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Catherine O'Hagan Wolfe
Clerk of the Court
United States Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, New York 10017

Re: Balintulo, et al v. Daimler AG, et al, No. 09-2778-cv (lead)

Dear Ms. Wolfe:

This letter is submitted on behalf of Plaintiffs-Appellees Ntsebeza and Balintulo in response to this Court's April 19, 2013, Order requesting supplemental briefing on the impact of *Kiobel v. Royal Dutch Petroleum*, No. 10-1491 (April 17, 2013) ("*Kiobel*") if any, on the above-referenced appeals. For the reasons set forth below, the Court lacks jurisdiction over these appeals and should permit the District Court to resolve the question of the impact of *Kiobel* in the first instance. If the Court does reach that question, it must find that the claims alleged in these cases "touch and concern" the United States.

First, as Plaintiffs-Appellees and the United States have previously briefed in these appeals, the denial of a motion to dismiss based on political question or international comity grounds is not a final judgment and the collateral order doctrine does not apply.[1] Lacking appellate jurisdiction to reach those issues, this Court similarly lacks pendent jurisdiction to reach the extraterritoriality or corporate liability issues (or any other issue raised by Defendants) because the collateral order doctrine does not apply to denials of motions to dismiss where, as here, a defendant's immunity from trial is not at issue. Even if the Court has jurisdiction to consider the appeals of the political question and comity rulings, it does not have pendent jurisdiction over the issues of extraterritoriality or corporate liability as these are neither questions of subject matter jurisdiction, which *Kiobel* itself amply demonstrates, nor inextricably intertwined with the political question or comity issues. Thus, the *Kiobel* decision only affirms that this Court does not have jurisdiction, and these appeals must be dismissed.

Second, it is premature for this Court to assess whether, pursuant to *Kiobel*, the claims "touch and concern" the United States. Before *Kiobel* no court had questioned the extraterritorial application of the Alien Tort Statute ("ATS"), and thus the pleadings here have not addressed facts regarding whether the claims "touch and concern" the United States. The issue should be briefed at the trial court level, which is the appropriate place to initially consider these questions. Plaintiffs should be afforded the opportunity to amend their complaints to plead appropriate facts in light of *Kiobel*.

Third, if this Court does reach the issue of the applicability of the *Kiobel* presumption in this case, that presumption is easily displaced here. *Kiobel*'s holding was narrow, applying only in the context of a paradigmatic "foreign-cubed" case—foreign defendant, foreign plaintiff, and exclusively foreign conduct—lacking any connection to the United States beyond the "mere corporate presence" of the defendants. It explicitly left unresolved how other claims may "touch and concern" the United States with "sufficient force" to displace the presumption in other factual contexts.

The claims against Defendants do displace the *Kiobel* presumption. As an

[1] *See* Brief of Plaintiffs-Appellees at 20-24, *Balintulo et al v. Daimler AG et al*, No. 09-2778-cv (2d Cir. Oct. 14, 2009) ("Plaintiffs-Appellees' Br."); Brief of the United States as Amicus Curiae Supporting Appellees at 12-24, *Balintulo et al v. Daimler AG et al*, No. 09-2778-cv (2d Cir. Nov. 30, 2009) ("U.S. Amicus Br.").

initial matter, here, unlike in *Kiobel*, several corporate defendants are citizens of the United States and citizenship, standing alone, is sufficient to displace the presumption. There is a qualitative difference between "mere presence" of a defendant in this country and its full citizenship. Moreover, the Congressional purpose in enacting the ATS was to provide redress for international law violations, which, if not remedied, might draw the United States into conflict with other countries or prevent the United States from fulfilling its international obligations.

Additionally, unlike *Kiobel*, the alleged violations in these cases involve issues central to U.S. domestic and foreign policy proscribing assistance to the apartheid government and security forces over the course of decades—policy that Defendants' violations worked directly against. U.S. policy included the implementation of United Nations ("UN") arms embargo and enactment of embargos of other goods, designed to deter assistance to apartheid security forces and undermine the apartheid regime. Furthermore, U.S. Defendants undertook conduct in the United States to circumvent these U.S. policies.

