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

---

AMICUS BRIEF OF THE NEW YORK CITY BAR ASSOCIATION IN SUPPORT OF RESPONDENT-APPELLANT

RICHARD L. MATTIACCIO
Chair, International Commercial Disputes Committee
JOSEPH E. NEUHAUS
Member, International Commercial Disputes Committee
THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

Counsel
Joseph E. Neuhaus
Sullivan & Cromwell LLP
125 Broad Street
New York, NY 10004
(212) 558-4000

April 20, 2017

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, the amicus curiae certifies that no parent corporation, and no publicly held corporations own 10% or more of its stock.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

STATEMENT OF INTEREST OF AMICUS CURIAE[1]

Founded in 1870, the New York City Bar Association (the "Association") is a voluntary organization of more than 24,000 attorneys. Through its standing committees, including the International Commercial Disputes Committee, the Association educates the Bar and the public about legal issues, including issues relating to international disputes in the state and federal courts of New York.

The Court's decision in this case is of great importance to the Bar, both in New York and across the country. U.S. lawyers are estimated to provide foreign clients with some $7.5 billion in legal services a year.[2] Under the ruling below, documents provided to counsel in order to obtain legal advice and representation in litigation in the United States may be exposed to discovery for use in a foreign proceeding under 28 U.S.C. § 1782, notwithstanding, among other things, a confidentiality stipulation barring such use. Members of the Association frequently provide legal advice to foreign clients, and depend on clients being able

---

[1] No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money intended to fund the brief's preparation or submission; and no person other than amicus and its counsel contributed money intended to fund the brief's preparation or submission. Both parties have consented to the filing of this brief. The Honorable John G. Koeltl took no part in the consideration or submission of this brief.

[2] U.S. INT'L TRADE COMMISSION, PUB. NO. 4412, RECENT TRENDS IN U.S. SERVICES TRADE: 2013 ANNUAL REPORT, at 5-7 (July 2013) (figures as of 2011), *available at* https://www.usitc.gov/publications/332/pub4412.pdf (last visited Apr. 17, 2017).

to provide full and frank disclosure of all relevant facts and information in order for counsel to render effective legal services of the highest quality. Further, members of the Association often urge foreign clients, in appropriate cases, to provide voluntary cooperation in discovery and other U.S. litigation procedures.

The decision below unnecessarily burdens the rendition of legal services to foreign clients, to the detriment not only of the New York legal community but of society at large. The decision also chills voluntary cooperation in U.S. discovery procedures. The Association is well situated to offer a broader perspective on the issues in this case that impact the development of clear, consistent and fair principles governing discovery and the enforcement of confidentiality agreements in the context of international disputes.

PRELIMINARY STATEMENT

The Association respectfully submits this *amicus curiae* brief in support of Cravath, Swaine & Moore LLP's ("Cravath") appeal in *Kiobel* v. *Cravath*, 17-424-cv (2d Cir. 2017). The Association does not propose to address all legal arguments raised on this appeal. The Association offers this brief to highlight policy issues implicated by the district court's decision. The Association takes no position on the merits of plaintiff Esther Kiobel's ("Kiobel") underlying claims against Royal Dutch Shell ("Shell").

The Association urges the Court to reverse Judge Hellerstein's decision, which threatens free and open communications between New York counsel and foreign clients. As this Court has observed, if one could obtain foreign parties' documents from their New York counsel who were engaged solely to provide legal counsel and representation, foreign parties would risk "disclosure of previously protected matters" any time they sought legal advice in New York, "chill[ing] open and frank communications between attorneys and their clients." *Ratliff* v. *Davis Polk & Wardell*, 354 F.3d 165, 169 (2d Cir. 2003).

Further, the decision below puts unnecessary pressure on the attorney-client relationship. Under the law accepted in all, or nearly all, United States jurisdictions, a client is entitled to the return of client documents provided to the lawyer. But numerous ethics opinions have balanced the interests of the client and lawyer by providing that the lawyer may generally retain a copy to, for example, protect himself or herself against claims. The decision below upsets that balance insofar as retaining a copy of the documents exposes a foreign client to discovery to which the client would not otherwise be exposed.

