No. _____

IN THE
Supreme Court of the United States

AMJAD HOSSAIN KHAN,
Petitioner,

v.

NAYEEM MEHTAB CHOWDHURY,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This Court has long held that a general verdict must be vacated if any of the underlying theories of recovery submitted to the jury is legally invalid. Four courts of appeals – the District of Columbia, Sixth, Eighth, and Eleventh Circuits – apply that rule. Eight courts of appeals – the First, Second, Third, Fourth, Fifth, Seventh, Ninth, and Tenth Circuits – have added harmless-error exceptions. Compounding that confusion, those eight circuits have adopted four conflicting approaches for determining whether an error is harmless.

The question presented is as follows:

Where one of the claims submitted to a jury is set aside after trial, must a court vacate the jury's general verdict, or may the court apply a "harmless error" exception?

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Amjad Hossain Khan petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Second Circuit (Pet. App. 1a-33a) in *Chowdhury v. Worldtel Bangladesh Holding, Ltd.*, is reported at 746 F.3d 42. The decision of the United States District Court for the Eastern District of New York (Pet. App. 34a-40a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 10, 2014. Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including June 11, 2014. App. No. 13A1069. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

This case is an ideal vehicle to resolve an issue on which there is a long-standing circuit conflict: Whether an appellate court should review general civil verdicts, premised in part on legally invalid claims, for harmless error. In this case, Respondent brought two claims against Petitioner, one under the Alien Tort Statute, 28 U.S.C. §1350, and one under the Torture Victim Protection Act, 106 Stat. 73, note following 28 U.S.C. §1350. Both claims were submitted to the jury, which returned a general verdict in favor of Respondent. On appeal, the Second Circuit acknowledged that

Respondent's claim under the Alien Tort Statute was invalid in light of *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013). But the court nonetheless affirmed the jury verdict on the ground that the erroneous submission of that claim to the jury was harmless. In doing so, the Second Circuit perpetuated a long-standing and acknowledged circuit conflict over whether, and to what extent, the erroneous submission of a legally invalid claim to a civil jury can be deemed harmless error. Every geographic circuit has weighed in on this fundamental question, and they have reached sharply divergent conclusions. The Court should grant certiorari in this case to resolve the conflict.

1. Petitioner and Respondent are Bangladeshi nationals, both of whom previously served on the Board of Directors of a Bangladeshi telecommunications entity known as World Bangladesh Ltd. (WBL). Prior to 2005, a holding company owned by Petitioner known as Worldtel Bangladesh Holdings, Ltd. ("WBH") held a nearly 57% ownership interest in WBL, and a holding company affiliated with Respondent owned the remainder. In 2005, at Respondent's initiative, WBL issued new shares and assumed new debt. As a result, Petitioner's interest in WBL was reduced to less than 1%, and Respondent's interest in WBL was increased to over 99%. Petitioner complained to various Bangladeshi government agencies, claiming that Respondent had effectuated these changes by forging Petitioner's signature and committing other fraudulent acts.

2. In 2007, Respondent was detained for one week by the Bangladesh National Police. Respondent claims

that during this one-week period, the police engaged in torture in connection with their interrogation. Respondent never gave up his share of WBL, however, and he currently serves as WBL's managing director.

3. Respondent brought claims against Petitioner and WBH in the Eastern District of New York under the Alien Tort Statute (ATS), 28 U.S.C. §1350, and the Torture Victim Protection Act (TVPA), 106 Stat. 73, note following 28 U.S.C. §1350. Respondent alleged that Petitioner and WBH had directed the Bangladesh National Police to engage in torture during Respondent's 2007 detention. To support this allegation, Respondent testified that his interrogators had stated they were acting at the behest of "Bahdi," which according to Respondent was a synonym for "Khan" (i.e., Petitioner). In addition, Respondent's parents testified that Petitioner had stated that he could make the torture stop. Petitioner, for his part, denied making any such statements and denied influencing the interrogation. Both of Respondent's claims were submitted to a jury.

The jury verdict form did not distinguish between the ATS claim and the TVPA claim. Rather, Question 1 on the form simply asked whether Petitioner was liable to Respondent for "torture," and Question 2 asked whether WBH was liable to Respondent for "torture." Pet. App. 41a. The jury answered both questions "Yes." *Id.* The jury then awarded $1.5 million in compensatory damages, without distinguishing between Petitioner and WBH. *Id.* The jury also awarded $250,000 in punitive damages against Petitioner. Pet. App. 42a.

4. Petitioner appealed to the Second Circuit, which held the case in abeyance pending this Court's decision in *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013). In *Kiobel*, this Court held that "the presumption against extraterritoriality applies to claims under the ATS," and that "relief [under the ATS] for violations of the law of nations occurring outside the United States is barred." *Id.* at 1669.

5. After *Kiobel* was decided, the Second Circuit upheld the jury verdict against Petitioner.

a. The Second Circuit acknowledged that under *Kiobel*, the submission of the ATS claim to the jury was legal error. The court explained that "pursuant to the rule enunciated by the Supreme Court, there is no legally sufficient basis to support the jury's verdict with respect to plaintiff's claim under the ATS." Pet. App. 12a. "'[A]ll the relevant conduct' set forth in [Petitioner's] complaint occurred in Bangladesh, and therefore [Petitioner's] claim under the ATS is 'barred.'" *Id.* (citation omitted). Thus, the Second Circuit reversed the District Court's judgment "insofar as it rests on [Petitioner's] claims under the ATS." *Id.* at 13a. Because Respondent sued WBH solely under the ATS, and not under the TVPA, *see Mohamad v. Palestinian Authority*, 132 S. Ct. 1702 (2012) (holding that TVPA does not impose liability on corporations), the effect of this reversal was to vacate the verdict against WBH. *See* Pet. App. 12a-13a n.6.

b. Nonetheless, the Second Circuit upheld the jury verdict against Petitioner on harmless-error grounds. The court acknowledged the Supreme Court's longstanding teaching that under "the so-called general

verdict rule . . . 'a new trial will be required' where 'there is no way to know that [an] invalid claim . . . was not the sole basis for [a] verdict.'" Pet. App. 14a (quoting *United N.Y. & N.J. Sandy Hook Pilots Ass'n v. Halecki*, 358 U.S. 613, 619 (1959)) (brackets in original). But the court stated that "[n]umerous subsequent courts, however, have engrafted a harmless error gloss onto the basic principle." *Id.* (internal quotation marks and ellipses omitted). It held that as long as it was "sufficiently confident that the verdict was not influenced by an error in the jury charge," the error could be deemed harmless. *Id.* (quotation marks omitted). Applying that harmless error rule, the Second Circuit concluded that "there was indeed adequate evidentiary support for a jury to find the defendants liable for torture under the TVPA." *Id.* at 15a.

c. Judge Pooler filed a separate concurring opinion. She emphasized that this case had no connection to the United States, noting that "the complaint alleges not just that all relevant conduct, but that all conduct claimed in this case, occurred in Bangladesh," and that "there was no evidence adduced at trial to indicate any conduct relevant to Chowdhury's ATS claim took place in the United States." Pet. App. 31a-32a.

REASONS FOR GRANTING THE WRIT

In the decision below, the Second Circuit concluded that Respondent's ATS claim – which was submitted to the jury – was barred as a matter of law. But despite this Court's numerous decisions holding that the verdict must therefore be vacated because "it [is] impossible to say" that the invalidated theory did not impact the jury's verdict, *see, e.g.*, *Wilmington Star Mining Co. v. Fulton*, 205 U.S. 60, 78 (1907), the Second Circuit upheld a $1.75 million jury verdict against Petitioner on harmless-error grounds. The Second Circuit's decision conflicts with decisions from the Sixth, Eighth, Eleventh, and D.C. Circuits, which follow this Court's rule of automatic reversal in civil cases in which invalid claims are submitted to the jury. Furthermore, the Second Circuit's legal standard for harmless error – under which it affirms general jury verdicts infected by invalid claims as long as it is "sufficiently confident that the verdict was not influenced by an error in the jury charge," Pet. App. 14a – is one of a welter of discordant legal standards used by the Courts of Appeals when reviewing such verdicts. The Court should grant certiorari to resolve this long-standing and important split.

A. The Second Circuit's Decision Conflicts With This Court's Precedent And Decisions From Eight Other Courts Of Appeals On Whether A Harmless-Error Exception Exists.

For over a century, this Court has applied a strict rule that when a general verdict is premised on multiple claims, one of which is invalid, then a new trial

is required. In *Maryland v. Baldwin*, 112 U.S. 490 (1884), the Court stated the rule as follows:

> On the trial evidence was introduced bearing upon all the issues, and, if any one of the pleas was, in the opinion of the jury, sustained, their verdict was properly rendered, but its generality prevents us from perceiving upon which plea they found. If, therefore, upon any one issue error was committed, either in the admission of evidence or in the charge of the court, the verdict cannot be upheld, for it may be that by that evidence the jury were controlled under the instructions given.

