

No. 06-4800-cv

No. 06-4876-cv

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

ESTHER KIOBEL, individually and on behalf of her late husband, DR.
BARINEM KIOBEL, BISHOP AUGUSTINE NUMENE JOHN-MILLER,
CHARLES BARIDORN WIWA, ISRAEL PYAKENE NWIDOR, KENDRICKS
DORLE NWIKPO, ANTHONY B. KOTE-WITAH, VICTOR B. WIFA, DUMLE
J. KUNENU, BENSON MAGNUS IKARI, LEGBARA TONY IDIGIMA, PIUS
Nwinee, KPOBARI TUSIMA, individually and on behalf of his late father
CLEMENT TUSIMA,
Plaintiffs-Appellants-Cross-Appellees,

--- v.---

ROYAL DUTCH PETROLEUM COMPANY; SHELL TRANSPORT AND
TRADING COMPANY, PLC;
Defendants-Appellees-Cross-Appellants,
and

SHELL PETROLEUM DEVELOPMENT COMPANY OF NIGERIA, LTD.,
Defendant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

HONORABLE KIMBA WOOD

DISTRICT COURT NO. 02 CIV. 7618

**SECOND PETITION FOR REHEARING *EN BANC* FOR
PLAINTIFFS-APPELLANTS-CROSS-APPELLEES**

INTRODUCTION

On February 4, 2011, Petitioners' first Petition for Rehearing and for Rehearing En Banc was denied.¹ Ten active judges were polled and split five- to-five on the question of whether an *en banc* hearing should be granted.²

In addition, the panel denied rehearing. Each member of the panel issued an opinion relating to that decision. In particular Chief Judge Jacobs issued an opinion expanding on his reasons for joining the majority of the panel in finding no corporate liability under the Alien Tort Statute ("ATS") and Judge Leval responded to the additional points made by Chief Judge Jacobs.

This Second Petition for Rehearing and Rehearing *En Banc* raises a single issue.³

¹ Attached collectively as Exhibit "1" are the Orders and Opinions issued in connection with the denial of Petitioners' Petition for Rehearing and their Petition for Rehearing *En Banc*. Petitioners have also attached the original Petition as Exhibit 2. Petitioners rely on the arguments made in their initial Petition for Rehearing and for Rehearing *En Banc* for the reasons why *en banc* review and rehearing by the panel are appropriate and incorporate those arguments herein.

² This vote was referred to in the dissenting opinion of Judge Katzmann. See Exhibit 1.

³ Petitioners' are unaware of any rule or case that dictates whether some or all of the issues raised in this second Petition should be raised in the form of a motion for reconsideration. See, e.g. *Puddu v. Royal Netherlands S.S. Co.*, 303 F. 2d 752 (2nd Cir. 1962). Petitioners request that this Petition be treated, in the alternative, as a motion for reconsideration if that is the correct procedure. The Petition is filed within the time period for a motion for reconsideration.

Under this Court's Internal Operating Procedure ("IOP") 35.1(b) **all** active judges are entitled to vote to determine whether a case should be heard *en banc*. The determination of a judge's status is made "on the date of entry of the *en banc* order;" in this case February 4, 2011.

The names of ten active judges are listed on the February 4, 2011, Order. However, on February 4, 2011, the date of the Order, there were eleven active judges on the Court. Under IOP 35.1(b) all eleven active judges as of the date of the Order should have been polled on the Petition. Judge Raymond J. Lohier, Jr. was sworn in as an active judge well before February 4, 2011, and was entitled to be polled and to vote on the Petition for Rehearing *En Banc* in this case.⁴

Given the importance of the issue decided in this appeal, not only for plaintiffs who have been litigating these issues for more than a decade but for many other ATS plaintiffs in pending cases against corporations in this Circuit,⁵ Judge Lohier's vote,

⁴ Judge Lohier is listed on this Court's website as being an active judge as of December 21, 2010. Petitioners recognize that active judges are not required to vote on Petitions for Rehearing *En Banc*; thus, if Judge Lohier decided not to vote on the Petition there would be no Rule 35.1 problem in the procedure followed in this case. This does not appear to be the case from the face of the Court's Order denying rehearing *en banc*.