More generally, adding to the burdens imposed by participating in litigation in the United States will have a tendency to discourage parties from consent to, or voluntary cooperation in, New York litigation. If an additional price of agreeing to produce documents (or sending documents to the United States to consider

whether to produce them) is that the documents will then be made available from counsel's offices to foreign adversaries, foreign clients will be less willing to produce documents voluntarily, to the ultimate detriment of the litigation process in the United States.

In that connection, the district court's decision also let Kiobel circumvent the confidentiality agreement and order with Shell that barred use of Shell's documents outside the United States litigation, an important safeguard that litigants often use to expedite discovery. A58 (Stipulation and Order Regarding Confidentiality of Discovery Materials ¶ 7, *Wiwa* v. *Royal Dutch Petroleum Co.*, No. 96 Civ. 8386 (Sept. 10, 2002).)[3] The court did so in a proceeding to which Shell, the entity whose interests were most at stake, was not even a party. This decision will likely cause foreign parties to weigh the risk of disclosure in foreign litigation even if they execute a confidentiality agreement, and further discourage them from voluntary cooperation in discovery in New York courts, leading to more discovery disputes and burden on the courts.

[3] Kiobel agreed to be bound by the confidentiality agreement in place in the *Wiwa* action. A69 (Stipulation and Order Regarding Confidentiality of Discovery Materials, *Kiobel* v. *Royal Dutch Petroleum*, No. 02 Civ. 7618 (KMW) (Oct. 21, 2002).)

ARGUMENT

I. THE DISTRICT COURT'S DECISION IMPEDES THE FULL AND FRANK COMMUNICATION WITH COUNSEL NECESSARY TO EFFECTIVE LEGAL REPRESENTATION, AND ULTIMATELY DISCOURAGES RELIANCE ON NEW YORK COUNSEL.

Shell's only relevant connection to the United States was that Kiobel chose to sue it here. *Kiobel* v. *Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1662-63 (2013). Shell contested jurisdiction every step of the way, and the only reason the documents Kiobel seeks are in the United States is because Shell provided them to its counsel. The district court's decision penalizes Shell for this, and in doing so threatens "'full and frank'" communication with New York counsel. *Mohawk Indus., Inc.* v. *Carpenter*, 558 U.S. 100, 108 (2009) (quoting *Upjohn Co.* v. *United States*, 449 U.S. 383, 389 (1981)) (noting importance of the privilege to "'broader public interests in the observance of law and administration of justice'"). The decision ignores that attorneys act as agents of their clients, holding the clients' materials for a limited purpose. The decision will discourage parties from relying on New York counsel, and in turn discourage foreign parties from transactions in New York.

A. The District Court's Decision Discourages Open Communication With Counsel.

This Court has repeatedly emphasized the importance of "open communication between attorneys and their clients so that fully informed legal advice may be given." *In re John Doe, Inc.*, 13 F.3d 633, 635-36 (2d Cir. 1994).

"[S]afeguarding client confidences promotes, rather than undermines, compliance with the law." *In re Grand Jury Investigation*, 399 F.3d 527, 531 (2d Cir. 2005). But "a client who consults a lawyer needs to disclose all of the facts to the lawyer and must be able to receive in return communications from the lawyer reflecting those facts." RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 68 cmt. c (2000). The district court's decision will discourage parties from being open with counsel.