Id. at 493. The Court has consistently adhered to this principle. *See, e.g.*, *City of Columbia v. Omni Outdoor Adver. Inc.*, 499 U.S. 365, 384 (1991) ("[T]he jury's general verdict against COA cannot be permitted to stand (since it was based on instructions that erroneously permitted liability . . .)"); *Sunkist Growers, Inc. v. Winckler & Smith Citrus Prods. Co.*, 370 U.S. 19, 29-30 (1962) ("Since we hold erroneous one theory of liability upon which the general verdict may have rested . . . it is unnecessary for us to explore the legality of the other theories" (citing *Baldwin*, 112 U.S. at 493)); *United N.Y. & N.J. Sandy Hook Pilots Ass'n v. Halecki*, 358 U.S. 613, 619 (1959) (ordering new trial in case where one valid and one invalid claim were submitted to the jury because "there is no way to know that the invalid claim . . . was not the sole basis for the verdict"); *Wilmington*, 205 U.S. at 79 (same). This Court has never upheld a civil jury verdict premised in part on an invalid claim, and has never suggested that

harmless error analysis would apply. Indeed, just a few terms ago, this Court emphasized that "when it is impossible to know, *in view of the general verdict returned* whether the jury imposed liability on a permissible or an impermissible ground, the judgment *must* be reversed and the case remanded." *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 482 n.3 (2008) (quoting *Greenbelt Coop. Publ'g Ass'n v. Bresler*, 398 U.S. 6, 11 (1970) (internal quotation marks omitted; emphases added)).

And for good reason. This Court has held that harmless-error analysis does not apply in cases in which it is excessively difficult to assess the effect of the error. *See, e.g.*, *Vasquez v. Hillery*, 474 U.S. 254, 263 (1986) ("[W]hen a petit jury has been selected upon improper criteria or has been exposed to prejudicial publicity, we have required reversal of the conviction because the effect of the violation cannot be ascertained."); *United States v. Gonzalez-Lopez*, 548 U.S. 140, 149 n.4 (2006) ("[W]e rest our conclusion of structural error upon the difficulty of assessing the effect of the error."). That principle applies fully to cases involving general verdicts premised in part on legally invalid claims. As Judge Jerome Frank stated, "[t]he general verdict is as inscrutable and essentially mysterious as the judgment which issued from the ancient oracle of Delphi." *Skidmore v. Baltimore & Ohio R.R. Co.*, 167 F.2d 54, 60 (2d Cir. 1948). It is impossible to reach reliable conclusions about the jury's justifications underlying these "inscrutable and essentially mysterious" verdicts.

Notwithstanding this Court's unconditional

explication of the general verdict rule, the Courts of Appeals are clearly and deeply divided over whether a civil jury verdict tainted by an invalid claim may nonetheless be upheld on harmless error grounds. Some courts have adhered faithfully to this Court's rule of automatic reversal. But as the Second Circuit put it in the decision below, others "have engrafted a harmless error gloss onto the basic principle." Pet. App. 14a (quotation marks and ellipses omitted).

1. In cases where an invalid theory was submitted to a civil jury and the jury returns a general verdict, the Sixth, Eighth, Eleventh, and D.C. Circuits apply a rule of automatic reversal. For instance, in *Loesel v. City of Frankenmuth*, 692 F.3d 452 (6th Cir. 2012), *cert. denied*, 133 S. Ct. 878 (2013), the Sixth Circuit held that when two cases were submitted to the jury, one of which was factually insufficient, reversal was required. The court held that it had "consistently adhered" to the "longstanding civil general verdict rule." *Id.* at 468 (quotation marks omitted). The Sixth Circuit noted that the Supreme Court had previously directed affirmance in *criminal* cases in which a factually insufficient claim is submitted to the jury, and that "[m]any circuits" had extended that holding to *civil* cases. *Id.* at 467. But the court parted ways with that out-of-circuit authority and held that the defendant was entitled to a new trial. *Id.* at 468. Likewise, in *Friedman & Friedman, Ltd. v. Tim McCandless, Inc.*, 606 F.3d 494 (8th Cir. 2010), the court reversed a jury verdict in which "the verdict form did not differentiate between damages for each of [the plaintiff's] two claims," stating that "[t]he rule in this circuit is clear

that when one of two theories has erroneously been submitted to the jury, a general verdict cannot stand." *Id.* at 502 (internal quotation marks omitted). When an invalid claim is submitted to a civil jury, the Eighth Circuit will uphold the jury verdict only when the verdict form explicitly distinguishes between the valid and invalid claims. *See Ondrisek v. Hoffman*, 698 F.3d 1020, 1026 (8th Cir. 2012) (upholding verdict when one claim was invalid only because jury verdict forms included "separate liability verdicts"), *cert. denied*, 133 S. Ct. 1820 (2013). *Accord Maccabees Mut. Life Ins. Co. v. Morton*, 941 F.2d 1181, 1184 (11th Cir. 1991) (reversing and remanding for new trial where jury returned general verdict form but three legal theories were presented, and holding that "this court must affirm that all three theories were properly submitted to the jury to sustain the court below" (quotation marks omitted)); *N. Am. Graphite Corp. v. Allan*, 184 F.2d 387, 389 (D.C. Cir. 1950) ("[S]ince there was a verdict without specification as to which of the two counts it rested upon plaintiff must be able to show that it was proper to submit both counts to the jury; that is to say, failure to support either would lead to reversal").

2. The remaining eight geographic circuits apply a total of four different, inconsistent harmless error rules. Two circuits require *absolute* certainty that the error was harmless; four circuits require *reasonable* or *sufficient* certainty that the error was harmless; one circuit requires the defendant to show affirmatively that the error was *not* harmless; and the Ninth Circuit applies its own four-factor test that no other circuit has adopted.

a. "*Absolute" certainty.* The Tenth Circuit applies a harmless error rule, but only when it can "say with absolute certainty" that the jury verdict did not rest on the improper grounds. *See, e.g.*, *Anixter v. Home-Stake Prod. Co.*, 77 F.3d 1215, 1229-31 (10th Cir. 1996) (remanding general verdict, finding even "remote" chance that jury was influenced by erroneous legal instruction compels remand under general verdict rule). Even in cases where it is "very unlikely" that the error affected the jury verdict, reversal is required unless there is "absolute certainty." *Farrell v. Klein Tools, Inc.*, 866 F.2d 1294, 1300-01 (10th Cir. 1989). The Third Circuit has similarly limited the application of harmless error review to situations in which the error "could not by any stretch of the imagination change the verdict." *Hurley v. Atl. City Police Dep't*, 174 F.3d 95, 122 (3d Cir. 1999), *abrogated on other grounds by Potente v. Cnty. of Hudson*, 900 A.2d 787, 794 (N.J. 2006).

b. "*Reasonable" or "sufficient" certainty.* In the opinion below, the Second Circuit applied a more lenient harmless error rule than the rule in the Third and Tenth Circuits. It held that it may affirm a judgment when it is "sufficiently confident" and "reasonably sure" that the verdict was not influenced by the invalid claim. Pet. App. 14a. Three other circuits follow this approach. *See Davis v. Rennie*, 264 F.3d 86, 106 (1st Cir. 2001) ("[W]e ask whether we can be reasonably certain that the jury's verdict did not rest on this erroneous basis."); *Tire Eng'g & Distribution, LLC v. Shandong Linglong Rubber Co., Ltd.*, 682 F.3d 292, 314 (4th Cir. 2012) ("An error is

harmless in this context where it is reasonably certain that the jury was not significantly influenced by issues erroneously submitted to it" (internal quotation marks omitted)), *cert. denied*, 133 S. Ct. 846 (2012); *Muth v. Ford Motor Co.*, 461 F.3d 557, 564 (5th Cir. 2006) (same).

c. *Burden on losing party to prove error.* Unlike the aforementioned circuits, which require an affirmative showing of the *absence* of harmful error (with varying degrees of certainty), the Seventh Circuit requires the losing party to show the *presence* of harmful error. *See McGrath v. Zenith Radio Corp.*, 651 F.2d 458, 464 (7th Cir. 1981) (jury verdict upheld unless defendant can "show that under none of the [charged] rationales was plaintiff entitled to the award of . . . damages"). As Judge Kozinski put it, "[t]he Seventh Circuit, for reasons of its own, has adopted a maverick rule precisely the opposite of that repeatedly announced by the Supreme Court. In order to win on appeal in the Seventh Circuit, the defendant must show that none of the plaintiff's theories will support the general verdict. . . . For reasons explained in *Baldwin*, this rule makes no sense at all, never mind that it contravenes Supreme Court authority." *Kern v. Levolor Lorentzen, Inc.*, 899 F.2d 772, 790-91 (9th Cir. 1990) (Kozinski, J., dissenting).

d. *Four-part test.* The Ninth Circuit has created its own, *sui generis* four-part test in which it may "exercise discretion" to uphold a civil jury verdict based on "(1) the potential for confusion of the jury; (2) whether the losing party's defenses apply to the count upon which the verdict is being sustained; (3) the

strength of the evidence supporting the count relied upon to sustain the verdict; and (4) the extent to which the same disputed issues of fact apply to the various legal theories." *See, e.g.*, *Webb v. Sloan*, 330 F.3d 1158, 1166-67 (9th Cir. 2003) (quotation marks omitted).

