No. 09-34

IN THE

Supreme Court of the United States

PFIZER INC.,

Petitioner,

v.

RABI ABDULLAHI, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

SUPPLEMENTAL BRIEF FOR PETITIONER

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October 7, 2009

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Petitioner Pfizer Inc. respectfully submits this supplemental brief under Rule 15.8 to apprise the Court of a recent circuit decision, *Presbyterian Church of Sudan* v. *Talisman Energy, Inc.*, -- F.3d --, No. 07-0016-cv, 2009 WL 3151804 (2d Cir. Oct. 2, 2009), that deepens the first intercircuit split identified in the petition: whether ATS jurisdiction can extend to a private actor based on alleged state action by a foreign government where there is no allegation that the government knew of or participated in the specific acts by the private actor claimed to have violated international law. See Pet. i, 14-19; Reply 5-9. The deepening of this split underscores the need for this Court's review.

1. In *Talisman*, the Second Circuit (per Jacobs, C.J., joined by Leval and Cabranes, JJ.) issued a comprehensive opinion concerning the proof necessary to link a private actor with a state actor under the ATS. At issue was whether Talisman Energy, Inc., a Canadian company, "aided and abetted ... the [Sudanese] Government to advance [human rights] abuses that facilitated the development of Sudanese oil concessions by Talisman affiliates." 2009 WL 3151804, at *1. The court held, at the threshold, that international law (rather than domestic United States law) defines the elements of aiding and abetting.[1] In choosing international law, the *Talisman* court explained: "*Sosa* [v. *Alvarez-Machain*, 542

[1] As both Petitioner and *Amicus Curiae* Chamber of Commerce of the United States noted, the circuits disagree, at the initial step of the ATS state action analysis, whether domestic law or international law applies to determine what interaction is required between a state and a private actor. See Reply 6 n.2; Chamber Br. 16 n.5.

U.S. 692 (2004)] and our precedents send us to international law to find the standard for accessorial liability." *Talisman*, 2009 WL 3151804, at *12.

The court then interpreted international law, in particular the Rome Statute, to define aiding and abetting liability as follows: "a defendant may be held liable under international law for aiding and abetting the violation of that law by another when the defendant (1) provides practical assistance to the principal which has a substantial effect on the perpetration of the crime, and (2) does so with the purpose of facilitating the commission of that crime." *Id.* (internal quotation marks omitted). The court additionally observed that "international law at the time of the Nuremberg trials recognized aiding and abetting liability only for purposeful conduct." *Id.* at *13. In other words, under "international law, ... the *mens rea* standard for aiding and abetting liability ... is purpose rather than knowledge alone." *Id.*

Applying this test, the court held that the defendant was entitled to summary judgment because, even though the defendant may have known that the Sudanese government was committing international law violations, the defendant did not act with the purpose that the Sudanese government do so. *Id.* at *14-*17.

2. In choosing international law to control the inquiry into linking a private actor with a state actor, the *Talisman* court followed the same approach as the Ninth Circuit took in *Abagninin* v. *AMVAC Chemical Corp.*, 545 F.3d 733 (9th Cir. 2008). There, as Petitioner discussed (Pet. 15-16; Reply 8-9), the Ninth Circuit also relied on the Rome Statute and also held that mere knowledge on the part of the sec-

ondary actor (there, the state) is not enough; instead, the state must have had a "plan or policy" to commit the international law violation. 545 F.3d at 742.

3. Other circuits, by contrast, look to domestic law—namely, 42 U.S.C. 1983—to define the proof necessary to link a private actor with a state actor for ATS purposes. See *Sinaltrainal* v. *Coca-Cola Co.*, 578 F.3d 1252, 1264 (11th Cir. 2009); *Aldana* v. *Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1247 (11th Cir. 2005); see also Pet. App. 50a; *Kadic* v. *Karadzic*, 70 F.3d 232, 245 (2d Cir. 1995). As the Chamber explained (Chamber Br. 8-15), this divergence as to the source of law has important practical results, for these courts do not require that the secondary actor had a "purposeful" intent, but only that the secondary actor "*knew* of the events in question." *Aldana*, 416 F.3d at 1248 (emphasis added); see also *Talisman*, 2009 WL 3151804, at *11 (adopting concurring opinion of Katzmann, J., in *Khulumani* v. *Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 277 (2d Cir. 2007), which looked to international law requiring purpose, rather than the concurring opinion of Hall, J., in that case, which looked to domestic law and required only knowledge, *id.* at 287-89).

4. If this split is resolved in favor of international law and its "purpose" requirement is applied here, then state action (and hence ATS jurisdiction) is plainly absent because the complaints nowhere allege that Nigeria had a "plan or policy" to conduct clinical trials without adequate consent. *Abagninin*, 545 F.3d at 742 ("allegations of 'affirmative action by the government of the Ivory Coast' fail to state a claim for crimes against humanity because Abagninin does not allege that the use of [the pesticide] was

part of a [state] plan or policy to commit one of the enumerated acts, *i.e.* to sterilize the plantation workers").

5. Even if domestic law is applied here in determining whether the private actor (Pfizer) has a sufficient nexus with the state actor (Nigeria) to warrant ATS jurisdiction, there remains an intercircuit split (reflected in the disagreement between the majority and dissenting opinions below) on whether that knowledge must be of the specific wrongful conduct by the primary actor or merely of more general conduct. Compare Pet. App. 50a-51a (majority's holding that it is sufficient that Nigeria knew of general contours of Pfizer's clinical trial, even if it did not know of the alleged failure to obtain informed consent) with Pet. App. 102a (dissent's argument that state action may not be found based on such general knowledge); *Aldana*, 416 F.3d at 1247 (no state action because plaintiffs "d[id] not allege sufficient facts to warrant the inference that the National Police knew of and purposefully turned a blind eye to the events" that were the specific conduct alleged to violate international law); *Sinaltrainal*, 578 F.3d at 1266 (no state action because there was "no suggestion" in the complaints that "the Colombian government was involved in, much less aware of, the murder and torture alleged in the complaints" to violate international law).

CONCLUSION

The recent *Talisman* decision deepens the first circuit split addressed in the petition for a writ of certiorari. The petition should be granted.

Respectfully submitted,

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