17-424-cv

IN THE

United States Court of Appeals for the Second Circuit

ESTHER KIOBEL, by her attorney-in-fact, CHANNA SAMKALDEN,

Petitioner-Appellee,

v.

CRAVATH, SWAINE & MOORE LLP,

Respondent-Appellant.

On Appeal from the United States District Court
for the Southern District of New York, No. 16 Civ. 7992 (AKH)
District Judge Alvin K. Hellerstein

REPLY BRIEF FOR RESPONDENT-APPELLANT CRAVATH, SWAINE & MOORE LLP

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INTRODUCTION

The question in this appeal is whether a petitioner can circumvent critical constitutional and statutory constraints on Section 1782 discovery by exploiting an attorney-client relationship. Kiobel admits that is exactly what is going on here. She concedes that the District Court "does not have jurisdiction" over Shell, that she signed a stipulated confidentiality order prohibiting any use of Shell's materials in future litigation, and that the Dutch courts where she plans to sue Shell next offer more limited discovery than those in the United States. Kiobel Br. 4, 7, 31 n.2. Yet Kiobel asks this Court to overlook these facts—and the "curious and

unacceptable result[s]" that would obtain if "[t]he price of an attorney's advice" were the "disclosure of previously protected matters," *Ratliff v. Davis Polk & Wardwell*, 354 F.3d 165, 169 (2d Cir. 2003)—all in the name of "efficiency." Efficiency cannot trump the statute's text, due process, or controlling case law. This Court should reverse.

On Section 1782's statutory elements, two centuries of precedent hold that subpoenas directed to an attorney cannot reach materials that the court could not compel the client to produce directly. *See* Opening Br. 23-24 & n.2. The same principle applies where the client "lie[s] outside the statutory limits of the court's power to compel production." *In re Application of Sarrio, S.A.*, 119 F.3d 143,146 (2d Cir. 1997). And bedrock due process limitations on a court's subpoena power require the same result. *See* Opening Br. 33-38. Kiobel cannot extend a U.S. court's jurisdiction over Shell through the fiction of subpoenaing its attorneys.

Kiobel's response is that *Sarrio*'s protection only covers "privileged" materials and that constitutional constraints on courts' subpoena powers only apply to documents held abroad. She is wrong. Whether materials are "privileged" in the sense she is referring to does not limit the protection recognized in *Sarrio*. *Sarrio*'s protection is distinct from the privilege that applies to confidential communications between clients and their counsel. *Ratliff*, 354 F.3d at 170. And Kiobel identifies no authority suggesting that due process limits on subpoenas to

corporate agents depend on the physical location of responsive documents. Cravath preserved these arguments, and Shell did not abandon *Sarrio*'s protection by producing documents under a negotiated confidentiality order in prior litigation—litigation that U.S. courts had no authority to entertain in the first place.

On the discretionary factors, Kiobel acts as if the only question is whether she needs Shell's documents for her Dutch suit. But *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004), says otherwise. The *Intel* factors ask whether Shell will be a party to the Dutch proceedings (it will), whether the Dutch government has objected to the use of Shell's documents (it has), whether the Netherlands has more restrictive discovery rules (it does), and whether compelling discovery will upset Shell's reasonable expectation of confidentiality (it will). The District Court misconstrued each consideration. Its decision cannot stand.

Kiobel contends that her petition is unique and that this case has no broader impact. She is half right: Kiobel's petition is uniquely brazen in its bid to circumvent established limits on a court's subpoena power and defy a confidentiality order to obtain materials produced in litigation over which the court lacked subject-matter jurisdiction. But if Kiobel prevails, then Section 1782 will know no limits and the very real concerns expressed in *Sarrio*, *Ratliff*, and the briefs of the *amici* will become reality. *See* N.Y. City Bar Ass'n Br. 5-14; U.S. Chamber of Commerce et al. Br. 3-12.

ARGUMENT

I. SECTION 1782 DOES NOT PERMIT DISCOVERY OF SHELL'S DOCUMENTS.

A. Section 1782 Does Not Authorize Discovery Of Client Documents Held By An Attorney For A Client "Found" Outside The District.

The subpoena power conferred by Section 1782 extends no further than the district in which "the person from whom discovery is sought resides (or is found)." *Schmitz v. Bernstein Liebhard & Lifshitz, LLP*, 376 F.3d 79, 83 (2d Cir. 2004) (internal quotation marks and brackets omitted). As Cravath explained in its opening brief (at 23-26), when a Section 1782 subpoena seeks client documents from a law firm, the person from whom discovery is sought for jurisdictional purposes is the *client*. If the client "lie[s] outside the statutory limits of the court's power to compel production," the court cannot subpoena the attorney. *Sarrio*, 119 F.3d at 146; *see In re Marc Rich & Co., A.G.*, 707 F.2d 663, 669 (2d Cir. 1983) (a federal court's "power to issue a subpoena is determined by its jurisdiction").

Apparently setting *Sarrio* aside, Kiobel argues (at 15) that this Court has found the client's residence irrelevant. Kiobel is mistaken. To the contrary, this Court has twice specifically reserved decision on whether Section 1782 applies to documents held by local counsel on behalf of clients found beyond the reach of the court's statutory jurisdiction.