This circuit conflict has been widely recognized. *See, e.g.*, *Davis*, 264 F.3d at 105 (noting that "[c]iting *Sunkist* and *Sandy Hook Pilots*, some courts have automatically reversed and remanded for a new trial when there is any error in one of multiple claims on which the general verdict may rest. However, other courts have analyzed whether it was harmless error to submit to the jury a theory encompassed in a general verdict form when that theory was tainted by legal error"; and collecting cases from other circuits (internal citation omitted)); *Hurley*, 174 F.3d at 136-37 & n.4 (Cowen, J., dissenting) (noting that "some of our sister circuits, utilizing a harmless error analysis, have affirmed general verdicts that were tainted by defective claims" but that others "have strictly adhered to the general rule announced in *Baldwin*"); *Kern*, 899 F.2d at 790 (Kozinski, J., dissenting) (also noting circuit conflict).

B. The Question Presented Is Recurring And Important, And This Case Is A Good Vehicle To Resolve The Circuit Conflict.

This case is worthy of this Court's plenary review. The issue is recurring: Rare is the legal issue that has been the subject of published opinions by all twelve geographic circuits. The circuits are divided: as explained above, there is a 4-2-4-1-1 split. And the

question is important: Given the multitude of federal statutes granting private rights of action, and the ability of federal courts to exercise supplemental jurisdiction over state-law claims under 28 U.S.C. §1367, plaintiffs almost invariably include multiple causes of action in their complaints. Thus, the issue presented here has the potential to arise in virtually every civil lawsuit filed in the federal courts. Notably, this Court recently granted certiorari to consider the interplay between invalid and (possibly) valid claims at the appellate stage, in a procedural posture that was seemingly much more idiosyncratic. *See* Petition for Writ of Certiorari, *Jennings v. Stephens*, 134 S. Ct. 1539 (2014) (No. 13-7211), 2013 WL 8116856 (presenting question of whether "a federal habeas petitioner who prevailed in the district court on an ineffective assistance of counsel claim must file a separate notice of appeal and motion for a certificate of appealability to raise an allegation of deficient performance that the district court rejected even though the Fifth Circuit acquired jurisdiction over the entire claim as a result of the respondent's appeal"). If that question is cert-worthy, then the question here surely must be cert-worthy as well.

Furthermore, this case is a flawless vehicle. The plaintiff brought only two claims, one under the ATS and the other under the TVPA. The ATS claim is clearly invalid: Judge Pooler went as far as to write a concurring opinion expressing just how weak the ATS claim was under *Kiobel*. Pet. App. 25a-33a. Meanwhile, Petitioner is not challenging the Second Circuit's decision upholding the TVPA claim in this certiorari

petition.[1] Thus, the application of harmless error review is outcome-determinative. In the Sixth, Eighth, Eleventh, and D.C. Circuits, which apply a rule of automatic reversal, Petitioner would have obtained a new trial; but due to the happenstance that Petitioner's trial occurred in the Second Circuit, the $1.75 million judgment against him was affirmed. If the Court grants certiorari, it can resolve that circuit conflict without any risk that some aspect of this case would prevent the Court from reaching the question presented.

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[1] Thus, this petition is distinguishable from recent petitions raising this issue, which were denied. For instance, the Court denied a petition challenging the Fourth Circuit's decision in *Shandong Linglong*, *supra*, at 12. But in that case, the Brief in Opposition argued that the case involved a *special* verdict, and "this special verdict case is not a suitable vehicle for resolving any purported conflict regarding whether and how courts apply the harmless error rule to general verdicts." Brief For Respondent In Opposition at 14, *Shandong Linglong Rubber Co., Ltd. v. Tire Engineering & Distribution, LLC*, 133 S. Ct. 846 (2013) (No. 12-444), 2012 WL 8969035. Similarly, this Court denied a petition challenging the Sixth Circuit's decision in *Frankenmuth*, *supra*, at 9. In that case, however, the Brief in Opposition primarily contended that the case was a poor vehicle because both theories that were submitted to the jury were invalid. See Brief For Respondent In Opposition at 8, *Loesel v. City of Frankenmuth*, 133 S. Ct. 878 (2013) (No. 12-563), 2012 WL 6204242 ("This case does not warrant the Court's review. Above all, it is an exceptionally poor vehicle for addressing the question petitioners present because the only remaining 'factual basis' for the City's liability should never have reached the jury."). Because there is no question that the verdict form did not distinguish between the TVPA and the ATS claim, and because Petitioner is not challenging the TVPA verdict in this Court, there is no possibility that these vehicle problems could arise here.

C. The Second Circuit's Decision is Incorrect.

In addition to being inconsistent with the decisions of four other courts of appeals, the Second Circuit's decision is incorrect. The court should have adhered to the general verdict rule laid down by this Court and reversed the District Court's judgment.

The Second Circuit's decision is explicitly and unapologetically inconsistent with this Court's case law. This Court has squarely held, and repeatedly reiterated, that when an invalid claim is submitted to a civil jury, "the verdict cannot be upheld." *Baldwin*, 112 U.S. at 493; *see also City of Columbia*, 499 U.S. at 384; *Sunkist*, 370 U.S. at 29-30; *Halecki*, 358 U.S. at 619; *Wilmington*, 205 U.S. at 79. The Court has never deviated from this principle or suggested that a harmless error rule should apply. The Second Circuit acknowledged this Court's longstanding rule, and yet it concluded that it was at liberty to "engraft[]" a "gloss" on that case law. Pet. App. 14a. In doing so, it went outside the proper role of an inferior federal court. *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997) ("[I]t is this Court's prerogative alone to overrule one of its precedents."). Moreover, it was particularly inappropriate for the Second Circuit to deviate from the general verdict rule, given that rule's long vintage. *Baldwin* was decided "[o]ver a century ago," and "[s]ince *Baldwin*, the Supreme Court has reaffirmed [the general verdict] rule, without exception, on at least three separate occasions." *Hurley*, 174 F.3d at 136 (Cowen, J., dissenting) (citing *Sunkist*, *Halecki*, and *Wilmington*). The discretion to take the "drastic

action," *id.* at 137, of announcing a new harmless error rule, resides solely in this Court.

Of course, this Court, unlike the Second Circuit, is not rigidly bound by prior Supreme Court decisions. But if the Court were to grant certiorari, *stare decisis* would counsel in favor of adhering to the general verdict rule. As the Court recently explained, *stare decisis* "is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process. Although not an inexorable command, *stare decisis* is a foundation stone of the rule of law, necessary to ensure that legal rules develop in a principle and intelligible fashion." *Mich. v. Bay Mills Indian C'mty*, 134 S. Ct. 2024, 2014 WL 2178337, at *10 (2014) (quotation marks and citations omitted). Thus, "any departure from the doctrine demands special justification." *Id.* (quotation marks omitted). Here, no special justification exists for overruling the general verdict rule, and traditional *stare decisis* considerations support retaining it. First, it is a rule of long vintage that has been reaffirmed by a "long line of precedents." *Id.* Second, it is not "unworkable," *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 139 (2008) (quotation marks omitted); to the contrary, it is clearer and easier to apply than the Second Circuit's harmless error rule. Third, it is a common-law rule of judicial administration, and this Court recently reaffirmed that *stare decisis* applies especially strongly to common-law rules. *Michigan*, 2014 WL 2178337, at *11 & n.12.

Finally, the general verdict rule is not "badly

reasoned," *Payne v. Tennessee*, 501 U.S. 808, 827 (1991); to the contrary, even analyzed *de novo*, it is correct. Appellate courts should not engage in "efforts . . . to divine what a jury may have been thinking when it rendered a general verdict," as such efforts are nothing more than "attempts at judicial telepathy." *Hurley*, 174 F.3d at 138 (Cowen, J., dissenting). Moreover, the danger of harmless-error review is particularly acute in the context of civil trials. Plaintiffs regularly pursue an amalgam of federal claims, state statutory claims, and state common law claims against a variety of different parties. Reconstructing the deliberations of a properly-instructed jury will often be complicated and speculative. Worse, allowing for harmless error review will create an incentive for plaintiffs to lard their complaints with multitudinous claims against multitudinous defendants, as plaintiffs will be able to rely on the harmless error doctrine should one of those claims prove invalid.

Indeed, the facts of this case illustrate the grave difficulty in reconstructing the jury deliberations of a hypothetical, properly-instructed jury. Respondent sued both Petitioner and WBH under the ATS, but sued only Petitioner under the TVPA. Thus, if the District Court had dismissed the ATS claim before trial and instructed the jury only on the TVPA claim, the Court would not have instructed the jury on WBH's liability; only Respondent's claim against Petitioner would have proceeded. Because of the District Court's erroneous conclusion that the ATS claim was viable, however, the jury instructions and jury verdict form incorrectly directed jurors to determine WBH's

liability as well. In response to those incorrect instructions, the jury found both Petitioner and WBH to be liable to Respondent and imposed a single $1.5 million compensatory damages award against both Petitioner and WBH.

As Petitioner argued in his supplemental briefing in the Second Circuit, Pet. App. 50a-51a, it is simply impossible to divine how the erroneous inclusion of WBH in the instructions and on the jury verdict form might have affected the jury's deliberations or its compensatory damages award. Perhaps the jury concluded that the compensatory damages judgment would be divided against the two defendants and increased it correspondingly; perhaps the jury felt more comfortable imposing a high damages award against a corporation than against a natural person; perhaps the jury found that two defendants were worse than one. All that *is* known is that the jury was wrongly instructed, wrongly deliberated about WBH's liability, and wrongly returned a verdict against WBH. What the damages award would have been against Petitioner with a correct verdict form is unknowable.