Together, these facts distinguish the current cases from *Kiobel* and demonstrate that the *Kiobel* presumption is displaced here. These issues, however, which involve new questions of fact, are best suited for initial resolution before the District Court.

I. THIS COURT LACKS JURISDICTION OVER THIS INTERLOCUTORY APPEAL

A. The Collateral Order Doctrine Does Not Apply to the Political Question and International Comity Issues Raised on Appeal

This is an interlocutory appeal from the denial of Defendants' motion to dismiss these actions. *In re South Africa Apartheid Litig.*, 617 F. Supp. 2d 228, 296-97 (S.D.N.Y. 2009). The final judgment rule prevents piecemeal appeals such as this unless a case falls within very limited exceptions under the collateral order doctrine. *Will v. Hallock*, 546 U.S. 345, 350 (2006). The District Court's denial of Defendants' motion to dismiss is not a final judgment and thus is not reviewable, regardless of whether the issues before the District Court were questions of subject matter jurisdiction or merits. *Catlin v. United States*, 324 U.S. 229, 236 (1945), *superseded on other grounds by statute*, 9 U.S.C. § 15; *Merritt v. Shuttle, Inc.*, 187 F.3d 263, 268 (2d Cir. 1999) ("[N]on-immunity based motions to dismiss for want of subject matter jurisdiction are not ordinarily entitled to interlocutory review . . .")

(citing *Catlin*, 324 U.S. at 236). Nor is there an issue of immunity in this case that would permit an appeal. *See* Plaintiffs-Appellees' Br. 22 (citing cases).[2]

Defendants seek to vastly broaden application of the collateral order doctrine to include the denial of a motion to dismiss on political question and international comity grounds. There is no support, however, for this expansion of the final judgment rule. *See, e.g., Abelesz v. Erste Grp. Bank AG*, 695 F. 3d 655, 659-60 (7th Cir. 2012) ("Permitting an appeal from the denial of a motion to dismiss based on political question grounds would substantially expand the scope of the collateral order doctrine."); *Doe v. Exxon Mobil Corp.*, 473 F. 3d 345, 353 (D.C. Cir. 2011) (same); *see also* Plaintiffs-Appellees Br. 20-24; U.S. Amicus Br. 12-24. Thus, the Court lacks jurisdiction to hear the appeal of these issues.

In addition, the factual predicate for Defendants' arguments no longer exists. The South African government now asserts that the District Court is "an appropriate forum" to hear the remaining claims in these cases. *See* Appellees' App'x ("PA") 358-59 (Letter from J.T. Radebe, MP, Minister of Justice and Constitutional Development to U.S. District Ct. Judge Shira A. Scheindlin, Sept. 1, 2009 ("Radebe Ltr.")). The United States also urged this Court to dismiss these appeals for lack of jurisdiction, pointing out that "[a]t no time has the United States informed the courts that the foreign policy consequences of this litigation are so grave as to call for dismissal on that basis . . . *and the United States does not make that representation now.*" U.S. Amicus Br. 19 (emphasis added).

B. This Court Lacks Jurisdiction to Decide Issues of Application of the *Kiobel* Presumption or Corporate Liability

Lacking jurisdiction over the political question and comity questions, this Court also lacks jurisdiction to consider the District Court's denial of Defendants' motion to dismiss on grounds of extraterritoriality or to consider the issue of corporate liability.[3] Here, such issues are not immediately reviewable. *See Catlin*,

[2] This Court's *Kiobel* majority made it clear that corporations are not "immune" under the ATS. *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 149 (2d Cir. 2010) ("Acknowledging the absence of corporate liability under customary international law is not a matter of conferring 'immunity' on corporations.").

[3] The Supreme Court's decision in *Kiobel* strongly suggests that the holding by the Second Circuit's *Kiobel* panel that corporations may not be held liable under the ATS, *Kiobel*, 621 F.3d at 148, has been superseded. Although certiorari was granted on the issue of corporate liability and that issue was fully briefed and argued, *Kiobel* reached only the question of extraterritoriality,

324 U.S. at 236; *Merritt*, 187 F. 3d at 268. And this Court's Orders for briefing on both matters do not confer jurisdiction where none exists at the outset.