If the district court is correct, then any time foreign parties provide materials to New York counsel, they risk hostile discovery, meaning, as the Court observed in *Ratliff*, "[t]he price of an attorney's advice would be disclosure of previously protected matters . . . chill[ing] open and frank communications between attorneys and their clients." 354 F.3d at 169. This would "jeopardize[]" "the policy of promoting open communications between lawyers and their clients." *In re Sarrio, S.A.*, 119 F.3d 143, 146 (2d Cir. 1997). Rather than provide documents to counsel in New York, foreign parties would have to take such extraordinary measures as requiring U.S. counsel to view the documents outside of the United States. But "[a] lawyer should be able to provide advice to his client . . . without having to travel to where the documents are located." *In re Application of Sarrio S.A.*, 1995 WL 598988, at *3 (S.D.N.Y. Oct. 11, 1995). Forcing counsel to travel abroad, an option available only to those who can afford it, or to adopt other expensive or

time-consuming measures in order to provide detailed legal advice, benefits no one, but is the foreseeable result of the district court's decision.

In light of the perverse incentives that discovery from attorneys creates, it is unsurprising that courts have rarely granted Section 1782 petitions against New York counsel. *See*, *e.g.*, *Schmitz* v. *Bernstein Liebhard & Lifshitz, LLP*, 376 F.3d 79, 85 (2d Cir. 2004) (denying petition where "petitioners [were] seeking discovery from DT, their opponent in the German litigation"); *In re Application Pursuant to 28 U.S.C. Section 1782 of Okean B.V. and Logistic Sol. Int'l to Take Discovery of Chadbourne & Parke LLP*, 60 F. Supp. 3d 419, 428 (S.D.N.Y. 2014) (finding discovery would be "unduly burdensome to and would injure non-party Chadbourne"); *In re Mare Shipping, Inc.*, 2013 WL 5761104, at *4 (S.D.N.Y. Oct. 23, 2013) (denying petition because "respondent's client . . . is a participant in the foreign proceeding"), *aff'd,* 574 F. App'x 6 (2d Cir. 2014) (summary order)[4]. The

[4] The district court cited *In re Mare Shipping* to support its holding that a law firm may "reside" in the Southern District for purposes of a Section 1782 petition seeking the client's documents. *Kiobel* v. *Cravath, Swaine & Moore, LLP*, 2017 WL 354183, at *2 (S.D.N.Y. Jan. 24, 2017). But the *Mare* court's ultimate decision *denied* the Section 1782 petition. *In re Mare Shipping*, 2013 WL 5761104, at *3-5.

cases that *have* granted Section 1782 petitions against New York law firms have done so in narrow circumstances inapplicable here.[5]

It is not an answer to say that the documents at issue here have been produced to the other side and so are not privileged, at least under U.S. standards. The issue is not the attorney-client privilege, but discouraging clients from providing even unprivileged documents to counsel to obtain legal advice and representation. The district court's theory would apply equally to any unprivileged documents, whether or not produced, that were sent to Cravath in order to obtain advice as to the positions to take in discovery negotiations and in the proceeding more generally. Further, as set forth in parts I.C and II *infra*, the scope of what the client was willing to voluntarily produce would be affected by the client's perceived exposure to follow-on discovery.

---

[5] In *In re Republic of Kazakhstan*, 110 F. Supp. 3d 512, 514 (S.D.N.Y. 2015), neither the law firm nor its clients opposed producing the requested documents, and the court only addressed a challenge from an intervenor. *See also In re Application for an Order Pursuant to 28 U.S.C. § 1782*, 773 F.3d 456, 459 (2d Cir. 2014) (no objection to service on law firm but only to nature of foreign proceeding). In *Ratliff*, the court emphasized that protection from production "was lost when [the client] voluntarily authorized Davis Polk to send the documents to the SEC." *Ratliff*, 354 F.3d at 170. Here, unlike in *Ratliff*, the documents were provided to plaintiff pursuant to compulsory discovery in a proceeding that was ultimately dismissed as improperly brought, under a confidentiality stipulation and order that barred use of any documents outside of the proceedings.