Significantly, this type of residual doubt is not unique to this case; to the contrary, it will occur in any case in which a general verdict is premised in part on an invalid legal theory. It is unfair to impose massive jury verdicts against defendants based on speculation of how a jury might have reacted to correct jury instructions. The Court should reiterate its century-old, clear, and easily administrable rule that general verdicts premised in part on invalid claims may not be sustained.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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June 11, 2014

APPENDIX

Appendix A

United States Court of Appeals,
Second Circuit.

Nayeem Mehtab CHOWDHURY,
Plaintiff–Appellee,

v.

WORLDTEL BANGLADESH HOLDING, LTD.,
Amjad Hossain Khan, Defendants–Appellants.

No. 09–4483–cv.

Argued: Feb. 15, 2011.

Decided: Feb. 10, 2014.

Before: CABRANES, POOLER and CHIN, Circuit Judges.

JOSÉ A. CABRANES, Circuit Judge:

Defendants in this action, an individual corporate officer and an affiliated company, appeal from a judgment entered against them by the United States District Court for the Eastern District of New York (Brian M. Cogan, *Judge*) following a trial and jury verdict. Defendants were found liable for torture under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, and the Torture Victim Protection Act of 1991 ("TVPA"), 106 Stat. 73, note following 28 U.S.C. § 1350. For the reasons that follow, we reverse the judgment insofar as its rests on the claim brought under the Alien Tort Statute; we affirm the judgment insofar as it rests on the claim under the Torture Victim Protection Act; and we remand the cause to

the District Court for such further proceedings as may be appropriate in the circumstances, including any appropriate adjustment for interest.[1]

I. BACKGROUND

A. Factual Background

Plaintiff-appellee Nayeem Mehtab Chowdhury ("Chowdhury" or "plaintiff"), who is the managing director of WorldTel Bangladesh Ltd. ("WorldTel Ltd") and a stockholder and officer of World Communications Investments Inc. ("WCII"), instituted this suit against his former business associate, defendant-appellant Amjad Hossain Khan ("Khan") and one of Khan's businesses, Worldtel Bangladesh Holding Ltd. ("WBH"). At all times relevant to this appeal, Chowdhury and Khan were citizens of Bangladesh with legal permanent resident ("LPR") status in the United States. Prior to the events giving rise to the current dispute, two of their businesses—WBH and WCII—jointly controlled a third entity, World Bangladesh Ltd. ("WBL"), with both Chowdhury and Khan serving as members on its board of directors. At trial, Chowdhury, who was WBL's managing director, testified that WBL had a 25–year license to provide a full range of telecommunications services in Bangladesh, with projected five-year profits estimated to be "in excess of a hundred million dollars." Joint App'x 87.

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[1] As a general matter, "[i]nterest shall be allowed on any money judgment in a civil case recovered in a district court ... calculated from the date of the entry of the judgment...." 28 U.S.C. § 1961(a).

In 2005, at Chowdhury's initiative, WBL issued new shares and took out additional debt, with the effect of reducing the interest that WBH (controlled by Khan) had in WBL, from fifty percent to less than one percent. Khan claims that Chowdhury employed improper corporate procedures and forged various signatures, including Khan's, in order to effect this change. Khan thereafter filed several official complaints against Chowdhury in Bangladesh, petitioning over 17 agencies and divisions of the Bangladeshi government for an official investigation of Chowdhury's actions.

Khan first complained to the Chief Metropolitan Magistrate in Bangladesh and to the Criminal Investigative Department of the Ministry of Home Affairs, each of which declined to pursue Khan's complaint after an independent investigation.[2] Khan next sought redress in 2007 with the Directorate General of Forces Intelligence ("DGFI"), an intelligence agency connected to the military. Following this complaint, in the summer of 2007, Chowdhury was summoned before the DGFI—with Khan present—and detained for 53 days, without charges and without access to anyone outside his room of confinement. Chowdhury testified at trial that he was released without any violence against his person during this period of detention by the DGFI.

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[2] Khan testified that he personally met with Bangladesh's Secretary of Home Affairs and complained to anybody he could think of in the government about Chowdhury's conduct.

However, Chowdhury also testified that on November 5, 2007, the Rapid Action Battalion ("RAB"), a paramilitary unit of the Bangladesh National Police to which Khan had also complained, arrested Chowdhury and held him, without any charges, until November 12, 2007. At trial, Chowdhury stated that during this second period of confinement, from November 5 to 12, 2007, the RAB tortured him, at Khan's direction, in order to force him to turn over his business interests in Bangladesh to Khan. Chowdhury further stated that, during his confinement by the RAB, he was blindfolded and handcuffed before electric shocks were applied to his thigh and arms through the use of an unidentified prodding device. Chowdhury testified that he was then lifted off his feet and suspended from the prison door by his handcuffs. He also stated in trial testimony that his interrogators told him they were acting at the behest of "Bahdi[, which is] a Bangla word for [Khan]." Joint App'x 137.

Chowdhury testified that he was subsequently transferred out of the RAB's custody and into the custody of the Dhaka Central Jail for medical treatment stemming from injuries sustained during the RAB's interrogation. Chowdhury also testified that, after the medical treatment, he was held for a further five months in jail before being released without any lasting medical symptoms aside from continuing nightmares.

Chowdhury's parents testified that they, and other family members, met with Khan during Chowdhury's detention by the RAB. The circumstances of that

meeting were disputed at trial. Chowdhury's parents stated that Khan asked to see them and told them, upon meeting, that: (1) Chowdhury had been subjected to electric shock interrogation; (2) Khan was present for the interrogation; and (3) Khan could make the interrogations stop if Chowdhury agreed to transfer his business interests to Khan and leave Bangladesh entirely. Chowdhury's parents testified that they refused to agree to these alleged demands. In contrast, Khan testified that Chowdhury's parents requested the meeting and subsequently asked him to withdraw the charges he had filed with Bangladesh authorities against Chowdhury—which he refused to do. Khan also flatly denied seeing Chowdhury during his detention, having any influence over his treatment in detention, or offering to release Chowdhury if he agreed to transfer his business interests to Khan. There is no dispute that Chowdhury refused to transfer his interest in WBL and remains its managing director.

B. Procedural History

On April 22, 2008, Chowdhury, WorldTel Ltd, and WCII (jointly, "plaintiffs") filed a complaint against Khan and WBH (jointly, "defendants"), alleging that Khan subjected Chowdhury to torture. On this basis, plaintiffs brought claims under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, and the Torture Victim Protection Act of 1991 ("TVPA"), 106 Stat. 73, note following 28 U.S.C. § 1350, seeking monetary damages, punitive damages, and injunctive relief. In pressing these claims, plaintiffs alleged that defendants directly committed violations cognizable

under the two statutes, as well as aided and abetted Bangladesh authorities in violations of the same. Defendants moved, pursuant to Federal Rule of Civil Procedure 12(b)(6), to dismiss the complaint in its entirety for failure to state a claim upon which relief can be granted. Upon review, the District Court dismissed with prejudice: (1) all claims by the plaintiff corporations; (2) Chowdhury's aiding and abetting claims under both the ATS and TVPA; and (3) Chowdhury's TVPA claim against WBH. *Chowdhury v. WorldTel Bangladesh Holding, Ltd.*, 588 F.Supp.2d 375, 388 (E.D.N.Y. 2008). The District Court dismissed Chowdhury's remaining claims—those alleging that his interrogation by the RAB constituted direct violations by Khan of both certain customary international law norms (actionable in federal court under the ATS) and of the TVPA—and granted Chowdhury leave to replead. *Id.*

On January 5, 2009, Chowdhury, as the sole plaintiff, filed an amended complaint alleging only that the defendants directly[3] engaged in conduct prohibited, or otherwise made actionable, by the ATS and TVPA. Specifically, Chowdhury alleged that Khan caused the RAB to torture him through "electrical shocks and painful shackled standing" and offered to prevent future torture in exchange for control over WBL.

The parties then conducted discovery, which concluded on May 5, 2009. The case proceeded to trial

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[3] Chowdhury did not re-file two claims alleging that defendants had aided and abetted violations under the TVPA and ATS.

on August 3, 2009. The jury, on August 4, 2009, returned a general verdict form in favor of Chowdhury in which it concluded that Khan and WBH were liable for torture. It found Khan and WBH liable for $1.5 million in compensatory damages and Khan alone liable for $250,000 in punitive damages. The jury further determined that WBH should not be held liable for punitive damages.

