/content/publications/attachments/ChinaTaskForce.pdf.

courts, including for claims under the ATS. At the margin, some foreign companies will decide that the risk is not worth it, depriving this country of the benefits of foreign investment.

3. These effects of ATS suits also interfere with U.S. foreign policy and hurt developing nations.

The potentially crippling costs of ATS litigation will, at the margin, "dissuade some corporations from doing business in ATS magnet countries," *International Implications*, *supra*, at 249-250, while actual ATS decisions would likely "prompt firms to disinvest en masse," *Awakening Monster*, *supra*, at 40. The Solicitor General has accordingly warned that an ATS regime featuring corporate and aiding-and-abetting liability would "have a deterrent effect on the free flow of trade and investment, because it would create uncertainty for those operating in countries where abuses might occur." U.S. *Ntsebeza* Br., 2008 WL 408389, at *20.

This deterrent effect of ATS litigation undermines U.S. foreign policy by countermanding the political branches' informed choice to encourage investment in certain strategically important nations. The political branches sometimes decide to permit investment in a country with a problematic human-rights record, as a means of advancing U.S. interests or helping that country along the road toward stability, and American businesses may and frequently do make the investment.

Take South Africa itself. As the Solicitor General has explained, "in the 1980s, the United States . . . urged companies to use their influence to press for change away from apartheid, while at the same time using limited sanctions to encourage the South African government to end apartheid." *Id.* "Such policies" of constructive engagement, the Solicitor General has warned, "would be greatly undermined if the corporations that invest or operate in the foreign country are subjected to lawsuits under the ATS as a consequence." *Id.* The instant lawsuits thus highlight the potential for corporate ATS liability to undercut the United States' efforts to encourage trade with carefully selected foreign nations.

The deterrent effect of ATS litigation also can severely harm developing countries themselves by depriving them of much-needed foreign investment. As explained above, many developing countries rely on foreign investment to provide the income and political stability necessary to develop democratic institutions and economic self-sufficiency. *See supra* at 19. ATS suits, and the threat of them, tend to curtail that essential investment. Such suits can also mean "access denied to international credit markets" because "[c]ountries on the losing side of ATS cases will find that bank credit and bond placements are more difficult." *Awakening Monster*, *supra*, at 43. ATS suits, in short, "will damage target countries." *Id.* at 42; see also Brief for United States as *Amicus Curiae* in Support of Appellees, *Balintulo v. Barclay Nat'l Bank Ltd.*, 2009 WL 7768609, at *9-*10

(2d Cir. Nov. 30, 2009) (No. 09-2778-cv) (arguing that the disincentives created by ATS suits "adversely affect U.S. economic interests as well as economic development in poor countries").

Given the many harmful "practical consequences" of corporate liability under the ATS, *Sosa*, 542 U.S. at 732, and to forestall further attempts to mire corporate defendants in ATS litigation, this Court should reaffirm its prior holdings that corporate liability is not available under the statute.

CONCLUSION

For all of the foregoing reasons, and for those in Appellees' brief, this Court should affirm the District Court's judgment.

Respectfully submitted,

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May 27, 2015

CERTIFICATE OF COMPLIANCE

Pursuant to Fed R. App. P. 32(a)(7)(C), I hereby certify that the foregoing brief was produced using the Times New Roman 14-point typeface and contains 6,947 words.

/s/ Catherine E. Stetson
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CERTIFICATE OF SERVICE

I certify that on May 27, 2015, the foregoing was electronically filed through this Court's CM/ECF system, which will send a notice of filing to all registered users.

/s/ Catherine E. Stetson
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