Cravath's brief sets forth substantial authority that client documents in the hands of an agent are not subject to discovery unless the client is subject to discovery. Brief of Appellant-Respondent at 23-24, 33-36, citing, *inter alia*, *In re Sealed Case*, 832 F.2d 1268, 1272-73 (D.C. Cir. 1987) ("[t]he mere fact that [a] court has jurisdiction over an alleged representative . . . is patently insufficient to . . . entitle" the party seeking discovery "to [the principal's] documents"), *abrogated on other grounds by Braswell* v. *United States*, 487 U.S. 99, 102 (1988); 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.").

The Court might also reaffirm the concerns it expressed in *Sarrio* and *Ratliff* in providing guidance to district courts when exercising their discretion to deny discovery under Section 1782. The discretionary Section 1782 factors that the Supreme Court set forth in *Intel Corp.* v. *Advanced Micro Devices, Inc.*, 542 U.S. 241, 264-65 (2004), were not exclusive. *See id.* at 264 ("We note below factors that bear consideration in ruling on a § 1782(a) request."). Indeed, the Supreme Court declined at that time "to adopt supervisory rules" for consideration of such requests, noting, "[a]ny such endeavor at least should await further experience with § 1782(a) applications in the lower courts." *Id.* at 265. It would be an appropriate exercise of this Court's supervisory authority to direct that

the fact that documents sought from a law firm are in the United States only because of the client's need for legal advice or to participate in United States litigation should weigh heavily against granting a Section 1782 petition.

B. The District Court's Decision Upsets the Balance Between a Client's Right to Return of its Documents and a Lawyer's Right to Retain a Copy of the Client File for His or Her Protection.

The result below also unnecessarily puts pressure on the attorney-client relationship. New York courts and ethics advisory committees have long recognized that client documents in the hands of counsel belong to the client and not the lawyer (subject to any retaining lien the attorney may have on account of unpaid bills). *Sage Realty Corp.* v. *Proskauer Rose Goetz & Mendelsohn LLP*, 91 N.Y.2d 30, 35 (1997) ("An attorney is obligated to deliver to the client, not later than promptly after representation ends, 'such originals and copies of . . . documents possessed by the lawyer relating to the representation as the . . . [former] client reasonably needs.'") (quoting RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 58(3) cmt. d (Proposed Final Draft No. 1, 1996)).[6]

---

[6] Courts elsewhere have reached the same conclusion. *See*, *e.g.*, *United States* v. *Barefoot*, 609 F. App'x 157, 158 (4th Cir. 2015) (summary order) (noting that "former counsel should return the case files to [the client]"); *Jones* v. *Comm'r*, 129 T.C. 146, 154 (T.C. 2007) ("The majority of courts . . . have held that clients are the legal owners of their entire case file."); *Sage Realty Corp.*, 91 N.Y.2d at 34 (noting it is the majority view that "an attorney is obligated to deliver to the client, not later than promptly after representation ends, [the client's documents]"). Further, even those states that hold an attorney has a property interest in the case

Indeed, lawyers are ethically barred from providing their clients' documents to third parties—even to other counsel for the client—without the client's consent. N.Y. State Ethics Op. 1094 (2016) (counsel may not turn over client's documents to former counsel absent client's permission).

At the same time, ethics committees in New York and elsewhere have found that a law firm may generally retain a copy of documents where needed, for example, to protect itself against an accusation of wrongful conduct. N.Y. State Ethics Op. 780 n.2 (2004) (citing similar conclusions reached by ethics panels in Alabama, California, Colorado, Kentucky, Massachusetts, Nebraska, and Ohio). But, as the New York State Bar Association ethics opinion noted, there may be instances in which that right must give way "where the client . . . wishes for legitimate reasons to ensure that no copies of a particular document be available under any circumstances." *Id.*; *see also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 43 cmt. b (2000) ("A lawyer ordinarily may not retain a client's property or documents against the client's wishes.").

