No. 10-56739

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

JOHN DOE I; JOHN DOE II; JOHN DOE III, INDIVIDUALLY AND ON BEHALF OF PROPOSED CLASS MEMBERS; AND GLOBAL EXCHANGE,

Plaintiffs-Appellants,

v.

NESTLÉ, U.S.A., INC.; ARCHER DANIELS MIDLAND COMPANY; AND CARGILL INCORPORATED,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, CASE NO. C-05-5133-SVW
THE HONORABLE STEPHEN V. WILSON, UNITED STATES DISTRICT JUDGE

BRIEF *AMICI CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE NATIONAL FOREIGN TRADE COUNCIL IN SUPPORT OF THE PETITION FOR REHEARING AND REHEARING *EN BANC*

KATHRYN COMERFORD TODD
SHELDON GILBERT
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
Tele: (202) 463-5337

Counsel for the Chamber of Commerce of the United States of America

PETER B. RUTLEDGE
Counsel of Record
215 Morton Avenue
Athens, GA 30605
Tele: (706) 850-5870
borut@uga.edu

CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America is a nonprofit corporation organized under the laws of the District of Columbia. It has no parent company and has issued no stock.

The National Foreign Trade Council is a nonprofit corporation organized under the laws of the State of New York. It has no parent company and has issued no stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

TABLE OF AUTHORITIES (cont'd)

Cases (cont'd)

TABLE OF AUTHORITIES (cont'd)

Cases (cont'd)

Statutes

Other Authorities

TABLE OF AUTHORITIES (cont'd)

Other Authorities (cont'd)

TABLE OF AUTHORITIES (cont'd)

Other Authorities (cont'd)

IDENTITY, INTEREST AND SOURCE OF AUTHORITY [1]

Identity: The Chamber of Commerce of the United States of America ("Chamber") is the world's largest federation of businesses and associations. The Chamber represents three-hundred thousand direct members and indirectly represents an underlying membership of more than three million U.S. businesses and professional organizations of every size and in every sector and geographic region of the country. An important function of the Chamber is to represent the interests of its members in matters before the courts, Congress and the Executive Branch.

The National Foreign Trade Council ("NFTC") is the premier business organization advocating a rules-based world economy. Founded in 1914 by a group of American companies, NFTC and its affiliates now serve more than 250 member companies.

Interest: *Amici* have a direct and substantial interest in the issues presented by this appeal. Numerous members have been – and may continue to be – defendants in suits predicated on liability under the Alien Tort Statute ("ATS"),

---

[1] Pursuant to Federal Rule of Appellate Procedure 29(c)(5), *amici* certify that no party's counsel authored this brief in whole or in part. Furthermore, no party, no party's counsel and no person – other than *amici*, their members or their counsel – contributed money that was intended to fund the preparation or submission of this brief.

28 U.S.C. § 1350. Over the past two decades, U.S. and foreign corporations have been named as defendants in nearly two-hundred lawsuits, many of which have been filed in this Circuit.[2] Unless the panel's published opinion is vacated, the deluge of ATS lawsuits, especially in this Circuit, will only worsen.

Although *amici* take no position on the factual allegations in this case, they unequivocally condemn forced labor practices. The question at bar, though, is not whether such wrongs occurred. Instead, it is whether private plaintiffs can stretch a U.S. statute beyond its explicit and intended scope to sweep up private companies that are alleged to have done nothing more than engage in ordinary business transactions involving commercial goods. *Amici* can offer a unique and helpful perspective on that issue. They have participated in cases before the Supreme Court involving the reach of the ATS – cases that the panel opinion misapplies. *See Kiobel v. Royal Dutch Petroleum*, 133 S. Ct. 1659 (2013); *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). They also have participated in cases before other federal circuits that have elucidated the contours of the ATS –

---

[2] *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, 460 (2011) (documenting ATS cases filed through 2011); notes 5-7, *infra* (documenting more recent cases since publication of the Drimmer & Lamoree study).

cases that the panel opinion either ignores or misapprehends. *See, e.g., Balintulo v. Daimler AG*, 727 F.3d 174 (2d Cir. 2013); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244 (2d Cir. 2009).

Source of Authority: Federal Rule of Appellate Procedure 29(a) and this Circuit's Rule 29-2(a) authorize the filing of this brief. All parties have consented to the filing.