Even if this Court determines that the collateral order doctrine applies to the political question and comity issues, it lacks pendent jurisdiction to consider the questions of corporate liability or extraterritoriality unless those issues: (1) are independently reviewable or "independently qualify for the collateral order exception;"[4] (2) call into question the district court's subject matter jurisdiction;[5] or (3) are inextricably entwined with the issues on appeal such that their resolution is necessary to ensure meaningful review of the question properly appealed.[6] This is because "pendent appellate jurisdiction should be exercised sparingly, if ever." *Mancuso v. N.Y. State Thruway Auth.*, 86 F.3d 289, 292 (2d Cir. 1996).[7]

Here, none of these requirements are satisfied. As noted, any denial of a motion to dismiss based on extraterritoriality and corporate liability would not render an order final; nor do they present any question of immunity from suit that traditionally qualifies for appeal under the collateral order doctrine. Questions of corporate liability or extraterritoriality are also not inextricably intertwined with the political question or comity issues.

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explicitly holding that because multinational corporations may be present in many places, "mere corporate presence" in the United States was not sufficient to overcome the presumption. That the Supreme Court reached out to expressly address "corporate" presence—in fact, *predicating* the holding on application to corporations—badly undermines the Second Circuit's holding on corporate liability. *See United States v. Ianniello*, 808 F.2d 184, 190 (2d Cir.1986), *overruled on merits en banc by United States v. Indelicato*, 865 F.2d 1370, 1381-82 (2d Cir.1989). Moreover, the Second Circuit's reasoning has also been rejected by every Circuit since the Second Circuit decision was rendered. *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 41-57 (D.C. Cir. 2011); *Flomo v. Firestone Natural Rubber Co.*, 643 F. 3d 1013, 1017-21 (7th Cir. 2011); *Sarei v. Rio Tinto PLC*, 671 F.3d 736, 747-48 (9th Cir. 2011).

[4] *Rein v. Socialist People's Libyan Arab Jamahiriya*, 162 F.3d 748, 757 (2d Cir. 1998); *see also Merritt*, 187 F.3d at 268.

[5] *San Filippo v. United Bhd. of Carpenters & Joiners*, 525 F.2d 508, 513 (2d Cir. 1975).

[6] *Luna v. Pico*, 356 F.3d 481, 486-87 (2d Cir. 2004); *Rein*, 162 F.3d at 757-58.

[7] The more permissive rule for pendent review of orders certified for appeal under 28 U.S.C. § 1292(b), articulated in *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199 (1996), is inapplicable to this § 1291 appeal.

In addition, neither extraterritoriality nor corporate liability is a question of subject matter jurisdiction. The Supreme Court's *Kiobel* decision clearly holds that the scope of an ATS federal common law cause of action is a merits question and not an issue of subject matter jurisdiction.[8] *Kiobel*, slip op. at 6. ("The principles underlying the presumption against extraterritoriality thus constrain courts *exercising their power* under the ATS.") (emphasis added). This is because the question of what claims are cognizable and against which defendants go to the scope of a cause of action, not the Court's *power* to decide whether a claim has been stated in the first place.[9] Indeed, had corporate liability been a question of subject matter jurisdiction, the Court would have been required to reach it in *Kiobel* prior to considering extraterritoriality. *See Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 94-95 (1988). The text of the ATS provides no indication to the contrary. *See Arbaugh v. Y & H Corp*., 546 U.S. 500, 516 (2006) (limitation on coverage of statute is nonjurisdictional in character unless statute clearly indicates otherwise).

Thus, whether the issue is denial of motions grounded on political question, international comity, corporate liability under the ATS, or the application of the *Kiobel* presumption, the Court has no jurisdiction over these appeals and they must be dismissed. The effects of *Kiobel* should be left to the district court to determine in the first instance.