In *Schmitz*, this Court avoided answering "the difficult question . . . whether § 1782 applies to documents only temporarily present in the jurisdiction for the purpose of discovery in another case." 376 F.3d at 85 n.6. This Court did the same thing in *U.S. Philips Corp. v. Iwasaki Electric Co.*, 142 F. App'x 516 (2d Cir. Aug. 9, 2005), observing that "because both client and counsel are in the Southern District of New York, this case does not require us to resolve any question about attorney possession left open by [*Schmitz*]." *Id.* at 517-518.

Kiobel insists (at 15) that the client's residence mattered in *Schmitz* only in connection with applying the discretionary factors. But that is not how this Court read *Schmitz* in *U.S. Philips Corp.*, *see* 142 F. App'x at 517-518, and it is obviously wrong. Indeed, in *Schmitz* itself, Cravath—which was also the respondent there—argued that the statutory factors were not satisfied because its client was beyond the statute's reach. *See* Brief of Appellee Cravath, Swaine & Moore LLP, *Schmitz supra*, at 37-44. This Court found it could avoid that question by affirming based on the discretionary factors. *Schmitz*, 376 F.3d at 85 n.6.

Kiobel claims that reaching the discretionary grounds in *Schmitz* somehow "confirm[s] that the client's residence posed no problem for the first factor." Kiobel Br. 16. That gets it backwards. Because the Court affirmed the district

court's *denial* of a Section 1782 petition, it did not have to satisfy itself that the first statutory factor had been met.[1]

None of the cases Kiobel relies on (at 16) advance her argument. For instance, in *In re Application for an Order Pursuant to 28 U.S.C. § 1782*, 773 F.3d 456 (2d Cir. 2014) (*Berlamont*), no party even *raised* the question this case poses. The attorneys who received the Section 1782 petition in that case "d[id] not dispute that" the petition "satisfie[d] the first and third requirements" of Section 1782; their arguments were limited to the second statutory factor. *Id.* at 460. Kiobel's next case, *In re Republic of Kazakhstan*, 110 F. Supp. 3d 512 (S.D.N.Y. 2015), cuts against her argument. The intervenors there claimed that the first factor was not satisfied because petitioners served a law firm's U.S.-based arm with a subpoena addressed to the firm's U.K.-based arm. *Id.* at 515. The district court rejected that contention only after it concluded that the U.K. arm *itself* possessed "the requisite 'systematic and continuous' presence to be 'found' [in the Southern District] for purposes of section 1782." *Id.*

Finally, the summary order in *Mare Shipping Inc. v. Squire Sanders (US) LLP*, 574 F. App'x 6 (2d Cir. 2014), is equally unhelpful to Kiobel. As in *Schmitz*,

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[1] This Court's recognition that the question was a "difficult" one, *Schmitz*, 376 F.3d at 85 n.6, shows that it did not share the district court's dismissive view of Cravath's argument. *See In re Application of Schmitz*, 259 F. Supp. 2d 294, 296 (S.D.N.Y. 2003).

the *Mare Shipping* court affirmed the denial of a Section 1782 petition on discretionary grounds. 574 F. App'x at 8-9. So the order's passing reference to the statutory factors, *see id.* at 8, would be dicta even if it had precedential force.

B. Shell's Documents Are Subject To The Protection This Court Recognized In *Sarrio*.

This Court recognized in *Sarrio* that the reasoning behind the rule that preserves client privileges over documents held on their behalf by counsel "appl[ies] also where the documents are not amenable to subpoena duces tecum because they lie outside the *statutory* limits of the court's power to compel production." 119 F.3d at 146 (emphasis added). That protection bars discovery of documents Cravath holds on Shell's behalf. Kiobel argues (at 17-19) that *Sarrio*'s protection does not cover "non-privileged" materials and she contends (at 19-21) that Shell's documents are not privileged. Kiobel is mistaken.

1. *Sarrio*'s Protection Applies To Documents Beyond The Statutory Reach Of A Subpoena, Whether They Are Subject To Another Privilege Or Not.

Kiobel starts by arguing that there is no bar to production of "non-privileged" documents from local counsel "even if the court cannot reach the client." Kiobel Br. 17. But documents that a court cannot reach in the client's hands *are* by definition protected from disclosure when conveyed to an attorney, whether they are covered by another privilege or not. *See Fisher v. United States*, 425 U.S. 391, 404 (1976); *cf.* 8 J. Wigmore, *Evidence* § 2307 n.1 (McNaughton

rev. 1961) ("If the client is compellable to give up possession [of a document], then the attorney is; if the client is not, then the attorney is not.").