ARGUMENT

I. PLENARY REVIEW IS WARRANTED BECAUSE THE CONFUSION AND INTER-CIRCUIT CONFLICTS CREATED BY THE PANEL OPINION THREATEN TO MIRE AMERICAN COMPANIES IN ENDLESS LITIGATION DESIGNED TO DAMAGE THEIR REPUTATIONS AND TO EXTRACT SETTLEMENTS.

The panel opinion in this case is as puzzling as it is controversial.

It is puzzling because, unlike other decisions of this Circuit and sister circuits, it ignores the Supreme Court's unambiguous admonition to limit the sweep of the Alien Tort Statute. Indeed, in every opinion where it has considered the ATS, the Supreme Court has clarified for the lower courts the statute's very

limited reach.[3] Just last term, the Court stated unambiguously that the ATS did not support jurisdiction over claims where the underlying conduct giving rise to the tort occurred abroad, even where the claims "touch and concern the territory of the United States" in some fashion. *Kiobel*, 133 S. Ct. at 1669. And just last *week*, the Supreme Court invoked *Kiobel* to declare "infirm" ATS claims in another case arising from this Circuit and predicated on overseas conduct. *See Daimler AG v. Bauman*, No. 11-965, Slip op. at 22 (Jan. 14, 2014).

In the wake of *Kiobel*, several federal appellate courts have heeded the Supreme Court's guidance. For example, the Second Circuit unanimously concluded that the ATS would not support jurisdiction over a suit just like this one where the claim was predicated on a theory of aiding and abetting alleged tortious conduct abroad. *See Balintulo*, 727 F.3d 174. Likewise, this Circuit sitting *en banc* summarily affirmed dismissal with prejudice of the complaint in *Sarei v. Rio Tinto, PLC* after the Supreme Court vacated the Circuit's prior opinion, 671

---

[3] *See Kiobel*, 133 S. Ct. 1659 (holding that the ATS did not apply to alleged conduct taking place in the territory of another sovereign); *Sosa*, 542 U.S. 692 (holding that the ATS is merely jurisdictional, setting forth high standards before any common-law causes of action will be recognized and charging federal courts with considering the "practical consequences" of any exercise of jurisdiction under the ATS); *Argentine Republic v. Amerada Hess Shipping Co.*, 488 U.S. 428 (1989) (holding that the ATS does not supply basis for federal court subject matter jurisdiction in action against foreign sovereign).

F.3d 736 (9th Cir. 2011), and remanded the case for further consideration in light of *Kiobel*. *See Rio Tinto, PLC v. Sarei*, 133 S. Ct. 1995 (2013) (Supreme Court order); *Sarei v. Rio Tinto, PLC*, 722 F.3d 1109 (9th Cir. 2013) (summarily affirming dismissal of complaint with prejudice).[4]

Not the panel opinion. Rather than heeding "the risks to international comity," *Bauman*, Slip Op. at 23, the panel opinion blithely announced several holdings about the scope of the ATS that prolong this litigation, complicate pending proceedings, and invite future filings:

- That the ATS applies to corporations even though the Second Circuit has reached a contrary conclusion, *see Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010), *aff'd on other grounds*, 133 S. Ct. 1659, and even though the Supreme Court had vacated the prior decision of this Circuit cited by the panel in support of this holding, *see Sarei*, 133 S. Ct. 1995;
- That the district court in this case erred in requiring plaintiffs to allege "specific intent" to satisfy the *mens rea* for claims of accessorial liability

[4] Several other circuits have affirmed dismissals of ATS suits against non-corporate defendants and declined to remand them for further opportunity to replead. *See, e.g*, *Korber v. Bundesrepublik Deutschland*, No. 12-3269, 2014 WL 68142 (7th Cir. Jan. 9, 2014); *Ben-Haim v. Neeman*, No. 13-1522, 2013 WL 5878913 (3d Cir. Nov. 4, 2013) (unpub. mem.).

even though, as Judge Rawlinson recognized, the district judge's approach properly tracked the approach of the Second Circuit opinion cited by the panel, *see Talisman Energy*, 582 F.3d at 259;

- That two recent decisions of international criminal tribunals justified further opportunity for plaintiffs to amend their complaint without any explanation why those two decisions altered the *actus reus* standard for accessorial liability under international law or, even if they did, whether any such standard satisfied the high bar set by the Supreme Court in *Sosa*, 542 U.S. 692;
- Finally, that plaintiffs should be given further opportunity to litigate a case predicated on extraterritorial conduct even though, just a few months earlier, this Court sitting *en banc* summarily affirmed dismissal with prejudice of a similar complaint in an ATS case predicated on an identical theory of liability and similar allegations of overseas conduct, *see Sarei*, 722 F.3d 1109.