Following the jury's verdict, defendants brought a motion pursuant to Federal Rules of Civil Procedure 50(b) and 59(a) seeking judgment as a matter of law, or in the alternative, a new trial. The District Court denied the motion, concluding that the evidence at trial "was not only legally sufficient to present the case to the jury, but one sided in plaintiff's favor." *Chowdhury v. Worldtel Bangladesh Holding, Ltd.*, No. 08 Civ. 1659(BMC), 2009 WL 9053203, at *1 (E.D.N.Y. Sept. 16, 2009). The District Court also noted that the jury could have reasonably determined from testimony not only that Khan had knowledge that Chowdhury was being tortured, but also that the RAB was acting "at the behest of [Khan]" and that Khan attended the torture.[4] *Id.* Overall, the District Court concluded that under a theory of agency or conspiracy, "[t]he facts set forth … were more than sufficient to permit the jury to infer that defendant

[4]The District Court noted, for instance, that evidence of an email sent from Khan to one of Chowdhury's associates, after the latter's arrest by the RAB, was "particular[ly] damning," and that Khan's explanation of the message while testifying before the jury "was somewhat shocking." *Chowdhury*, 2009 WL 9053203, at *1.

had a deal with the torturers to extract business concessions from [Chowdhury] by doing what they do best." *Id.*

In considering the motion, the District Court also rejected multiple evidentiary challenges by defendants. As relevant here, defendants contended that Chowdhury should not have been allowed to testify regarding statements by RAB agents that they were torturing him at Khan's direction. *Id.* at *2. In dismissing this challenge, the District Court concluded that the statement was properly admitted as the statement of an agent or co-conspirator because "the jury could reasonably infer that the reason the RAB let [Chowdhury] know why they were torturing him was to induce surrender which would further the aims of the agency and conspiracy." *Id.*

The District Court entered judgment in favor of Chowdhury on August 6, 2009, and denied defendants' motion for judgment as a matter of law on September 16 , 2009.

This appeal followed. After oral argument on February 15, 2011, our resolution of the appeal was held in abeyance pending the Supreme Court's review of another ATS case from this Circuit, *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010). On October 17, 2011, the Supreme Court granted the petition for a writ of certiorari in *Kiobel* to consider whether the law of nations recognizes corporate liability. *See Kiobel v. Royal Dutch Petroleum Co.*, ____ U.S. ____, 133 S.Ct. 1659, 1663, 185 L.Ed.2d 671 (2013) ("*Kiobel*"). Following oral argument

on February 28, 2012, the Supreme Court, on March 5, 2012, restored the case to its calendar for reargument on the additional question of "[w]hether and under what circumstances the [ATS] allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States." *Kiobel v. Royal Dutch Petroleum*,____U.S. ____, 132 S.Ct. 1738, 182 L.Ed.2d 270 (2012) (order directing supplemental briefing and reargument). Reargument was held on October 1, 2012, and on April 17, 2013, the Supreme Court affirmed the judgment of the Court of Appeals, but on different grounds, holding that "the presumption against extraterritoriality applies to claims under the ATS," and that "relief [under the ATS] for violations of the law of nations occurring outside the United States is barred." 133 S.Ct. at 1669. The *Kiobel* action having concluded, we directed the parties in the instant appeal to submit supplemental briefing on the impact, if any, of the Supreme Court's decision in *Kiobel*. We now address their arguments.

II. DISCUSSION

On appeal, defendants raise four principal arguments: (1) Chowdhury's ATS claims against both Khan and WBH must be dismissed under the Supreme Court's holding in *Kiobel* due to their extraterritorial nature; (2) under the general verdict rule, Chowdhury's TVPA claim against Khan must also be dismissed; (3) Chowdhury's TVPA claim ought to be dismissed because the underlying conduct was extraterritorial and did not constitute actionable torture, and because the claim was predicated on

improper agency theories of liability; and (4) Chowdhury's testimony regarding the RAB's statements constituted hearsay under Federal Rule of Evidence 801 and was improperly admitted because it was unfairly prejudicial. We consider these arguments in turn.

A. Standards of Review

We review *de novo* a denial of a motion for judgment as a matter of law. *See Highland Capital Mgmt. LP v. Schneider*, 607 F.3d 322, 326 (2d Cir. 2010). "In undertaking this review, we view the evidence in the light most favorable to the party against which the motion was made ... [and] draw[ ] all reasonable inferences regarding the weight of the evidence and the credibility of witnesses in favor of the non-movant...." *Id.* (citations and internal quotation marks omitted). We review a district court's denial of a Rule 59 motion for a new trial for abuse of discretion. *See United States v. Rigas*, 583 F.3d 108, 125 (2d Cir. 2009); *see also In re Sims*, 534 F.3d 117, 132 (2d Cir. 2008) (explaining that the term of art "abuse of discretion" includes errors of law, clearly erroneous assessments of the evidence, or decisions "that cannot be located within the range of permissible decisions" (internal quotation marks omitted)). We explain the relevant standard of review regarding Khan's challenge to the admission of out-of-court statements in our discussion of that issue.

B. ATS Claims

Defendants first argue that the judgment entered against them pursuant to the ATS must be reversed in light of the Supreme Court's recent ruling in *Kiobel*. The unique history and purpose of the ATS has been described at length by the Supreme Court, by the lower courts, and by scholars, and need not be reiterated here.[5] The ATS provides "original jurisdiction" in the federal district courts over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. In *Sosa v. Alvarez–Machain*, 542 U.S. 692, 712, 124 S.Ct. 2739, 159 L.Ed.2d 718 (2004) ("*Sosa*"), the Supreme Court recognized that "the ATS is a jurisdictional statute creating no new causes of action," but that it indicates Congressional intent that "the common law would provide a cause of action for [a] modest number of international law violations" based on a "norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th–century paradigms" familiar to

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[5] *See, e.g.*, *Kiobel*, 133 S.Ct. at 1663; *Sosa v. Alvarez–Machain*, 542 U.S. 692, 712, 124 S.Ct. 2739, 159 L.Ed.2d 718 (2004); *Kiobel*, 621 F.3d at 115; *Filartiga v. Pena–Irala*, 630 F.2d 876, 887 (2d Cir. 1980); *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975) (Friendly, J.) ("This old but little used section is a kind of legal Lohengrin ... no one seems to know whence it came."), *abrogated on other grounds by Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 130 S.Ct. 2869, 177 L.Ed.2d 535 (2010); Anthony J. Bellia Jr. & Bradford R. Clark, *The Alien Tort Statute and the Law of Nations*, 78 U. CHI. REVV. 445 (2011); Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA J. INT'LL. 587 (2002).

those who enacted the statute. *Sosa*, 542 U.S. at 724–25, 124 S.Ct. 2739; *see also id.* at 731 n.19, 124 S.Ct. 2739 (explaining that the ATS, although a grant of jurisdiction, "carries with it an opportunity to develop common law").

While this appeal was pending, the Supreme Court in *Kiobel* further clarified the scope of the ATS by holding that "the presumption against extraterritoriality applies to claims under the ATS," and concluding that "relief [under the ATS] for violations of the law of nations occurring outside the United States is barred." 133 S.Ct. at 1669 (citing *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 130 S.Ct. 2869, 2883, 177 L.Ed.2d 535 (2010)). Writing for the Court, the Chief Justice further noted that "all the relevant conduct [in *Kiobel*] took place outside the United States," and therefore the plaintiffs' "case seeking relief for violations of the law of nations occurring outside the United States is barred." *Id.*

Applying the holding of *Kiobel* to the facts of this case, we conclude that, pursuant to the rule enunciated by the Supreme Court, there is no legally sufficient basis to support the jury's verdict with respect to plaintiff's claim under the ATS. As described in Part I, *ante*, "all the relevant conduct" set forth in plaintiff's complaint occurred in Bangladesh, *Kiobel*, 133 S.Ct. at 1669, and therefore plaintiff's claim brought under the ATS is "barred,"[6]

[6] Plaintiff's claims under the ATS against WBH encounter a second obstacle as well: the Supreme Court's decision in *Kiobel* did not disturb the precedent of this Circuit, *see Kiobel*, 621

id; see also Balintulo v. Daimler AG, 727 F.3d 174, 189–90 (2d Cir. 2013) ("[C]laims under the ATS cannot be brought for violations of the law of nations occurring within the territory of a sovereign other than the United States.... [I]f all the relevant conduct occurred abroad, that is simply the end of the matter under *Kiobel*."). Accordingly, the judgment must be reversed insofar as it rests on plaintiff's claims under the ATS.

C. TVPA Claim

1. General Verdict Rule

Second, defendants argue that it is impossible to know whether the jury found in favor of plaintiff on the basis of an ATS or TVPA theory of liability. As a consequence, defendants contend, if the ATS claim must be vacated then the judgment must be vacated in its entirety and the cause remanded for a new trial.

F.3d at 145, *aff'd on other grounds by* 133 S.Ct. at 1669, that corporate liability is not presently recognized under customary international law and thus is not currently actionable under the ATS. *See Baraket v. Holder*, 632 F.3d 56, 59 (2d Cir. 2011) ("'A decision of a panel of this Court is binding unless and until it is overruled by the Court *en banc* or by the Supreme Court.'") (quoting *S & R Co. of Kingston v. Latona Trucking, Inc.*, 159 F.3d 80, 83 (2d Cir. 1998)). We also note that Chowdhury's amended complaint did not state a TVPA claim against WBH. *See Mohamad v. Palestinian Authority*,____ U.S. ____, 132 S.Ct. 1702, 1710, 182 L.Ed.2d 720 (2012) (holding that "Congress did not extend liability to organizations" under the TVPA).