II. THE *KIOBEL* PRESUMPTION IS DISPLACED BECAUSE THE CLAIMS IN THESE CASES TOUCH AND CONCERN THE UNITED STATES, BUT THE DISTRICT COURT SHOULD DEVELOP THE RECORD IN THE FIRST INSTANCE ON THIS ISSUE

In *Kiobel*, the Supreme Court adopted a new presumption that ATS claims must "touch and concern" the United States with "sufficient force" to state a cause of action. *Kiobel*, slip op. at 14. Whether the presumption applies in these cases is a

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[8] The Supreme Court's *Kiobel* decision thus supersedes the Second Circuit's *Kiobel* holding, 621 F.3d at 145, 148-49, that federal courts do not have subject matter jurisdiction over ATS claims against corporations. *See Ianniello*, 808 F.2d at 190.

[9] *Morrison v. Nat'l Austl. Bank Ltd*., 130 S. Ct. 2869, 2877 (2010) ([T]o ask what conduct [a cause of action] reaches is to ask what conduct [it] prohibits, which is a merits question. Subject-matter jurisdiction, by contrast, refers to a tribunal's power to hear a case. It presents an issue quite separate from the question whether the allegations the plaintiff makes entitle him to relief.").

question for the district court to consider first given the array of factors, including factual considerations, at play in determining whether claims touch and concern the United States, particularly where, as here, the pleadings were written before *Kiobel* was decided.

A. *Kiobel* Was Limited to its Facts and Rejected a Bright-Line Rule that Bars ATS Claims Arising from Foreign Conduct

The *Kiobel* holding is narrow: A presumption against the extraterritorial application of an ATS cause of action applies; and, under the facts of *Kiobel*, where the parties were all foreign citizens and all the conduct relating to the claims occurred on foreign territory without any additional connection to the United States, the presumption was not displaced. *Id.* Notably, the Court made clear that "claims that touch and concern the territory of the United States . . . with sufficient force" may displace the presumption. *Id.*

Without further delineating what claims sufficiently touch and concern the United States, the Court held simply that "mere corporate presence"—the only connection to the United States in *Kiobel*—did not. The "mere presence" so concerning to the *Kiobel* court involved the minimal contact of the foreign defendants to the United States, which had been sufficient for personal jurisdiction: the defendants were listed on domestic exchanges and maintained a small investor servicing office in New York City. *See generally Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 93 (2d Cir. 2000). Other than something more than such "mere presence," *Kiobel* did not identify what degree of connection a defendant must have to the United States.

Importantly, the Court also rejected by implication the bright line rule invoked by two Justices: that only claims arising entirely on U.S. territory could be asserted under the ATS. *Kiobel*, slip op. at 1-2 (Alito, J., concurring). Thus, a majority of Justices would recognize ATS causes of action where acts giving rise to the claim occur outside the United States. *Id.* at 1 (Kennedy, J., concurring). The Court also explicitly left open many "significant questions regarding the reach and interpretation of the Alien Tort Statute" in other cases. *Id.* In particular, one open question is the implementation of the *Kiobel* presumption in cases alleging "serious violations of international law principles protecting persons" that are not covered by the reasoning and holding of *Kiobel*, which may require "further elaboration and explanation." *Id.*

Moreover, *Kiobel* does not apply the usual presumption against extraterritoriality, as such, because that presumption: ordinarily applies only to substantive law enacted by Congress; either applies to the statute or not so that (unlike in *Kiobel*) application on the high seas defeats the presumption; does not apply to jurisdictional statutes; and is not ordinarily applied on a case-by-case basis. Instead, in *Kiobel*, the majority opinion applies the "principles" underlying the presumption in what Chief Justice Roberts conceded is an atypical application of the usual presumption against the extraterritorial application of U.S. statutes. *Id.* at 5 (Roberts, J.). Thus, the manner in which these principles apply in other ATS settings, outside the "foreign-cubed" cases, is still to be determined in particular cases considering the purposes of the ATS. Were all cases under the ATS involving extraterritorial conduct categorically excluded by the presumption, there would be no need for "further elaboration and explanation" regarding claims and cases not covered by the reasoning and holding of *Kiobel*.[10]

B. The Claims in This Case Touch and Concern the United States

1. The Cases Touch and Concern the United States with Sufficient Force to Displace the Presumption Because Defendants Ford and IBM Are U.S. Citizens

Two Defendants in these cases are U.S. corporations: Ford and IBM.[11] Both companies are incorporated and maintain their principal places of business in the United States, coordinating corporate activities from here. By its terms, the *Kiobel* holding does not apply to U.S. defendants and leaves open the issue whether the *Kiobel* presumption applies to cases such as these.