⁵ The panel decision also has the effect of overturning a prior panel's decision in *Abdullahi v Pfizer, Inc.*, 562 F. 3d 163 (2d Cir. 2009), in which this Court found that ATS claims against a corporate defendant for conducting medical experiments on children without informed consent stated a claim for relief. There are other cases pending before this Court and in district courts within this Circuit that will be

if it was in favor of *en banc* review, would lead to an *en banc* decision that would determine this issue with finality within this Court for all of these cases.

In particular, the appeal in *Balintulo et al v. Daimler AG et al*, No. 09-2778-CV, is now pending before a different panel of this Court. The issue of corporate liability was raised *sua sponte* by that panel and was argued in January 2010. If that panel now follows the *Kiobel* decision and dismisses plaintiffs' claims in that appeal on this basis a Petition for Rehearing *En Banc* would certainly be filed and would raise the same issues raised by the Petition in this appeal.

**POLLING ALL ACTIVE JUDGES IS NECESSARY TO ENSURE
COMPLIANCE WITH LOCAL RULE 35.1.**

As indicated above, Rule 35.1(b) provides that all active judges may vote on a Petition for Rehearing *En Banc* and that the determination of who the active judges are for these purposes is made as of the date of the *En Banc* Order. In this case that date is February 4, 2011. Judge Lohier was sworn in as an active judge on this Court well before February 4, 2011, and under Rule 35.1(b) was entitled to vote on the Petition For Rehearing *En Banc* in this case. The fact that his name was not listed on this Court's Order suggests that he may not have been polled notwithstanding the procedure set forth in IOP 35.1(b). Rule 35.1(b) is clear that the determination of the

dismissed if the decision is allowed to stand. *See, e.g., Liu Bo Shan v China Construction Bank*, No 10-2992.

active judges entitled to participate in this vote is to be made as of the date of the Order in this case February 4, 2011.

Given the equally divided vote for rehearing *en banc* and the fact that the panel decision will have far-reaching effects not only for these plaintiffs but also for many other ATS plaintiffs in pending cases within the Circuit, petitioners bring this Second Petition for Rehearing *En Banc* to ensure that all active Judges have the opportunity to vote as provided in IOP 35.1(b).

This case has been pending for nearly a decade and was set for trial in the District Court. Judge Wood stayed the trial pending the resolution of several issues certified for appeal. Though additional issues were raised on cross-appeal, the panel's decision did not address any of the issues certified by Judge Wood or the issues raised by the cross-appeal. Furthermore, the panel's sharply divided decision creates a split in the Circuit courts on this issue. This case is the most appropriate and timely vehicle for the *en banc* resolution of the fundamental differences of opinion within this Court on the important issue of corporate liability under the Alien Tort Statute. Without *en banc* review here petitions for *en banc* review are likely to be filed in the other corporate ATS cases pending in this Circuit.

CONCLUSION

This Petition simply seeks compliance with IOP 35.1(b) so that Judge Lohier

has the opportunity to vote on plaintiffs' Petition for Rehearing *En Banc* in light of the equally divided vote of ten of eleven active judges as of the date of the Order denying the Petition. The reasons for granting the Petition have already been set forth in the briefs previously submitted. Inevitably there will be petitions for rehearing *en banc* in all of the pending cases that will be dismissed based on the panel's ruling. It would be fair to all of the litigants in these cases and serve the interests of judicial economy if this Court resolved its conflicting views on the issue of corporate liability under the ATS in this case.

Dated: February 17, 2011

Respectfully Submitted,



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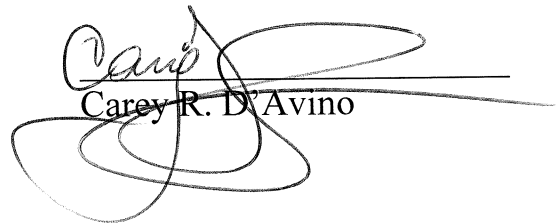
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 17th day of February, 2011, a true and correct copy of the foregoing Plaintiffs-Appellants-Cross-Appellees' Second Petition for Rehearing *En Banc* was served via email and overnight delivery on the following counsel for Defendants-Appellees-Cross-Appellants:

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