Kiobel seizes on the fact that *Sarrio* asked "whether the attorney-client privilege shields documents undiscoverable abroad but transferred to an attorney in the United States." 119 F.3d at 147. But *Sarrio* was not referring to the narrow category of "disclosures protected by the attorney-client privilege" at issue in the mine-run of discovery disputes. *Ratliff*, 354 F.3d at 170. Nor could it have been. Pre-existing documents sent to an attorney are never subject to the privilege if they "could have been obtained by court process from the client when he was in possession." *Fisher*, 425 U.S. at 403; *see Colton v. United States*, 306 F.2d 633, 639 (2d Cir. 1962) (same). So the only way the *Sarrio* court could have thought the target of the Section 1782 subpoena in that case had "a substantial claim" of privilege in light of *Fisher* is if "the documents subpoenaed" could *not* have been obtained directly from the client. 119 F.3d at 146. Properly understood, *Sarrio*'s references to "privilege" cannot bear the cramped interpretation Kiobel would give them.[2]

[2] For the same reason, the fact that *Sarrio* avoided answering the question because the respondent dropped its claim of "privilege" on appeal does not support Kiobel's reading of the case. 119 F.3d at 147. The "privilege" at issue was the protection for "documents unreachable in a foreign country" but transferred to domestic counsel for advice—the same basic argument Cravath makes here. *Id.* at 146; *see id.* at 145 (discussing the respondent's argument to the district court).

Kiobel's misreading of *Sarrio* is somewhat understandable. The decision's terminology caused similar confusion in *Ratliff*. The law firm respondent in that case, Davis Polk, relied on *Sarrio* while "conced[ing]" that "it was *not* claiming attorney-client privilege." *Ratliff*, 354 F.3d at 167 (emphasis added and internal quotation marks omitted); *see id.* 170. The court remarked that it was "not entirely clear whether Davis Polk means that the documents themselves contain no disclosures protected by the attorney-client privilege, or whether it means that it is not asserting the protection discussed in *Sarrio* that would protect documents regardless of their content." *Id.* at 170. The Court concluded that it was "more likely that Davis Polk means to disclaim only that the documents contain privileged statements." *Id.* Assuming that Davis Polk was "claiming the protection discussed in *Sarrio*," the *Ratliff* court went on to find that this protection had been "lost" when the firm's foreign client "voluntarily authorized Davis Polk to send the documents to the SEC." *Id.*.

Having found that the documents were not protected from production by *Sarrio*, the Court stated the general rule that "documents held by an attorney in the United States on behalf of a foreign client, absent privilege, are as susceptible to subpoena as those held in a warehouse within the district court's jurisdiction." *Id.* Contrary to Kiobel's assertion, that observation does not "destroy Cravath's argument" or suggest that "there is no bar to production of non-privileged

documents held by counsel." Kiobel Br. 17-18. It merely states the obvious: If a client forfeits the protection described in *Sarrio*, its documents are discoverable absent some other privilege. That is not what happened here.

2. Cravath Did Not Forfeit And Shell Did Not Abandon *Sarrio*'s Protection.

Kiobel doubles down on her misreading of the case law by arguing (at 9-16) that Shell abandoned *Sarrio*'s protection and that Cravath failed to preserve the issue. Kiobel is wrong. Shell explicitly reserved its rights, and Cravath consistently maintained that Kiobel cannot reach Shell's documents because it cannot show that *Shell* is "found" within the Southern District of New York. A105-106, A216, A223-224; *see also* A206-207 (Kiobel's response).[3]

It makes no difference whether Shell's documents contain "disclosures protected by the attorney-client privilege." *Ratliff*, 354 F.3d at 170. Rather, just like the respondent in *Ratliff*, Cravath distinguished between the privilege that shields confidential communications with attorneys—which is not at issue here—and the *Sarrio* protection. A215. When the District Court pointed to *Ratliff*'s statement that documents held "on behalf of a foreign client, absent privilege," are discoverable, *id.*, Cravath's counsel explained:

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[3] Kiobel glosses over that *Shell* produced the documents in the earlier litigation, albeit through Cravath. Cravath was not the producing party. *E.g.*, Kiobel Br. 1 (referring to "documents that Cravath has previously produced"); *id.* at 2 (same).

> The point of that is to say that you can't shield documents that are *otherwise discoverable* by putting them in a law firm's possession. Of course that's black letter law. The black letter law is that the documents belong to the client, and merely the fact that you have sent them to a law firm does not expose them to discovery.

A216 (emphasis added). Cravath emphasized that Shell's documents were not "otherwise discoverable" because "*Shell is not here*." *Id.* (emphasis added). That is precisely the argument Cravath advances on appeal.[4]

Focusing on the *Sarrio* protection actually at issue here, Kiobel's argument appears to be that any "privilege was abandoned" by Shell's document production in the earlier litigation. Kiobel Br. 19. But Shell's production—under protest—of materials subject to strict confidentiality constraints in a lawsuit that should never have been brought in the United States cannot be compared to voluntary, self-interested disclosures.[5]

Kiobel argues that it makes no difference that Shell consistently disputed the court's subject-matter and personal jurisdiction in *Kiobel*. But the *Ratliff* court

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[4] Kiobel claims (at 21) that Cravath somehow waived this argument—despite making it—because it did not discuss *every* relevant authority. That is meritless. *See, e.g.*, *Eastman Kodak Co. v. STWB, Inc.*, 452 F.3d 215, 221 (2d Cir. 2006) ("[A]ppeals courts may entertain additional support that a party provides for a proposition presented below.").