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[10] *Morrison* and its application of the presumption against extraterritoriality offer no guidance to courts applying the *Kiobel* presumption. To determine whether the presumption was displaced in that case, *Morrison* looked to language of the *conduct-regulating* statute to evaluate whether the presumption was dispositive given contact with the United States, and concluded that Congressional focus in the Exchange Act was on securities traded in the United States. *Morrison*, 130 S. Ct. at 2883-84. Here, the ATS is purely jurisdictional with no underpinning substantive statute to evaluate the sufficiency of a claim's connection with the United States. Thus, *Kiobel* adopted the "touch and concern" standard for the ATS, permitting courts to apply their common law powers based on the facts of each case, to evaluate whether the presumption is displaced. The new *Kiobel* presumption thus differs in kind from the *Morrison* context, and contacts deemed insufficient there have no bearing here.

[11] Plaintiffs reached a settlement with General Motors in bankruptcy proceedings and will dismiss General Motors from these actions.

There is no question whatsoever about the legitimacy or power of the United States to legislate and apply international law under the ATS to its own citizens. *See, e.g.*, Sir Robert Jennings & Sir Arthur Watts, eds., *Oppenheim's International Law*, § 138 at 462 (9th ed. 1992); Restatement (Third) of the Foreign Relations Law of the United States, § 402(2) (1987) ("Restatement (Third)") ("[A] state has jurisdiction to prescribe law with respect to . . . the activities, interests, status, or relations of its nationals outside as well as within its territory."). This principle applies to corporations as well as natural persons. Restatement (Third), § 402 cmt. e. This principle is as fundamental to the international system as the principle that States may regulate conduct within their own territory, and the ATS implements both of these principles. This is especially true given the *Sosa* Court's recognition that the ATS applies to serious violations of international human rights norms. *See Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

Significantly, the *Kiobel* Court was faced with arguments that recognition of the ATS claims in that case would itself have violated international law restrictions on the exercise of extraterritorial jurisdiction. *See, e.g.*, Supp. Brief for Respondents, *Kiobel v. Royal Dutch Petroleum Co*, No. 10-1491, 2012 WL 3127285, at *37-48 (June 6, 2012). Thus, the application of an ATS cause of action to foreign corporations for claims arising on foreign soil was seen as raising the kind of potential foreign policy problems antithetical to the Court's conception of the statute's purposes.

The *Kiobel* Court's concern, however, about the exercise of U.S. sovereign power outside U.S. territory does not apply in the same way when an ATS cause of action is applied to a U.S. citizen. *Kiobel*, slip op. at 6; *see also* Brief of the Kingdom of the Netherlands and the United Kingdom of Great Britain and Northern Ireland as *Amici Curiae* in Support of Neither Party, *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491, 2012 WL 2312825, at *15 (June 13, 2012) (no issue under international law when United States applies ATS extraterritorially to its own citizens); Brussels I Regulation (Council Regulation 44/2001) (discussing European Union's requirement that states provide for jurisdiction in domestic courts for tort claims, including human rights claims, against foreign subsidiaries with respect to extraterritorial claims). Thus, unlike in *Kiobel*, no serious argument can be made that the ATS would violate international law if applied to the acts of these U.S. Defendants for serious human rights violations committed in South Africa.[12]

[12] Moreover, the South Africa government initially objected to this case when it included

This view is also supported by the centuries-old principle that nations are responsible under international law for international law violations committed by their citizens inside or outside their territory. According to Emmerich de Vattel, a leading international law scholar of the founding period, nations "ought not to suffer their citizens to do an injury to the subjects of another state." Emmerich de Vattel, The Law of Nations: Or, Principles of the Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns 162 (1797); *see also* 4 William Blackstone, Commentaries on the Law of England 68 (1765).