Moreover, the panel announced these conclusory holdings, without any elaboration on their meaning or explanation of their underlying reasoning, in a published opinion that plaintiffs will undoubtedly invoke as binding in other district courts and before future panels in this Circuit (absent intervention by an *en banc* court).

This is where the panel opinion becomes controversial. The rehearing petition explains how the panel opinion creates (or exacerbates) multiple circuit splits over the proper interpretation of the Alien Tort Statute. *See* Petition for Rehearing and Rehearing *En Banc* at 16-19. *Amici* fully endorse Appellees' position on these points but, mindful of their obligation under this Circuit's Advisory Committee Note to Rule 29-1, do not retread that ground in this brief. Instead, this brief explains why this proceeding, particularly in light of the panel opinion, involves questions of "exceptional importance" warranting plenary review. Fed. R. App. P. 35(b)(1)(B).

First, this proceeding will have a tremendous impact on pending and future ATS litigation in this Circuit and elsewhere. For pending cases, the confusing and unreasoned standards articulated in the panel opinion threaten to create chaos for district courts and corporate defendants, seeking to resolve these cases at the pleading stage. Those standards also invite a new wave of ATS litigation in this Circuit, contrary to the clear signals by the Supreme Court that the statute should be narrowly construed.

Second, with the panel's sanction, this proceeding threatens to create a road map for plaintiffs to damage the image of corporate defendants, mire them in expensive litigation, and extract settlements even where the companies have not

engaged in any wrongdoing. ATS cases are almost never tried to verdict. Instead, they are dismissed, settled, or simply never end. This "Never-Ending Story" strategy seems to be the goal of some plaintiffs, in order to keep the company in the spotlight *via* litigation as long as possible. Not only do such tactics force companies to bear the unrecoverable costs of defending against the suit, they also damage the image of the corporate defendants who are brazenly branded as human rights violators. Unless vacated, the panel opinion threatens to make it virtually impossible for companies ever to obtain closure in such suits and licenses these sorts of destructive public campaigns.

For these reasons, in addition to the ones given in the rehearing petition, plenary review of this case is essential.

A. The panel's decision threatens to have a profound impact on pending ATS litigation and to invite a wave of new ATS litigation in this Circuit.

Since the Supreme Court's decision in *Kiobel*, the panel's opinion appears to be the first published decision of a federal circuit to reinstate ATS claims and to elaborate on the elements of aiding-and-abetting liability. Unless corrected, it is bound to have a significant and deleterious effect on pending and future ATS litigation.

Over the past decades, corporations have been named as defendants in nearly two-hundred ATS lawsuits. Nearly all of these suits are premised on the theory that the corporation aided and abetted some violation of international law. Consequently, decisions such as the panel opinion concerning the reach of the ATS and the elements of accessorial liability have a profound impact on such suits.

The most immediate impact will likely be felt on pending cases in this Circuit. Presently, there are at least eight pending ATS cases originating with a district court in this Circuit.[5] The panel's opinion forces other panels and district courts in those cases, bound by published Circuit precedent, to unearth the meaning of the panel's unexplained holdings. Given the complete lack of reasoning in the panel's decision, that inevitably will be a time-consuming and unpredictable exercise.

---

[5] In addition this proceeding, *see Saldana v. Occidental Petroleum Corp.*, *appeal pending*, No. 12-55484 (9th Cir.); *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1134, 1147-48 (C.D. Cal. 2005), *appeal pending*, No. 10-55515 (9th Cir.); *Institute of Cetacean Research v. Sea Shepherd Conservation Soc.*, 725 F.3d 940 (9th Cir. 2013); *Dacer v. Estrada*, No. C 10–04165 WHA, 2013 WL 5978101 (N.D. Cal. Nov. 8, 2013); *Doe II v. Cisco Sys., Inc.*, No. 11-cv-2449-EJD (N.D. Cal.); *Sun v. China Petroleum & Chem. Corp.*, No. 2:13-cv-05355-BRO-E (C.D. Cal.). In addition, *Bauman v. DaimlerChrysler AG*, arising from this Circuit, 644 F.3d 909 (9th Cir. 2011), raises claims under the ATS, albeit ones that the Supreme Court has declared "infirm." *See supra* at 4. In light of the Supreme Court's very recent opinion reversing this Circuit's judgment, immediate dismissal is a mere formality.