The Supreme Court decades ago announced the so-called general verdict rule, that "a new trial will be required" where "there is no way to know that [an] invalid claim.... was not the sole basis for [a] verdict." *United N.Y. & N.J. Sandy Hook Pilots Ass'n v. Halecki*, 358 U.S. 613, 619, 79 S.Ct. 517, 3 L.Ed.2d 541 (1959); *see also Sunkist Growers, Inc. v. Winckler & Smith Citrus Prods. Co.*, 370 U.S. 19, 30, 82 S.Ct. 1130, 8 L.Ed.2d 305 (1962); *Tire Eng'g & Distribution, LLC v. Shandong Linglong Rubber Co.*, 682 F.3d 292, 313 (4th Cir. 2012) ("The Supreme Court has recognized that when a jury issues a general verdict on multiple theories of liability and one of those theories is overturned on appeal, the entire verdict falls.").

Numerous subsequent courts, however, "have engrafted a ... harmless error gloss onto the basic principle." *Muth v. Ford Motor Co.*, 461 F.3d 557, 564 (5th Cir. 2006). So it is that we have recognized, in this context, that "[h]armless error arises when we are sufficiently confident that the verdict was not influenced by an error in the jury charge." *Bruneau v. S. Kortright Cent. Sch. Dist.*, 163 F.3d 749, 759–760 (2d Cir. 1998), *abrogated on other grounds by Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 129 S.Ct. 788, 172 L.Ed.2d 582 (2009); *see also Tire Eng'g & Distribution*, 682 F.3d at 314; *Gillespie v. Sears, Roebuck & Co.*, 386 F.3d 21, 30 (1st Cir. 2004) ("[W]e have generously applied the harmless error concept to rescue verdicts where we could be *reasonably sure* that the jury in fact relied upon a theory with adequate evidentiary support.").

Applying a harmless error analysis to the facts of the instant case, we have no difficulty in concluding, as we discuss below, that there was indeed adequate evidentiary support for a jury to find the defendants liable for torture under the TVPA. Under the straightforward circumstances of this case, plaintiff's claim brought under the ATS and his claim under the TVPA both stemmed from the same alleged acts of torture, and Khan can point to no circumstances in which the jury could have found him liable under the ATS but not the TVPA.

2. Other Challenges to the TVPA Claim: Extraterritoriality, Torture, and Agency

a. Extraterritoriality

Defendant Khan also raises other challenges to the validity of judgment entered against him under plaintiff's TVPA claim. All of his arguments lack merit.

First, Khan asserts that the conduct underlying the TVPA claim here "do[es] not 'touch and concern' the United States," Appellant's Supp. Letter Br. 4 (quoting *Kiobel*, 133 S.Ct. at 1669), and we must therefore exercise a "'vigilant door keeping' function," *id.* (quoting *Sosa*, 542 U.S. at 732–33, 124 S.Ct. 2739), to bar it. We find no support in *Kiobel* or any other authority for the proposition that the territorial constraints on common-law causes of action under the ATS apply to the statutory cause of action created by the TVPA. Rather, we must conduct a separate statutory analysis with respect to the TVPA to determine whether that statute—not the ATS—

"'gives ... clear indication of an extraterritorial application.'" *Kiobel*, 133 S.Ct. at 1664 (quoting *Morrison*, 130 S.Ct. at 2878). Under this separate analysis, we conclude that the TVPA, unlike the ATS, has extraterritorial application.

Our analysis begins with the text of the statute. Congress created civil liability in the TVPA, *inter alia*, for torture and extrajudicial killing carried out by an individual with "actual or apparent authority, or color of law, of *any foreign nation.*" TVPA § 2(a) (emphasis supplied). Although this language could conceivably refer to conduct occurring within the United States, the provision is more naturally understood to address primarily conduct occurring in the territory of foreign sovereigns.[7] The legislative history of the TVPA unambiguously supports that conclusion. *See* S. Rep. No. 102–249, p. 3–4 (1991) ("A state that practices torture and summary execution is not one that adheres to the rule of law. Consequently, the Torture Victim Protection Act (TVPA) is designed to respond to this situation by providing a civil cause of action in U.S. courts for torture committed abroad."); H.R. Rep. No. 102–367, pt. 1, p. 4 (1991), 1992 U.S.C.C.A.N. 84 (noting Judge Bork's skepticism in *Tel–Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984), as to

[7] Justice Kennedy—one of the five Justices who joined the *Kiobel* majority opinion—explicitly endorsed the extraterritorial reach of the TVPA in his concurring opinion in *Kiobel*, noting that the TVPA addresses "human rights abuses *committed abroad.*" *Kiobel*, 133 S.Ct. at 1669 (Kennedy, J., concurring) (emphasis added).

whether "victims of torture committed in foreign nations" could bring a cause of action under the ATS absent an explicit grant of a cause of action and stating that the "TVPA would provide such a grant"). Thus, we find no bar on the basis of extraterritoriality to Chowdhury's TVPA claim.[8]

b. Torture

Second, Khan argues that the facts presented do not constitute torture under the TVPA, because not all police brutality is actionable under the statute. It is clearly true, of course, that not all conduct falling under the journalistic and political rubric of "police brutality," whether here or abroad, can be described as "torture," but a review of the particular facts of this case persuades us that the jury could have properly found the conduct presented to constitute torture under the TVPA. The TVPA defines torture as

> any act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering (other than pain or

[8] Although the parties do not raise the issue, we note that our affirmance of plaintiff's TVPA claim here necessarily recognizes that aliens—not just American citizens—may bring suit under the TVPA, a conclusion that we have relied upon, but not made explicit, in prior decisions. *See Arar v. Ashcroft*, 532 F.3d 157, 176 n.13 (2d Cir. 2008) (observing "that past holdings of our Court, as well as those of our sister courts of appeals, strongly suggest that TVPA actions may in fact be brought by non-U.S. citizens," and collecting authorities), *vacated and superseded, on other grounds, on rehearing en banc*, 585 F.3d 559, 568 (2d Cir. 2009).

> suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind.

TVPA § 3(b)(1). While "torture [under this definition] does not automatically result whenever individuals in official custody are subjected even to direct physical assault," *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 93 (D.C. Cir. 2002), we conclude that the term "torture" can apply to powerful electric shocks administered to the body, when the fact-finder determines that the shocks are sufficiently severe. This conclusion is bolstered by the numerous courts of appeals that have referred to electric shocks as an instrument of torture. *See, e.g.*, *Jean-Pierre v. U.S. Attorney General*, 500 F.3d 1315, 1324 n. 6 (11th Cir. 2007) (noting that electric shock can constitute torture within the meaning of the 1984 United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"), Dec. 10, 1984, S. Treaty Doc. No. 100–20, 1465 U.N.T.S. 85, the multilateral international convention upon which the TVPA was based); *see also Cherichel v. Holder*, 591 F.3d 1002, 1009, n.11 (8th Cir. 2010) (electric shock may rise to

the level of torture); *Abdel-Rahman v. Gonzales*, 493 F.3d 444, 448 (4th Cir. 2007) (same); *Lhanzom v. Gonzales*, 430 F.3d 833, 848 (7th Cir. 2005) (same); *United States v. Webster*, 392 F.3d 787, 794 (5th Cir. 2004) (same); *Price*, 294 F.3d at 92–93; *Zubeda v. Ashcroft*, 333 F.3d 463, 472 (3d Cir. 2003) (same).

Additionally, the TVPA contemplates the "purposes" for which torture might be undertaken by the perpetrator, and specifically lists "intimidating or coercing" the victim among them. TVPA § 3(b)(1). Here, defendants subjected Chowdhury to electric shocks for the distinct purpose of coercing him to relinquish his business interests to Khan.

In this case, moreover, the District Court took particular care to instruct the jury on the definition of torture in a manner consistent with the one provided by the TVPA, stating that "[t]he severity requirement is crucial in determining whether conduct is torture" and that "an act must be a deliberate and calculated act of an extremely cruel and inhuman nature specifically intended to inflict excruciating and agonizing physical or mental pain or suffering" in order to constitute torture.[9] Joint App'x 213. Accordingly, we find that plaintiff's allegations of being subject to electric shock while detained by the RAB were properly actionable as torture under the TVPA.

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[9] Indeed, the District Court further instructed the jury, properly, that not all physical assaults, instances of police brutality, or excessive force rise to the level of torture.

c. Agency

Third, Khan claims that the jury's verdict was predicated on improper agency theories of liability, arguing that any brutality by RAB agents was not attributable to him. We disagree. The weight of authority makes clear that agency theories of liability are available in the context of a TVPA claim.

For a claim of torture to be actionable under the TVPA, a plaintiff must demonstrate, *inter alia*, that a defendant acted "under actual or apparent authority, or color of law, of any foreign nation." TVPA § 2(a). To determine whether a defendant acted under color of foreign law, we look to "principles of agency law and to jurisprudence under 42 U.S.C. § 1983." *Kadic v. Karadzic*, 70 F.3d 232, 245 (2d Cir. 1995). Under those principles, "[f]or purposes of the TVPA, an individual acts under color of law ... when he acts together with state officials or with significant state aid." *Khulumani v. Barclay Nat. Bank Ltd.*, 504 F.3d 254, 260 (2d Cir. 2007) (per curiam) (internal quotation marks omitted), *aff'd for want of a quorum sub nom. Am. Isuzu Motors, Inc. v. Ntsebeza*, 553 U.S. 1028, 128 S.Ct. 2424, 171 L.Ed.2d 225 (2008); *Kadic*, 70 F.3d at 245 (same); *cf. Arar*, 585 F.3d at 567–568 ("[T]o state a claim under the TVPA, [plaintiff] must adequately allege that the defendants possessed power under [foreign] law, and that the offending actions ... derived from an exercise of that power, or that defendants could not have undertaken their culpable actions absent such power."). Khan, who was found to have conspired with state

authorities in Bangladesh, thus clearly acted under color of law within the meaning of the TVPA.