The district court's ruling here considerably raises the stakes in this balance between the interests of lawyer and client. It imposes on a law firm representing a

---

file agree that the property right does not extend to "things furnished by the client." Ill. State Ethics Op. 94-13, at 3 (1995). In short, there is a broad consensus that an attorney does not have an ownership interest in his or her *clients*' documents.

foreign client in the position of Shell an unfair choice of disposing of all documents in its possession in order to protect the client's interest in avoiding increased exposure to U.S. discovery and potentially compromising the law firm's own interest in protecting itself from accusations of wrongful conduct. The courts should not unnecessarily force a law firm to weaken its defenses against claims of malpractice or wrongdoing in order to ensure that the client is protected from exposure to unwanted discovery.

Further, even apart from a law firm's potential need to protect itself, the decision below creates an incentive for law firms serving foreign clients to destroy client files as soon as permissible after a proceeding is completed. That may not always be in the client's interest should it have continuing questions or wish to look to the lawyer as a record of what happened in a completed litigation, but that judgment would be unnecessarily skewed by fear of the documents remaining exposed to Section 1782 discovery.

C. The District Court's Decision Will Discourage Parties from Relying on, or Voluntarily Cooperating in, New York's Judicial System.

The quality of New York's legal system is a vital element of "New York's status as a world financial leader." *Weltover* v. *Republic of Argentina*, 941 F.2d 145, 153 (2d Cir. 1991), *aff'd*, 504 U.S. 607 (1992). As the New York Court of Appeals has noted, "the ability to access a local forum applying a well-established,

commercially sophisticated body of law is certainly as important to New York businesses as are our extensive financial and communications resources." *Deutsche Bank Sec., Inc.* v. *Montana Bd. of Invs.*, 7 N.Y.3d 65, 73 (2006).

But the Court should be mindful of an interpretation and application of Section 1782 that imposes unnecessary burdens on parties that voluntarily cooperate in document production and other incidents of litigating in New York. Participation in litigation in New York, which necessarily entails retention of New York counsel, should not trigger ripples of exposure for foreign participants. Imposing such exposure where that is not necessary to the efficient and fair conduct of the litigation creates obstacles to the smooth-functioning of the civil justice system. That incremental exposure will make parties less willing to consent or resort to the New York courts and less willing to cooperate when summoned.

Here, for example, Shell consistently opposed jurisdiction while cooperating in "extensive" discovery. *Kiobel* v. *Royal Dutch Petroleum Co.*, 456 F. Supp. 2d 457, 468 (S.D.N.Y. 2006). But now, if the decision is upheld, Shell's documents will be used against it abroad. If Shell had conducted the *Kiobel* litigation with an eye towards litigation unrelated to New York, it would have been better served opposing discovery at every turn so as to minimize document production. And going forward, other foreign entities can be expected to be even more wary of voluntarily participating in discovery in New York, lest an adversary or other

person take advantage of the foreign entity's cooperation in this venue to obtain its documents for use abroad.

Litigation in the United States has developed a global reputation for being burdensome. Courts should exercise restraint in adding to those burdens where, as here, doing so would do nothing to improve the efficiency or quality of the U.S. judicial system, and, in practice, could make that system less efficient. An interpretation of Section 1782 that limits discovery of client documents in the hands of counsel, whether based on principles of agency law or as an appropriate exercise of judicial discretion, would have a salutary effect both on judicial efficiency and the attorney-client relationship.

II. THE DISTRICT COURT'S DECISION REDUCES THE UTILITY OF CONFIDENTIALITY AGREEMENTS.

The district court also erred in overriding the agreed confidentiality order entered in the litigation between Kiobel and Shell. Confidentiality agreements "serve 'the vital function of 'securing the just, speedy, and inexpensive determination' of civil disputes by encouraging full disclosure of all evidence that might conceivably be relevant.'" *S.E.C.* v. *TheStreet.Com*, 273 F.3d 222, 229 (2d Cir. 2001) (quoting *Martindell* v. *Int'l Tel. & Tel. Corp.*, 594 F.2d 291, 295 (2d Cir. 1979)) (ellipses and brackets omitted). Consequently, courts are "hesitant . . . to permit modifications of protective orders in part because such modifications unfairly disturb the legitimate expectations of litigants." *Id*. at 230. Accordingly,

"there is a 'strong presumption against the modification of a protective order,' and orders should not be modified 'absent a showing of improvidence in the grant of the order or some extraordinary circumstance or compelling need.'" *In re Telligent, Inc.*, 640 F.3d 53, 59 (2d Cir. 2011) (quoting *TheStreet.Com*, 273 F.3d at 229).