The confusion created by the panel over the *mens rea* standards illustrates its potential impact on litigation in other cases. Prior to the issuance of the panel opinion, there already was a mature and acknowledged conflict on this issue between the Second and Fourth Circuits, which held that purpose to facilitate the principal violator is required, and the Eleventh and D.C. Circuits, which held that knowledge of the underlying violation suffices.[6] The panel opinion adds a new layer of complexity to this split over the *mens rea* question: it suggests a distinction between "purpose" to facilitate the underlying tort and the "specific intent" to facilitate the underlying tort (which, in the panel's view, the district judge erroneously required). Yet the opinion cited by the panel in support of this decision, the Second Circuit's decision from *Talisman Energy*, admits of no such distinction and, instead, accords the two terms identical meanings. Consequently, unless corrected, the panel opinion will sow confusion among courts in this

---

[6] *Compare Talisman Energy*, 582 F.3d at 259, *and Aziz v. Alcolac, Inc.*, 658 F.3d 388, 401 (4th Cir. 2011), *with Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1158 (11th Cir. 2005), *and Doe VIII v. Exxon Mobil Corp.*, 654 F.3d 11, 39 (D.C. Cir. 2011). The status of the rule in the D.C. Circuit is open to some question. Following *Kiobel*, the D.C. Circuit vacated its judgment and remanded the ATS claims for further consideration by the district court, but it left other portions of the panel opinion intact. *See Doe VIII v. Exxon Mobil Corp.* 527 Fed. Appx. 7 (D.C. Cir. 2013) (unpub.).

Circuit, which must apply this elusive (and perhaps non-existent) distinction between "purpose" and "specific intent."

The effect, though, is not limited to cases pending within this Circuit. Additionally, there are several ATS actions pending in federal courts in other circuits.[7] The panel opinion is the first published opinion, since *Kiobel*, to reinstate an ATS claim and to gloss the elements of aiding-and-abetting liability. So it will no doubt be invoked by plaintiffs in other Circuits that do not yet have a binding circuit rule on the four holdings described above.

In sum, plenary review is necessary to ensure that the panel's decision does not wreak havoc among pending ATS cases in this Circuit, invite a new wave of litigation here, and spawn confusion in other Circuits over the proper reach of the statute.

---

[7] *See, e.g.*, *Doe VIII*, 527 Fed. Appx. 7; *Licci ex rel. Licci v. Lebanese Canadian Bank, SAL*, 732 F.3d 161 (2d Cir. 2013); *Giraldo v. Drummond Co.*, No. 2:09-CV-1041-RDP, 2013 WL 3873960 (N.D. Ala. July 25, 2013), *appeal pending*, No. 13-15503 (11th Cir.); *Al-Shimari v. CACI, Int'l, Inc.*, No. 1:08-CV-827-GBL, 2013 WL 3229720 (E.D. Va. June 25, 2013), *appeal pending*, No. 13-2162 (4th Cir.); *In re Chiquita Brands Int'l, Inc. Alien Tort Statute and S'holder Derivative Litig.*, No. 08-1916-MDL, 2013 WL 475719 (S.D. Fla. Aug. 30, 2013); *Linde v. Arab Bank, PLC*, 293 F.R.D. 138 (E.D.N.Y. 2013); *Penaloza v. Drummond Co.*, No. 2:13-cv-393-RDP (N.D. Ala.); *Adhikari v. Daoud & Partners*, No. 09-CV-1237, 2013 WL 4511354 (S.D. Tex. Aug. 23, 2013); *Daobin v. Cisco Sys., Inc.*, No. 8:11-CV-01538-PJM (D. Md.); *Abbass v. CACI Premier Tech., Inc.*, No. 1:13-CV-1186-LMB (E.D. Va.).

B. The panel's decision threatens to mire companies in endless litigation designed to tarnish their reputations, to burden them with discovery and to extract settlements.

Apart from its impact on pending cases, the panel opinion encourages plaintiffs to pursue a familiar script in ATS litigation. It promotes litigation designed to damage the companies' brands, mires them in costly and complex discovery, and ultimately enhances the settlement pressures irrespective of whether the companies are at fault.