[5] Kiobel notes (at 20) that her petition also seeks deposition transcripts created in the course of the *Kiobel* litigation. To the extent those transcripts do not attach Shell's documents as exhibits, Cravath does not dispute that they are not subject to *Sarrio*'s protections. They remain, however, subject to the confidentiality orders. A72-73.

plainly thought it relevant that the client there voluntarily cooperated with authorities to "create[] a favorable impression." 354 F.3d at 170. Indeed, it emphasized that fact no fewer than four times, and noted that the client waived a jurisdictional defense. *See, e.g.*, *id.* at 167, 170.

Kiobel next downplays the confidentiality order that she signed with Shell. She notes (at 21) that it was entered prior to enactment of Federal Rule of Evidence 502. But that Rule simply illustrates the fact that parties may agree, with court approval, to preserve objections to discovery. That is just what happened here. The order that Kiobel signed did not, as she pretends, address only inadvertent waivers of attorney-client privilege. Rather, Kiobel agreed that Shell's productions "shall not be deemed an admission that any Discovery Material is not *otherwise protected from disclosure* . . . and shall not constitute a waiver of the right of any person to object to the production . . . for any reason consistent with the Federal Rules of Civil Procedure." Opening Br. 30 (quoting A60 (¶ 11) (emphasis added)). That disposes of Kiobel's argument that Shell abandoned *Sarrio*'s protection. And Kiobel can identify no reason why—particularly as a party to that agreement—she should be permitted to ignore its plain terms. *Cf.* Fed. R. Evid. 502(e).

Finally, Kiobel urges that Section 1782 "cannot turn on the merits of prior litigation." Kiobel Br. 22. But the *merits* of her prior suit are not at issue. No U.S. court was authorized to *hear* her case. *See Kiobel v. Royal Dutch Petroleum Co.*,

133 S. Ct. 1659, 1669 (2013); *Exp.-Imp. Bank of the Republic of China v. Grenada*, 768 F.3d 75, 93 (2d Cir. 2014) (a court's power to order discovery is predicated on subject-matter and personal jurisdiction). In other words, it is not because Kiobel lost that the discovery she obtained was unwarranted. The discovery was unwarranted because Kiobel had no right to bring her suit in the United States.

Kiobel counters that the *Wiwa* plaintiffs tacked on state-law claims, independent of the Alien Tort Statute. But the Southern District entertained those claims under its supplemental jurisdiction. *See Wiwa v. Royal Dutch Petroleum Co.*, No. 96 CIV. 8386 (KMW), 2002 WL 319887, at *31 (S.D.N.Y. Feb. 28, 2002) (citing 28 U.S.C. § 1367(a)). So the Supreme Court's ruling in *Kiobel* would have barred them, too. And even if the court had subject-matter jurisdiction over some claim in *Wiwa*, it almost certainly lacked personal jurisdiction over Shell. *See* Opening Br. 29. Kiobel was therefore not entitled to discovery, and even if the confidentiality orders had not preserved Shell's rights, that basic legal error would negate any waiver. *See id.* at 31 (citing *Mohawk Indus. v. Carpenter*, 558 U.S. 100, 109 (2009)).[6]

[6] Kiobel suggests in passing (at 3) that the District Court's decision resembles an order permitting a party to use discovery following dismissal for *forum non conveniens*. It does not. A *forum non conveniens* dismissal is an exercise of a court's discretion—discretion that cannot exist where the court lacks jurisdiction.

3. The District Court's Decision Sets A Harmful Precedent.

Cravath and its *amici* have echoed the concerns that this Court voiced in *Ratliff*. They have illustrated the "unacceptable result" that follows from "[e]xposing documents—not otherwise subject to production—to discovery demands after delivery to one's attorney whose office [i]s located within the sweep of a subpoena." 354 F.3d at 169; *see* Opening Br. 32-33; N.Y. City Bar Ass'n Br. 5-14; U.S. Chamber Br. 3-12.

Kiobel's only answer is to fall back on her misreading of *Ratliff* and insist that this case is no different. Kiobel Br. 22-23. But as the foregoing discussion shows, nothing in *Ratliff* supports the District Court's expansion of Section 1782 beyond its statutory limits. On the contrary, both *Sarrio* and *Ratliff* warned against making the "disclosure of previously protected matters" the "price of an attorney's advice." *Ratliff*, 354 F.3d at 169; *see Sarrio*, 119 F.3d at 146.

Kiobel tries to deflect attention from the consequences of the District Court's decision by impugning the foreign clients served by New York lawyers, who now risk being subjected to discovery requests aimed at their counsel, years after the close of litigation and in flagrant disregard of confidentiality orders.

See Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp., 549 U.S. 422, 429-430, 434 (2007). Moreover, there is no "*forum non-conveniens* exception" to the confidentiality orders. Kiobel is barred from using Shell's materials, no matter what happened in her prior suit.

Contrary to Kiobel's insinuation (at 23), no one is suggesting that such litigants will break the law. The real risk is that parties will lose faith in confidentiality orders and therefore refuse to permit documents to be reviewed in, produced from, or retained by law firms in the United States, and that they will insist on litigating every conceivable objection to discovery. The added costs of litigation would burden courts and litigants unjustifiably.