Congress passed the ATS for precisely this purpose. Indeed, the *Kiobel* Court's discussion of the history of the ATS supports the application of ATS claims to U.S. corporations complicit in serious international law violations arising abroad. Significantly, when such violations were committed by U.S. citizens, their extraterritorial acts could engage U.S. responsibility under international law or provoke hostile action by foreign sovereigns. Failure to provide a federal forum to remedy violations committed by U.S. citizens on foreign soil would have undermined the central purpose of the ATS, as recognized by the *Sosa* Court. *Sosa*, 542 U.S. at 739. Had a U.S. citizen attacked a French Ambassador on foreign soil and sought safe harbor in the United States, it is absolutely clear that the ATS was designed to provide the foreign Ambassador a civil remedy.

The 1795 Opinion by Attorney General Bradford underscores this understanding that a federal forum was necessary to avoid hostility by foreign sovereigns resulting from the conduct of U.S. citizens abroad. The Bradford Opinion addressed an attack on British Sierra Leone and a formal protest and request for compensation made by the British government. This was precisely the kind of situation for which the founders enacted the ATS to ensure a federal forum for the adjudication of international law claims by aliens. The events underlying the British protest occurred in large part on Sierra Leone territory.[13] The *Kiobel*

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requests for intrusive relief. After the cases were reduced in scope and limited to claims for damages, however, the South Africa government changed its position and informed the district court that it no longer objected to this litigation proceeding in U.S. courts. *See* PA 358-59 (Radebe Ltr.).

[13] Beach of Neutrality, 1 Op. Atty. Gen. 57 (Bradford Opinion). The diplomatic correspondence concerning the underlying British claim are annexed to the Supplemental Brief of *Amici Curiae* Professors of Legal History in Support of Petitioners, *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491 (June 13, 2012) as Appendix B (Letter from George Hammond, June 25, 1795) and Appendix C (Memorial of Zachary Macaulay and John Tilley, Nov. 28, 1794).

majority distinguished the Bradford Opinion on grounds that the underlying events involved U.S. citizens and perhaps a treaty violation. *Kiobel*, slip op. at 11-12. Although the *Kiobel* majority found the Bradford Opinion insufficient to overcome the *Kiobel* presumption in that case, the Bradford Opinion clearly supports the application of the ATS to extraterritorial violations of international law committed by U.S. citizens.

Thus, the history and purpose of the ATS, as well as modern international law principles, demonstrate that international law violations committed by U.S. citizens on foreign soil "touch and concern" U.S. territory with "sufficient force" to displace the *Kiobel* presumption.

2. In Addition to the U.S. Citizenship of Several Defendants, This Case Involves Claims that Plainly Touch and Concern the United States with Sufficient Force to Overcome the Presumption

U.S. citizenship alone is sufficient to overcome the *Kiobel* presumption. However, additional factors, including conduct in the United States, effects on the United States, and a strong U.S. policy interest in enforcement of UN and U.S. sanctions affirm that the *Kiobel* presumption is displaced here for both U.S. and foreign Defendants.

These cases present a unique set of human rights violations linked to apartheid in South Africa—violations in which the United States had a decades-long interest and concern. Plaintiffs allege corporations aided and abetted serious rights human rights violations that supported and maintained an institutionalized regime of systematic oppression in South Africa based solely on race. Apartheid itself is a crime against humanity. Second Am. Compl. ¶ 45, *Balintulo v. Daimler AG*, No. 02-md-1499 (S.D.N.Y. May 19, 2009), ECF No. 162 ("*Balintulo* Compl."); *see also* Am. Compl. ¶¶ 160, 162-63, *Ntsebeza v. Daimler AG*, No. 02-mdl-1499 (S.D.N.Y. Oct 27, 2008) ("*Ntsebeza* Compl.").

The United States was among the nations that took forceful and repeated policy actions to publicly condemn apartheid, *Balintulo* Compl. ¶ 121, and undermine the very apartheid security forces that Plaintiffs allege Defendants aided and abetted. The United States viewed ending apartheid as critical to the U.S. national interest. *See, e.g.*, Exec. Order, Prohibiting trade and certain other transactions involving South Africa, No. 12532, 50 FR 36861, 3 C.F.R., 1985

Comp. at 387 (1985) (President announcing that "the policies and actions of the Government of South Africa constitute an unusual and extraordinary threat to the foreign policy and economy of the United States" and declaring "a national emergency to deal with that threat.").