Shell and Kiobel entered into a confidentiality agreement that expressly barred the use of the documents produced in New York in the Dutch litigation, and Shell "reasonably relied" on the "assure[d] confidentiality." *TheStreet.Com*, 273 F.3d at 230. The district court's decision disturbs, without any "compelling need," Shell's reliance. Had Shell been a party to the proceeding below, this alone would have been "presumptively unfair." *Id*. Given that Shell, whose documents were at issue, was not joined to the proceeding, that result should not have been contemplated.

As the New York Court of Appeals has recognized, one of the reasons for New York's "pre-eminent financial" position is that its courts protect "the justified expectations of . . . parties to [contracts]." *J. Zeevi and Sons, Ltd.* v. *Grindlays Bank (Uganda) Ltd.*, 37 N.Y.2d 220, 227 (1975). Shell had a fully justified expectation that its documents would not be disclosed for use in foreign litigation. This Court has observed in the context of a Section 1782 request that such agreements deserve to be credited and weigh against disclosure. *Schmitz*, 376 F.3d

at 85 (affirming denial of Section 1782 request where, *inter alia*, the documents had been disclosed to American plaintiffs under a "promise[] not to disclose the documents to anyone, including the German plaintiffs" in related litigation).

Allowing a party to use Section 1782 as an end-run around a confidentiality agreement would "undermine completely the purpose of the confidentiality agreement by inhibiting the free flow of discoverable information." *See Grief* v. *Nassau Cnty.*, 2017 WL 1190944, at *2 (E.D.N.Y. Mar. 30, 2017). The legitimate expectations of litigants would be "unfairly disturb[ed]," and every party would need to worry that their documents might be produced at a later date despite the agreement. *See TheStreet.Com*, 273 F.3d at 230.

CONCLUSION

In interpreting and applying Section 1782, this Court has shown a sensitivity to the practical and policy implications in the use of Section 1782. *Ratliff*, 354 F.3d at 169-70. The ruling below, which exposed a client's documents to disclosure for use in a foreign proceeding solely because the client retained a New York law firm to represent it in improperly brought U.S. litigation, places an unnecessary burden on obtaining the advice of New York lawyers and on cooperating in discovery. The district court's order should be reversed.

Dated: April 20, 2017
New York, New York

Respectfully submitted,

RICHARD L. MATTIACCIO
Chair, International Commercial Disputes Committee
JOSEPH E. NEUHAUS
Member, International Commercial Disputes Committee

THE NEW YORK CITY BAR ASSOCIATION
42 West 44th Street
New York, New York 10036
Tel.: (212) 382-6600
Fax: (212) 398-6634

By: 
Joseph E. Neuhaus
Sullivan & Cromwell LLP
125 Broad Street
New York, NY 10004
(212) 558-4000
Attorneys for Amicus Curiae
THE NEW YORK CITY BAR ASSOCIATION

Federal Rules of Appellate Procedure Form 6. Certificate of Compliance With Type-Volume Limit

Certificate of Compliance With Type-Volume Limit, Typeface Requirements, and Type-Style Requirements

1. This document complies with the word limit of Fed. R. App. P. 29(a)(5) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f),

This document contains 3,890 words.

2. This document complies with 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:

This document has been prepared in a proportionally spaced typeface using Microsoft Office 2010 in Size 14 Times New Roman font.

Joseph E. Neuhaus
Sullivan & Cromwell LLP
125 Broad Street
New York, NY 10004
(212) 558-4000
Attorney for *Amicus Curiae* The New York City Bar Association

Dated: April 20, 2017