C. In Any Event, Due Process Bars Discovery Of Shell's Documents From Cravath.

The statutory limits on the District Court's authority to compel production of Shell's documents are reinforced in this case by the well-established principle that a court cannot enforce a subpoena against a corporation's agent or representative unless it has jurisdiction over the corporation itself. Opening Br. 33-36. Kiobel does not dispute that none of the relevant Shell entities is subject to personal jurisdiction in the Southern District. *Id.* at 36-38. Instead she offers a series of meritless objections.

Kiobel's first bid is waiver. Kiobel Br. 25. But, again, Cravath has consistently maintained that the District Court was not authorized to grant discovery because Shell does not "reside" and is not "found" in the Southern District. *See supra* pp. 10-11. The constitutional limits on the District Court's subpoena power buttress Cravath's statutory arguments. *See Eastman Kodak*, 452 F.3d at 221.

Kiobel's next effort is another run at *Ratliff*. She contends that this Court "found no need to consider" whether it could exercise personal jurisdiction over the client of the respondent law firm in that case. Kiobel Br. 25. But after the law firm objected to the subpoena in *Ratliff* on the grounds its client was "not subject to the jurisdiction of U.S. courts," the petitioner "expressly offered to limit" its request to the materials the client had voluntarily submitted to the SEC despite not being subject the SEC's jurisdiction. 354 F.3d at 167. It seems likely that the court did not separately address personal jurisdiction because any jurisdictional defense "was lost" along with *Sarrio*'s protection when the client voluntarily shared its documents with the SEC.

Finally, Kiobel argues (at 25-26) that the cases Cravath cited in its opening brief are only relevant when the documents at issue are housed overseas. While it may be true that the documents sought in those cases were located abroad, Kiobel points to no evidence to suggest that this somehow confines their basic teaching—that personal jurisdiction over a corporation is a prerequisite to enforcing a subpoena against the corporation's agent. *See In re Marc Rich & Co.*, 707 F.2d at 665, 667-668. Because that prerequisite is not met here, due-process limitations offer yet another reason to reverse the District Court's order.

II. THE DISTRICT COURT ABUSED ITS DISCRETION IN GRANTING KIOBEL'S PETITION.

Even if the District Court had the power to command discovery from Cravath under Section 1782, it should have exercised its discretion to deny Kiobel's petition. Opening Br. 39-54. Although a deferential abuse-of-discretion standard applies to this question, Kiobel Br. 27, it is an abuse of discretion to misconstrue the law. *Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 435 (2d Cir. 2007).

The District Court's erroneous construction of each *Intel* factor warrants remand, at a minimum. *See Rafiq v. Gonzales*, 468 F.3d 165, 166-167 (2d Cir. 2006) (per curiam). But here, because the "application of the correct legal standard could lead to only one conclusion," the Court "need not remand." *Schaal v. Apfel*, 134 F.3d 496, 504 (2d Cir. 1998). All four *Intel* factors, properly construed, weigh against discovery. The Court should therefore reverse outright.

A. Kiobel Improperly Conflates Whether A Dutch Court *Can* Command Production Of Shell's Documents With Whether It *Will* Do So.

Under the first *Intel* factor, "when the person from whom the discovery is sought is a participant in the foreign proceeding" discovery is less likely to be necessary because "[a] foreign tribunal has jurisdiction over those appearing before it, and can itself order them to produce evidence." *Intel*, 542 U.S. at 264.

This Court's decision in *Schmitz* teaches that this factor favors Cravath. There, this Court held that where a law firm is the nominal Section 1782 respondent, "the person from whom discovery is sought" for *Intel* first-factor purposes is the law firm's foreign client. *Schmitz*, 376 F.3d at 85. Kiobel admits (at 7) that Cravath's client Shell will be the defendant in her contemplated Dutch action. Under a straightforward application of *Intel* and *Schmitz*, the District Court should have found that the first *Intel* factor weighed against granting Kiobel's petition. Opening Br. 40-41. Kiobel's response is unpersuasive.

Kiobel claims that the first-factor inquiry is "whether the evidence may be 'unobtainable absent § 1782(a) aid.' " Kiobel Br. 30 (quoting *Intel*, 542 U.S. at 264). But Kiobel truncates that quotation. What *Intel* really says is that "nonparticipants in the foreign proceeding may be outside the foreign tribunal's jurisdictional reach; hence, their evidence, available in the United States, may be unobtainable absent § 1782(a) aid." 542 U.S. at 264. As the language Kiobel omits makes clear, this factor is not a freewheeling inquiry into whether a Section 1782 petition is the only practical way to obtain the evidence Kiobel wants.

Kiobel contends (at 30) that Shell will not be within the jurisdiction of the Dutch courts until she files her suit. If that were the test, petitioners could evade *Intel*'s first factor every time by seeking discovery before coming to court. For contemplated suits, the question is whether the petitioner *will be* within the

jurisdiction of the foreign tribunal when suit is filed. *Cf. In re Application of Pimenta*, 942 F. Supp. 2d 1282, 1288 (S.D. Fla. 2013) (finding that the first *Intel* factor favored granting the application because the respondent "would not be" a party to the contemplated foreign proceeding). And Kiobel's Dutch counsel says that Shell will be. *See* A85.