Suits like this one impose enormous reputational costs on companies and often form part of a deliberate strategy designed to shame companies by unfairly branding them as human rights violators. For example, in this case, the lawsuit sought to inflict financial and reputational harm on the defendants. Press releases and demonstrations just before Halloween and Valentine's Day urged consumers to refuse to purchase chocolate because it was allegedly the product of "child slavery" and cited this action as support for that claim.[8]

These sorts of tactics are not unique to this case. They have been employed elsewhere such as in ATS litigation against a multinational beverage company that

---

[8] *See, e.g.*, Deborah Orr, Slave Chocolate?, Forbes (Apr. 24, 2006), *available at* http://www.forbes. com/forbes/2006/0424/096.html.

plaintiffs alleged to have been involved in murder, rape and torture (whereas in fact the actual lawsuit rested on the allegation that local bottlers had coordinated with Colombian paramilitary).[9] Indeed, in an interview one of the plaintiffs' counsel in that litigation explained that they were "not in a hurry for the cases to be resolved, because as long as they stay tied up in the courts they will continue to receive attention in the media."[10] Ultimately the suit was dismissed, and that dismissal was affirmed on appeal – but not before some shareholders dumped the company's stock and its share price was damaged.[11]

The costs imposed on companies are not limited to their brand and reputation. Once these cases pass the pleading stage, discovery becomes a complex, burdensome and often unmanageable undertaking. Suits like this one predicated on aiding-and-abetting liability inevitably entail an inquiry into the conduct of the primary tortfeasor, which almost always is located abroad.

---

9 *See* Press Release, Campaign to Stop Killer Coke, *Coke Hit With New Charges of Murder, Rape, Torture* (Mar. 1, 2010), *available at* http://www.organicconsumers.org/articles/article_20311.cfm.

10 Malcolm Fairbrother, *Colombia, Human Rights and U.S. Courts: An Interview with Daniel Kovalik* (April 25, 2002), *available at* http://ias7.berkeley.edu/Events/spring2002/04-25-02-kovalik/index.html.

11 *See* Joshua Kurlantzick, *Taking Multinationals to Court: How the Alien Tort Act Promotes Human Rights*, 21 World Pol. J. 60, 63-64 (2004).

Consequently, much of the document production and deposition-taking must involve evidence and witnesses located in the Ivory Coast. This forces both parties to seek discovery in the form of a letter rogatory, a notoriously slow and unpredictable process, *see* Gary B. Born & Peter B. Rutledge, International Civil Litigation in United States Courts 1025 (5th ed. 2011). Responses to the letters rogatory may arrive (if at all) only after months, if not years, of waiting. For example, in one ATS case against an American company arising out of its alleged activities in Colombia, the Colombian Government responded to certain letters rogatory more than four months *after* trial had ended.[12] In this case, it will be especially difficult as the Ivory Coast has not even signed the Hague Evidence Convention. *See* Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters: Status Table, *available at* http://www.hcch.net/index_en.php?act=conventions.status&cid=82.

Not only is it complex, discovery also is burdensome. In cases like this one, a corporate defendant's liability turns on evidence of whether its conduct satisfies the relevant standards for the *actus reus* and *mens rea* of accessorial liability. Proof of these elements, thus, requires extensive discovery – often in post-conflict or

[12] Brief for Appellees/Cross-Appellants in *Romero v. Drummond Co.*, Nos. 07-14040DD, 07-14356-D (11th Cir.) at 11.

active-conflict regions where discovery is fraught with peril. Additionally, such discovery can take up the time of a number of people. As prior cases from this Circuit demonstrate, it is not unusual for discovery to entail depositions of senior corporate officers, including the President and Chief Executive Officer, as well as searches of companies' internal emails. *See Doe I v. Unocal Corp.*, 395 F.3d 932, 938-42 & n. 10 (9th Cir. 2002), *rehearing en banc granted and appeal dismissed*, 403 F.3d 708 (2005). Unless corrected, the panel opinion ensures that those fishing expeditions will be especially widespread in this case because it leaves so much unclear about the relevant standards governing accessorial liability in this Circuit.

The combination of deliberately dramatic public relations campaigns, complex discovery, and the unclear standards announced in the panel opinion create a recipe for protracted litigation. Cases under the ATS alleging aiding and abetting liability have endured for years.[13] In this Circuit, the *Sarei*, litigation lasted over a dozen years. *See Sarei v. Rio Tinto, PLC*, 221 F. Supp. 2d 1116, 1127 (C.D. Cal. 2002), *remanded*, 550 F.3d 822 (9th Cir. 2008) (en banc). ATS

---

[13] *See* Gary C. Hufbauer & Nicholas K. Mitrokostas, Awakening Monster: The Alien Tort Statute of 1789 at 63-73 (2003) (providing filing date for oldest ATS suits).