Agency law, however, does not simply apply to the question whether a defendant acts under color of law; it also can provide a theory of tort liability if a defendant did not personally torture the victim. As the Supreme Court recently explained in *Mohamad v. Palestinian Authority*, ____ U.S. ____, 132 S.Ct. 1702, 182 L.Ed.2d 720 (2012), "Congress is understood to legislate against a background of common-law adjudicatory principles," *id.* at 1709 (quotation marks omitted), and therefore "the TVPA contemplates liability against officers who do not personally execute the torture or extrajudicial killing," *id.* (citing *Chavez v. Carranza*, 559 F.3d 486 (6th Cir. 2009)).

Congress has not, in other words, "specified" any "intent" that traditional agency principles should not apply under the TVPA. *Meyer v. Holley*, 537 U.S. 280, 287, 123 S.Ct. 824, 154 L.Ed.2d 753 (2003); *see also* S. Rep. No. 102–249, at 9 (1991) (noting that "responsibility for torture ... extends beyond the person or persons who actually committed those acts"); *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1248 (11th Cir. 2005) (holding that "the [TVPA] reaches those who ordered, abetted, or assisted in the wrongful act"). Accordingly, an individual can be liable for "subject[ing]" the victim to torture even if his agent administers the torture,[10]

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[10] The District Court dismissed the aiding-and-abetting claim against Khan, and therefore we need not address whether the

see TVPA § 2(a)(1), and the District Court did not err in permitting agency theories of liability to be submitted to the jury.[11]

TVPA recognizes that theory of liability—an "ancient criminal law doctrine" that is generally presumed not to apply in civil suits. *See Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 181–82, 114 S.Ct. 1439, 128 L.Ed.2d 119 (1994); *In re Terrorist Attacks on Sept. 11, 2001*, 714 F.3d 118, 123 (2d Cir. 2013).

[11] Khan raises a number of claims regarding the specific agency theories upon which the District Court instructed the jury, all of which lack merit. First, Khan claims that "there was no evidence of an agreement" between him and members of the RAB. Appellants' Br. 15. Having conducted a review of the record, we identify no support for this argument, and therefore reject it. Second, Khan argues that a ratification theory of agency can be used "only with respect to a parent corporation's liability for a subsidiary's acts." Appellants' Br. 18. We perceive no basis in tort law or agency law for Khan's argument, *see, e.g.*, Restatement (Third) of Agency § (outlining the bases for liability on a ratification theory of agency), and further determine that the ratification theory of agency was amply supported by the record evidence in this case. Finally, Khan raises a perplexing claim that the District Court's instruction on willful participation liability was "essentially the same as [an instruction] on aiding and abetting," and since the District Court had already dismissed the aiding and abetting claims, it should not have instructed the jury on willful participation. Appellants' Br. 21. Whether someone is a "willful participant in joint action with the State or its agents," however, is the standard for determining whether a private actor acts under color of law, *see Dennis v. Sparks*, 449 U.S. 24, 27, 101 S.Ct. 183, 66 L.Ed.2d 185 (1980), and is plainly not, as Khan asserts, merely an alternative instruction on an aiding-and-abetting theory. Accordingly, we conclude that Khan's

D. Admission of Out–of–Court Statements

Finally, Khan argues that the District Court erred in allowing Chowdhury to testify about statements made by RAB agents while he was in their custody. The District Court admitted these statements as statements of an agent or coconspirator pursuant to Federal Rule of Evidence 801(d)(2).[12] We review a district court's evidentiary rulings for "abuse of discretion." *United States v. Al Kassar*, 660 F.3d 108, 123 (2d Cir. 2011); *In re Sims*, 534 F.3d 117, 132 (2d Cir. 2008). Whether certain evidence is hearsay is generally a question of law that is reviewed *de novo*, *see United States v. Ferguson*, 676 F.3d 260, 285 (2d Cir. 2011), but the admission of evidence under Rule 801(d)(2) is generally based on a

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claims regarding the agency theories upon which the District Court instructed the jury all lack merit.

[12] Rule 801(d)(2) provides that a statement is not hearsay if it is offered against "an opposing party" and it:

> (A) was made by the party in an individual or representative capacity;
>
> (B) is one the party manifested that it adopted or believed to be true;
>
> (C) was made by a person whom the party authorized to make a statement on the subject;
>
> (D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or
>
> (E) was made by the party's coconspirator during and in furtherance of the conspiracy.
>
> Fed. R. Evid. 801(d)(2).

district court's assessment of whether the evidence is sufficient to trigger one of the Rule's five exceptions, and therefore we generally review for "clear error" a district court's decision, pursuant to Rule 801(d)(2), to admit evidence that would otherwise constitute hearsay, *see id.* at 285 & 285 n.27; *United States v. Coppola*, 671 F.3d 220, 246 (2d Cir. 2012). Having reviewed the record in light of this standard, we find no error, much less clear error, in the District Court's admission of the testimony. Accordingly, we reject defendants' evidentiary challenge substantially for the reasons set forth in the District Court's ruling of August 4, 2009, and in our prior discussion of the sufficiency of the evidence with respect to agency liability, *see* Part II(C)(ii)(c), *ante*.

CONCLUSION

We have reviewed all of Khan's arguments on appeal and summarize our holdings as follows:

(1) The conduct giving rise to this action occurred within the territory of another sovereign and, therefore, pursuant to the Supreme Court's recent decision in *Kiobel v. Royal Dutch Petroleum Co.*, ____ U.S. ____, 133 S.Ct. 1659, 185 L.Ed.2d 671 (2013), cannot form the basis for an action brought under the Alien Tort Statute, 28 U.S.C. § 1350.

(2) The general verdict rule does not require that the judgment against defendant be vacated with respect to plaintiff's claim under the Torture Victim Protection Act, 106 Stat. 73, note following 28 U.S.C. § 1350, because,

on the facts of this case, the jury necessarily found defendant Khan liable under that statute in returning a general verdict in favor of plaintiff.

(3) Plaintiff's claim under the Torture Victim Protection Act was based on actionable torture, and permissibly predicated on agency theories of liability.

(4) The District Court did not err in allowing plaintiff to testify at trial regarding certain statements made to him by foreign police agents, who were agents or coconspirators of the defendant.

For the reasons stated above, we **REVERSE** the judgment of the District Court insofar as its rests on claims brought under the Alien Tort Statute, and we **AFFIRM** the judgment insofar as it rests on a claim brought under the Torture Victim Protection Act. We **REMAND** the cause to the District Court for such further proceedings as may be appropriate in the circumstances, including any appropriate adjustment for interest.

ROSEMARY S. POOLER, Circuit Judge, concurring:

I am pleased to concur in the concise and thorough opinion of this Court. I write separately for the sole purpose of emphasizing the narrowness of this Court's disposition with respect to the implications of *Kiobel v. Royal Dutch Petroleum Co.*, ____ U.S. ____, 133 S.Ct. 1659, 185 L.Ed.2d 671 (2013), for claims brought under the Alien Tort Statute, 28 U.S.C. § 1350 (the "ATS"). This narrowness is tied to

considerations regarding which claims do not "touch and concern the territory of the United States," *Kiobel*, 133 S.Ct. at 1669, and conclusions which are driven by the facts and arguments made in the case before us on appeal.

I. KIOBEL

As our opinion describes, we have held in abeyance decision on this appeal since the case was argued on February 15, 2011. **Maj. Op. at [47–48].** Our resolution of this appeal was held in abeyance pending the resolution of the question of "whether the law of nations recognizes corporate liability." **Maj Op. at [48]** (citing *Kiobel*, 133 S.Ct. at 1663).[1] After oral argument on these questions, the Supreme Court ordered reargument on a third question: "'[w]hether and under what circumstances the [ATS] allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States.'" **Maj Op. at [48]** (quoting *Kiobel v. Royal Dutch Petroleum Co.*, ____ U.S. ____, 132 S.Ct. 1738, 182 L.Ed.2d 270 (2012)).