Kiobel protests (at 30-31) her suit is different because she needs the documents to plead her case. But Kiobel's proposed carve-out is counter to this Court's admonition that Section 1782 proceedings should not devolve into a "battle-by-affidavit of international legal experts." *Euromepa S.A. v. R. Esmerian, Inc.*, 51 F.3d 1095, 1099 (2d Cir. 1995). A district court should not have to ask whether discovery is needed to state a claim or whether it would merely be helpful on the merits. *Intel* and *Schmitz* state a simple rule: If the target of discovery will be a party in the contemplated foreign proceeding, Section 1782 assistance is unnecessary. *Intel*, 542 U.S. at 264; *Schmitz*, 376 F.3d at 85. Kiobel's merits-focused approach improperly complicates the analysis.

Kiobel argues that even with Shell as a party, Section 1782 aid is warranted because there are "barriers to obtaining the evidence abroad." Kiobel Br. 31. Kiobel's cited cases do not say that. They hold instead—as Cravath has argued all along—that discovery should not be allowed when "the foreign tribunal has the authority to order an entity to produce the disputed evidence." *In re Ex Parte*

Application of Qualcomm Inc., 162 F. Supp. 3d 1029, 1039 (N.D. Cal. 2016); *In re Application of OOO Promnefstroy*, No. M 19-99(RJS), 2009 WL 3335608, at *5 (S.D.N.Y. Oct. 15, 2009) ("[I]t is the foreign tribunal's ability to control the evidence and order production . . . on which the district court should focus."). And according to Kiobel's own attorney, a Dutch court could compel the production of documents from Shell and has done so in other cases. A195-196 (¶¶ 7, 9). Whether and to what extent the Dutch courts will choose to exercise that authority is an entirely different question. Opening Br. 42.

Kiobel reiterates (at 31-32) that the Dutch courts may not be able to reach all of the documents she wants because Shell may not have them. But, as Kiobel concedes (at 33-34), Shell has constructive possession of the documents through Cravath. Opening Br. 42-44. And Kiobel's assertion of waiver (at 31-32) ignores that Kiobel first raised the argument that Shell may not possess all of the documents she wants in her Dutch attorney's reply declaration. *See* A196 (¶ 9). Kiobel does not cite any case holding that a party waives an argument by not filing a motion for a sur-reply to address new arguments made in a reply brief.

Beyond waiver, Kiobel rests on *In re Catalyst Managerial Services, DMCC*, __ F. App'x __, No. 16-2653-cv, 2017 WL 716846, at *2 (2d Cir. Feb. 23, 2017), a summary order where the court found that certain cases did not support an argument that documents are within the foreign court's jurisdiction when the

respondent can retrieve them from third parties. *Catalyst Managerial* is neither here nor there. Cravath has cited different cases (at 42-43), and Cravath's cases *do* support the argument that Kiobel's requested documents are within the Dutch court's jurisdictional reach because they are in Cravath's possession. Moreover, the third parties in *Catalyst Management* were banks, which do not have the same principal-agent relationship with their clients that Cravath has with Shell. *See* 2017 WL 716846, at *1.

Kiobel also argues (at 34) Section 1782 discovery is warranted because a former Shell executive was among the defendants in her prior suit. But, as with any source at Shell, any documents from this employee were *Shell* documents, which Shell possesses by virtue of Cravath's representation of Shell in the *Kiobel* and *Wiwa* matters. Opening Br. 42-44. Under Kiobel's own case, because she can seek "*the same documents*" as part of the foreign litigation, Section 1782 assistance is unwarranted. *In re Application of Bracha Found.*, 663 F. App'x 755, 765 (11th Cir. 2016) (per curiam) (citing *Schmitz*, 376 F.3d at 81-84).

That leaves Kiobel's contention that Section 1782 is the "most efficient" way for her to get the documents she wants. Kiobel Br. 32-33. But efficiency has nothing to do with *Intel*'s first factor. *See Intel*, 542 U.S. at 264. And Kiobel's efficiency rationale is suspect in any event. Taken seriously, Kiobel's argument would mean that any litigant that seeks documents held by an adversary's attorney

could issue subpoenas directly to the attorney. The cases say otherwise. *See Cusumano v. Microsoft Corp.*, 162 F.3d 708, 716-717 (1st Cir. 1998) (whether material "was otherwise available . . . by direct discovery" must "figure in the balance" of whether to quash a subpoena on a non-party); *Haworth, Inc. v. Herman Miller, Inc.*, 998 F.2d 975, 978 (Fed. Cir. 1993) (courts may "properly require [a litigant] to seek discovery from its party opponent before burdening [a] nonparty . . . with [an] ancillary proceeding").

B. Kiobel Improperly Minimizes Both The Netherlands' Amicus Brief In *Kiobel* And The Netherlands' More-Restrictive Discovery Rules.

The District Court also erred in dismissing the Netherlands' amicus brief in *Kiobel* and in giving no weight to the Netherlands' more-restrictive discovery rules. Opening Br. 45-49. Cravath does not dispute that Dutch courts may be receptive to Section 1782 assistance in the typical case. But Kiobel's case is not typical. The Netherlands' Ministry of Foreign Affairs specifically objected to American courts exercising jurisdiction over Alien Tort Statute cases like Kiobel's, and did so, in part, because of the discovery burdens that those cases impose. A167-169.