Defendants in this case undermined the strong U.S. interest in not only ending apartheid but also in enforcing the sanctions regime that it had developed and supported both at the UN and at home. The establishment of a UN arms embargo, with U.S. support, indicates the depth of U.S. interest and clearly distinguishes these cases from *Kiobel* where no such sanctions regime was ever in place and where the U.S. government had not taken any comparable stance based on its economic and foreign policy interests. As early at 1963, an arms embargo against South Africa was put in place. *Balintulo* Compl. ¶ 113; *Ntsebeza* Compl. ¶¶ 41-46. In 1971, new Commerce Department regulations, "[i]n conformity with the United Nations Security Council Resolution of 1963, . . . imposed an embargo on shipments to [South Africa] of arms, munitions, military equipment and materials for their manufacture and maintenance." *Balintulo* Compl. ¶ 114.

The U.S. government's ban was later expanded to include any commodity that would be sold to or used by apartheid security forces or used to service equipment owned by those forces, and export licenses were required for the export of produce useful in crime control and detection. *Id.* ¶¶ 117-18. By 1982, U.S. Export Administration Regulations prohibited export of technical data for use by apartheid security forces, and export licenses for sale of computers to government consignees were awarded only upon a showing they could not be used to support the policy of apartheid. *Id.* ¶¶ 119-20. A year later that agency announced it would deny all exports, re-exports and sales to or for use by or for security forces. *Id.* ¶ 121.

In 1986, by overwhelming majorities in both Houses, Congress passed the Comprehensive Anti-Apartheid Act, which had immediate and sweeping effects across the United States. The Act prohibited the export of computers, software, and other technology for the use of South African government entities associated with apartheid and the extension of new loans or credit to such entities. *See* Pub. L. No. 99-440, 100 Stat. 1086, §§ 301-23 (1986). It also prohibited importation into the United States of South African military articles, and various other goods. The Act suspended all U.S. air service to South Africa, ended nuclear cooperation, excluded South Africa from holding accounts in U.S. financial institutions, and voided the tax treaty between the two nations. The Act also pressured South

Africa's other trading partners to pass similar legislation. *Id.* at 402

In addition to these effects on the United States and its foreign policy, U.S. Defendants' took affirmative steps in this country to circumvent the sanctions regime, though discovery would be necessary to determine the full scope of such U.S.-based conduct. *See Balintulo* Compl. ¶¶ 246-50 (Ford); ¶¶ 196, 198, 212 (IBM); *Ntsebeza* Compl. ¶ 128 (Ford); ¶¶ 139-41 (IBM).

In short, the Plaintiffs allege that all Defendants aided and abetted the human rights violations committed by the apartheid regime contravening an important U.S. policy interest in bringing apartheid to an end. U.S. Defendants further facilitated their violations by evading the domestic and international sanctions regime that the United States helped develop and had strong interest in enforcing. Together, the strong U.S. policy interest in bringing the regime's human rights violations to an end, the effects in the United States, and the conduct in the United States, clearly show that the claims alleged here 'touch and concern" the United States with "sufficient force" to overcome the *Kiobel* presumption.

At a minimum, this case should be returned to the District Court to consider whether Plaintiffs are entitled to amend their complaints with facts in light of *Kiobel,* or undertake limited discovery[14] to address the new *Kiobel* presumption regarding the issue of whether Plaintiffs' claims "touch" and "concern" the United States.

s/Paul Hoffman

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[14] For example, at the District Court level, Defendant Rheinmetall's significant contacts with the United States, including contracts with the U.S. military, were identified. *See* Balintulo Pls.' Opp'n to Rheinmetall AG's Mot. to Dismiss, *Balintulo v. Daimler AG*, No. 02-md-1499 (S.D.N.Y. May 22, 2009) ECF No. 173. The District Court permitted discovery to develop those facts. Order & Op. (S.D.N.Y. June 22, 2009) ECF No. 199.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on May 24, 2013, the foregoing Plaintiffs-Appellees' Letter Brief, was served upon the following via electronic mail, pursuant to Local Rule 25.2(g), and Federal Express:

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