litigation against Royal Dutch Petroleum went on for over a decade until the Supreme Court finally affirmed dismissal of the suit**.** *See Kiobel*, 621 F.3d at 124 (noting that original suit was filed in 2002); *Kiobel*, 133 S. Ct. at 1669 (affirming dismissal in 2013). Some cases against companies based on their alleged conduct in South Africa have lasted over a decade. *See Balitntulo*, 727 F.3d at 183 (noting filing date of original lawsuit). In those cases, even after the Second Circuit declared that "the Supreme Court's holding in *Kiobel* plainly bars the plaintiffs' claims," *id.* at 193, plaintiffs have persisted in trying to keep the litigation alive in district court. *See In re South African Apartheid Litig.*, Nos. 02 MDL 1499 (SAS) *et al.*, 2013 WL 6813877 (S.D.N.Y. Dec. 26, 2013). Litigation against Exxon Mobil for its alleged activities in Indonesia was filed in 2001 and *still* has not advanced beyond the pleading stage. *See Doe VIII*, 654 F.3d at 15, *judgment vacated*, 527 Fed. Appx. 7.

This case follows the same pattern, and the panel opinion only makes matters worse. The case was first filed in 2005, and Appellees waited nearly five years for dismissal in the district court. The case is now over eight years old and remains stuck at the pleading stage. With the panel's order granting plaintiffs yet another opportunity to amend their complaint, defendants face the prospect of another round (if not several rounds) of pleadings before the district court can

again rule on whether the plaintiffs even have stated a claim (which, even if defendants prevail, undoubtedly will set up another appeal in light of the panel's retention of jurisdiction).

This "Never Ending Story" – public relations campaigns, complex and burdensome discovery, and protracted litigation – represents "an *in terrorem* increment of the settlement value." *Dura Pharm., Inc. v. Broudo,* 544 U.S. 336, 347 (2005). Indeed, settlements often seem to be the plaintiffs' end goal in ATS litigation directed at private companies and predicated on loose standards of aiding-and-abetting liability. Such tactics have successfully squeezed settlements out of companies in this Circuit, where Unocal allegedly settled a case against it for $30 million. *See* Daniel Diskin, Note, *The Historical and Modern Foundations for Aiding and Abetting Liability Under the Alien Tort Statute*, 47 Ariz. L. Rev. 805, 809-10 (2005). Similarly, protracted litigation in the Second Circuit eventually forced Royal Dutch Shell to settle one case for over $15 million without any finding (or admission) of liability. *See* Shell Pays Compensation in Nigeria, Economist (June 13, 2009). The panel opinion, with its unclear standards and unexplained holdings, simply encourages the sorts of tactics designed to wear down corporations even when they are never alleged to have engaged in any direct wrongdoing.

***

The bottom line is simple: the panel opinion, with its vague and unexplained standards, is not only inconsistent with *Kiobel* and subsequent decisions of other Circuits dismissing ATS claims, it also sanctions and exacerbates the sort public shaming of corporate defendants by litigation without visible end. The only proper course for this important proceeding is the one taken by the Second Circuit in *Balintulo* and this Circuit in *Sarei* – faithful application of the principles announced by the Supreme Court in *Kiobel* to conclude that plaintiffs cannot state a claim and, consequently, the litigation must finally come to an end. Any other course results in open season on multi-national companies in this Circuit.

CONCLUSION

For the foregoing reasons, the petition for rehearing *en banc* should be granted.

Respectfully submitted,

/s

PETER B. RUTLEDGE
Counsel of Record
215 Morton Avenue
Athens, GA 30605
Tele: (706) 850-5870
borut@uga.edu

KATHRYN COMERFORD TODD
SHELDON GILBERT
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
Tele: (202) 463-5337

Counsel for the Chamber of Commerce of the United States of America

January 21, 2014

CERTIFICATE OF COMPLIANCE WITH

TYPE-VOLUME LIMITATIONS, TYPEFACE REQUIREMENTS

AND TYPE-STYLE REQUIREMENTS

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because:
    - the brief contains 3,981 words excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
2. This brief complies wit the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because:
    - the brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman font.

January 21, 2014 /s
Peter B. Rutledge

CERTIFICATE OF SERVICE

I, Peter B. Rutledge, certify that on January 21, 2014, the attached BRIEF *AMICI CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE NATIONAL FOREIGN TRADE COUNCIL IN SUPPORT OF THE PETITION FOR REHEARING AND REHEARING *EN BANC* was filed electronically with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

January 21, 2014

/s
Peter B. Rutledge