Kiobel responds (at 36) that the Netherlands's concerns about "the non-reimbursable litigation costs" of American discovery (A167) do not apply because Shell's discovery costs are already sunk. But the Netherlands' concerns went well

beyond cost. It feared that if the Supreme Court allowed American courts to obtain discovery from European companies like Shell in Alien Tort Statute cases like Kiobel's, European countries would retaliate by refusing to honor American discovery requests in their courts. A169-170. That concern is particularly salient because of Section 1782's reciprocal aims; American courts compel discovery for use in foreign courts so that foreign courts will compel discovery for use in American courts. *See Schmitz*, 376 F.3d at 84 (emphasizing the statute's aim of "encouraging foreign countries by example to provide similar means of assistance to our courts") (internal quotation marks omitted). Yet the District Court did not even mention the Netherlands' reciprocity concerns. *See* A285-287. Neither does Kiobel.

Kiobel instead charges that a brief by the Netherlands' Ministry of Foreign Affairs is not "authoritative" because the Dutch government may have changed its mind and Dutch courts are independent. Kiobel Br. 36-37. The first point is baseless speculation. On the second, this Court has been explicit: An authoritative statement can come from a country's judiciary *or* its executive. *Euromepa*, 51 F.3d at 1100.

On the third factor, Kiobel's defense is that the District Court did not need to consider the Netherlands' more-restrictive discovery rules. Kiobel Br. 38-40. That is incorrect. Although a foreign country's stricter discovery rules do not require

denial of a Section 1782 petition, they are among the factors the Supreme Court and this Court have pointed to as proper considerations. *Intel*, 542 U.S. at 264 (although Section 1782 has no foreign-discoverability requirement, foreign discoverability "may be relevant in determining whether a discovery order should be granted in a particular case"); *Mees v. Butler*, 793 F.3d 291, 303 (2d Cir. 2015) (district courts "may well find that in appropriate cases a determination of discoverability under the laws of the foreign jurisdiction is a useful tool in their exercise of discretion under section 1782") (internal quotation marks omitted). But the District Court refused to give the Dutch rules any weight at all. Opening Br. 49.

Kiobel contends that the Court somehow overturned *Intel* and *Mees* in *Brandi-Dohrn v. IKB Deutsche Industriebank AG*, 673 F.3d 76 (2d Cir. 2012), when it stated that "a district court should not consider the discoverability of the evidence in the foreign proceeding." *Id.* at 82 (emphasis omitted). But *Brandi-Dohrn* had nothing to do with the discretionary factors; it simply reiterated *Intel*'s rejection of a statutory foreign-discoverability requirement. *Id.* at 84.[7]

But even if Kiobel is correct that district courts need consider a foreign country's more-limited discovery rules only in "unusual circumstances," Kiobel

[7] To the extent the Court's summary order in *In re Application of O'Keefe*, 650 F. App'x 83, 84 (2d Cir. 2016), read *Brandi-Dohm* as touching on the discretionary factors, it misunderstood the case and is unpersuasive. *See* Local Rule 32.1.1(a).

Br. 40, her petition qualifies. And Kiobel's end-run around the Netherlands' stricter discovery rules is particularly inappropriate given that the materials at issue are from earlier litigation that should never have been in the U.S. courts in the first place. *See* A111-113; Opening Br. 2-3, 49. In refusing to give any weight to the Netherlands' more-limited approach to discovery, or to Kiobel's procedural gamesmanship, the District Court erred as a matter of law.

C. Kiobel Cannot Use A Section 1782 Petition To Circumvent The *Kiobel* and *Wiwa* Confidentiality Orders.

Finally, the District Court erred in letting Kiobel breach the *Kiobel* and *Wiwa* confidentiality orders without making the demanding showing this Court's precedents require. Opening Br. 49-54. Kiobel once more asserts waiver, but the record shows otherwise. And Kiobel's fallback argument that modification was unnecessary or inappropriate is meritless.

1. Cravath Preserved Its Confidentiality Objections.

Kiobel argues (at 41-43, 47) that Cravath did not make its appellate arguments regarding confidentiality below. But Cravath repeatedly argued that Section 1782 discovery was unwarranted because it sought materials protected by the *Kiobel* and *Wiwa* discovery orders—the same argument it makes here. A115-116; Opening Br. 51-53. Realizing as much, Kiobel complains (at 47) that Cravath did not cite the same *cases* below. This Court, however, has held that it "may

entertain additional support that a party provides for a proposition presented below." *Eastman Kodak*, 452 F.3d at 221. That is all Cravath did here.

Cravath also contested the scope of the District Court's confidentiality order. When the District Court directed the order's substance—"an application of the old protective order to the new situation"—Cravath explicitly objected. A219, A234. Those objections are preserved.

2. The District Court Erred In Ordering Disclosure Of Documents Protected Under The *Kiobel* And *Wiwa* Confidentiality Orders.

Preservation aside, the District Court erred in ordering disclosure of documents protected under the confidentiality orders. Opening Br. 49-54. Kiobel's arguments fall far short of the mark.

First, Kiobel argues (at 46) that the District Court did not need to modify the confidentiality orders because they applied to disclosures by Shell alone. But the orders require Cravath—a "person in possession of Confidential Material"—to "avoid disclosure of its contents in any manner not permitted by" the orders. A73 (¶ 6).

Second, Kiobel argues (at 50) that the confidentiality orders' boilerplate statement that they could be modified by court order (A80 (¶ 21)) allows for modification for any reason. But the provision says nothing that would alter the *standard* for modification, which comes from this Court's cases. *See* Opening Br.

51-52. And the *Kiobel* and *Wiwa* confidentiality orders are unlike the one in *U.S. Philips Corp.*, which specifically contemplated the parties seeking court permission to use confidential documents in related cases. *See* Brief for Petitioner-Appellee, *U.S. Philips Corp. supra* (in Statement of Facts).

Third, Kiobel contends (at 49-50) that Shell could not have reasonably relied on the confidentiality orders because the district court did not review the documents Shell designated confidential. But where, as here, a confidentiality order requires that the parties destroy or return confidential documents after litigation ends (A63-64 (¶ 20)), parties can "reasonably expect that any information produced subject to the [p]rotective [o]rder would ordinarily not be used in other matters." *Nielsen Co. (U.S.), LLC v. Success Sys., Inc.*, 112 F. Supp. 3d 83, 121 (S.D.N.Y. 2015).[8]

Moreover, Kiobel's own cases recognize that a protective order should not be modified where the requestor "is seeking to circumvent limitations on its ability to conduct discovery in its own case or to gain access to materials it would otherwise have no right to access." *In re Ethylene Propylene Diene Monomer (EPDM) Antitrust Litig.*, 255 F.R.D. 308, 324 (D. Conn. 2009) (citing *AT&T Corp.*

[8] That distinguishes this case from *In re "Agent Orange" Product Liability Litigation.*, 821 F.2d 139, 147 (2d Cir. 1987), where the "order by its very terms was applicable solely to the pretrial stages of the litigation." The destruction provision in the *Kiobel* and *Wiwa* orders demonstrates that Shell "relied on the permanence of th[e] order[s]." *Id.* (emphasis omitted).

v. Sprint Corp., 407 F.3d 560, 562 (2d Cir. 2005)); Opening Br. 52. *AT&T* itself involved a stipulated protective order, 407 F.3d at 561, giving lie to Kiobel's suggestion that the reliance interests are different. Shell might have reasonably expected Kiobel to have moved to modify the protective order or de-designate confidential documents while *Kiobel* and *Wiwa* were ongoing. But once the case was complete and its confidential documents were disposed of, Shell had every right to assume that they would remain that way. *Nielsen Co.*, 112 F. Supp. 3d at 121.[9]

Against all of this, Kiobel argues (at 51) that her case is different because she is a party to the confidentiality orders. But that cuts against—not in favor—of modification. Unlike a third party, Kiobel could have negotiated for the right to use Shell's discovery in other forums. She did not. And though Kiobel weakly argues (at 52) that the confidentiality orders did not prohibit her from using Shell's confidential documents overseas, she conceded the opposite below. *See* Petitioner's Mem. of Law at 6, Dist. Ct. Dkt. No. 4 (conceding that, under the confidentiality orders, Shell's documents "cannot be disclosed—even to a Dutch court").

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[9] Kiobel also argues (at 50) that Shell's designated-confidential documents are not confidential. No court has found that. And, under the confidentiality orders, documents designated confidential are presumed to be so until a court orders otherwise. A63 (¶ 18).

Kiobel is left with her argument that it would be unfair to deny her documents she wishes to use to prove her case in the Netherlands. But, as Cravath has pointed out (at 52-53) and as Kiobel does not deny, confidentiality orders are a trade-off. Kiobel agreed to the stipulated confidentiality agreement to ease the discovery process. *See SEC v. TheStreet.com*, 273 F.3d 222, 230 (2d Cir. 2001). She also accepted that the documents would be unavailable to her in any other proceeding. She cannot renege on that bargained-for agreement now through a Section 1782 petition. Opening Br. 52-53; *see also* U.S. Chamber Br. 19-20 & n.2 (collecting cases).

There should be no doubt about the injuries that affirming the District Court's order would inflict. The *amici* have warned this Court that the District Court's order makes it harder for foreign corporations to communicate with U.S. counsel and cooperate with America's famously burdensome discovery processes. N.Y. City Bar Ass'n Br. 5-14; U.S. Chamber Br. 4-18. Corporations and attorneys *do* understand confidentiality orders like these to protect them from later disclosure of confidential documents overseas. Kiobel's self-serving assertion to the contrary (at 52) is not credible.

CONCLUSION

For these reasons and those in the opening brief, the District Court's order should be reversed and Kiobel's petition denied. In the alternative, this Court should reverse and remand for further proceedings.

Respectfully submitted,

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I hereby certify that the foregoing was filed with the Clerk using the appellate CM/ECF system on June 1, 2017. All counsel of record are registered CM/ECF users, and service will be accomplished by the CM/ECF system.

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