The Supreme Court did not explicitly answer the questions posed in the first petition for certiorari which caused us to hold resolution of this appeal in

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[1] The petition for certiorari that was granted also included the question of whether corporate liability under the ATS was a question of subject matter jurisdiction, or a merits issue. *See* Brief for Petitioner at *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013) (No. 10–1491), 2011 WL 2326721 at *i.

abeyance.[2] Rather, it affirmed the decision of this Court by requiring reargument on, and then answering, the third question above, a question the Supreme Court put before the parties of its own accord. In affirming, the Supreme Court reasoned that, as a matter of statutory interpretation, the "principles underlying the presumption against extraterritoriality ... constrain courts exercising their power under the ATS." *Kiobel*, 133 S.Ct. at 1665. But as to the question of "whether" the ATS allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States, the answer was an unequivocal "Yes." Concluding as much is required by the manner in which the Supreme Court answered the question of the "circumstances" under which courts might recognize such a cause of action, reasoning as follows: "[W]here the claims [under the ATS] touch and concern the territory of the United States, they must do so with sufficient force to

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[2] At least one sister circuit has determined that, by not passing on the question of corporate liability and by making reference to "mere corporate presence" in its opinion, the Supreme Court established definitively the possibility of corporate liability under the ATS. *Doe I v. Nestle USA, Inc.*, 738 F.3d 1048, 1049 (9th Cir. 2013) (citing *Kiobel*, 133 S.Ct. at 1669). The relevance of the Supreme Court's reference to corporate presence for the disposition of this case need not be explored here, because as the majority opinion notes, and as I agree, "all of the relevant conduct" took place in Bangladesh. **Maj. Op. at [49].** As such, the assertion that *Kiobel* "did not disturb the precedent of this Circuit" with respect to corporate liability, **Maj. Op. at [49 n. 6],** is not pertinent to our decision, and thus is dicta.

displace the presumption against extraterritorial application." *Kiobel*, 133 S.Ct. at 1669.[3] Reasoning that "[o]n [the] facts [in *Kiobel*], all the relevant conduct took place outside the United States," and further reasoning "that mere corporate presence [of a defendant]" would also not "suffice[ ]" to displace the presumption against extraterritorial application of a United States statute, specifically the ATS, the Supreme Court affirmed our dismissal of plaintiffs' claims in *Kiobel*.

The affirmance was unanimous, although it drew three concurrences. Justice Alito, joined by Justice Thomas, concurred "in the judgment and join[ed] the opinion of the Court as far as it goes." *Id.* at 1669

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[3] I note that some of the district courts to have considered the issue have apparently split on the import of this language. *Compare*, *e.g.*, *Sexual Minorities Uganda v. Lively*, 960 F.Supp.2d 304, 324, 2013 WL 4130756, at *15 (D. Mass. Aug. 14, 2013) ("Given that Defendant is a United States citizen living in this country and that the claims against him 'touch and concern the territory of the United States ... with sufficient force to displace the presumption against extraterritoriality,' a cause of action is appropriate under the ATS." (quoting *Kiobel*, 133 S.Ct. at 1669)), *with Al Shimari v. CACI Intern., Inc.*, 951 F.Supp.2d 857, 867 (E.D. Va. 2013) (noting that "Plaintiffs' reading of *Kiobel* [supporting extraterritorial application of the ATS in some circumstances] is a fair one," because *Kiobel*'s "'touch and concern' language is textually curious, and may be interpreted by some as leaving the proverbial door ajar," but nonetheless dismissing plaintiffs' claims). At this writing, one of our sister circuits has seen fit to vacate its prior rule on the question of extraterritoriality and remand to the district court for further consideration of the issue. *Doe v. Exxon Mobil Corp.*, 527 F. App'x 7 (D.C. Cir. 2013).

(Alito, J., concurring). Specifically, Justice Alito noted that the question of whether claims "touch and concern the territory of the United States" was a "formulation [that] obviously leaves much unanswered." *Id.* Justice Alito would have gone farther, however, and concluded that "a putative ATS cause of action will fall within the scope of the presumption against extraterritoriality ... unless the domestic conduct is sufficient to violate an international law norm that satisfies Sosa's requirements of definiteness and acceptance among civilized nations." *Id.* at 1670. Justice Alito characterized this as a "broader standard." *Id.*

Justice Breyer, joined by Justices Ginsburg, Sotomayor, and Kagan, concurred in the judgment only. Justice Breyer would have reached the disposition of the majority not by invoking the presumption against extraterritoriality, but rather by invoking the "principles and practices of foreign relations law." *Id.* at 1670 (Breyer, J., concurring). As such, Justice Breyer would have concluded that a federal court could find jurisdiction under the ATS under three circumstances: "(1) the alleged tort occurs on American soil, (2) the defendant is an American national, or (3) the defendant's conduct substantially and adversely affects an important American national interest...." *Id.* at 1671. Because none of the three conditions were satisfied in *Kiobel*, Justice Breyer would have affirmed our dismissal of the plaintiffs' claims in *Kiobel.* Justice Kennedy, writing for himself, concurred in the Court's opinion. His concurrence, in full, is as follows:

> The opinion for the Court is careful to leave open a number of significant questions regarding the reach and interpretation of the Alien Tort Statute. In my view that is the proper disposition. Many serious concerns with respect to human rights abuses committed abroad have already been addressed by Congress in statutes such as the Torture Victims Protection Act of 1991 (TVPA), 106 Stat. 73, note following 28 U.S.C. § 1350, and that class of cases will be determined in the future according to the detailed statutory scheme Congress has enacted. Other cases may arise with allegations of serious violations of international law principles protecting persons, cases covered neither by the TVPA nor by the reasoning and holding of today's case; and in those disputes the proper implementation of the presumption against extraterritorial application may require some further elaboration and explanation.

Id. at 1669 (Kennedy, J., concurring).

II. CHOWDHURY'S CLAIMS

Drawing from the principles and reasoning of the Supreme Court in *Kiobel,* I am convinced that this is not a case covered "neither by the TVPA nor by the reasoning and holding of" *Kiobel,* and thus is not a case in which "the proper implementation of the presumption against extraterritorial application [ ] require[s] some further elaboration...." *Id.* at 1669 (Kennedy, J., concurring). This is true for several reasons.

First, as our opinion makes clear, in this case the plaintiff has a clear avenue of relief available to him in the form of the TVPA. **Maj. Op. at [49–54].** Having pursued this avenue for relief for conduct outside of the United States, Chowdhury has vindicated the interests which we first identified in the ATS, namely, to hold accountable a torturer, who "has become like the pirate and slave trader before him hostis humani generis, an enemy of all mankind." *Filartiga v. Pena–Irala*, 630 F.2d 876, 890 (2d Cir. 1980).

Second, our opinion draws on one set of questions explicitly identified by the majority in *Kiobel* to determine whether a claim sufficiently touches and concerns the United States, by focusing on the Statute. In my view that is the proper disposition. conduct of defendants in this case.[4] We therefore explain that " 'all the relevant conduct' set forth in plaintiff's complaint occurred in Bangladesh." **Maj. Op. at [49]** (quoting *Kiobel*, 133 S.Ct. at 1669). Further still the complaint alleges not just that all relevant conduct, but that all conduct claimed in this case, occurred in Bangladesh. Finally, there was no evidence adduced at trial to indicate any conduct

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[4] We have no cause in this case to focus on the nationality of the defendant, as he is a Bangladeshi citizen. The *Kiobel* Court at least implied that nationality could be relevant for determining whether a claim brought under the ATS would "touch and concern" the territory of the United States, as the *Kiobel* Court determined that "it would reach too far" for "mere corporate presence" to suffice to make out a claim under the circumstances in *Kiobel*. 133 S.Ct. at 1669.

relevant to Chowdhury's ATS claim took place in the United States.

Chowdhury does not seriously contest this factual matter on appeal. Haphazardly, he avails, "[Khan] maintained his residence and business in the United States while directing the acts of torture to be carried out in Bangladesh. He may well have directed some of those acts from his U.S. residence." Pl. Letter Br. at 7, May 10, 2013. Chowdhury points to no evidentiary basis to support this claim. In point of fact, trial testimony from Chowdhury's own mother and father supported the conclusion that Khan was in Bangladesh at the time of Chowdhury's torture. And Khan himself testified, at the time of trial in 2009, that though he had a residence in the United States, he had been living in Bangladesh for four years prior, including during 2007, when the RAB engaged in acts of torture at Khan's instigation. And of course there is no dispute that Chowdhury's torture occurred entirely within Bangladeshi holding facilities, at the hands of the RAB, a Bangladeshi force. Thus, the fact that all conduct (both relevant to the ATS claim and otherwise) took place outside the United States renders our case firmly on point with the facts and holding of *Kiobel*.

Third, the distinctions recognized in our opinion today, and which were recognized in *Kiobel* as well, go to the crux of the presumption against extraterritoriality. As the Supreme Court noted in *Morrison v. National Australia Bank Ltd.*, the mere relevance of the "presumption ... is not self-evidently dispositive, but its application requires further

analysis." 561 U.S. 247, 130 S.Ct. 2869, 2884, 177 L.Ed.2d 535 (2010). In *Morrison*, further analysis required the Court to examine the "focus" of the Securities Exchange Act, and led to the conclusion that the Act would cover situations where "the purchase or sale [of a covered security] is made in the United States, or involves a security listed on a domestic exchange." *Id.* at 2886. The analogous analytical work of the Supreme Court in *Kiobel* led it to adopt a rule under the ATS which was "careful to leave open a number of significant questions regarding [its] reach and interpretation." *Kiobel*, 133 S.Ct. at 1669 (Kennedy, J., concurring). These questions require courts to answer, at least, whether the claims "touch and concern the territory of the United States." *Id.* at 1669. Because the record establishes that the claims alleged in this case involve conduct that took place entirely in Bangladesh, I am convinced that we need not elaborate on what facts, if alleged or proved, might lead us to conclude that claims touch and concern the United States. The elaboration of such "significant questions," *id.* at 1669 (Kennedy, J., concurring), is properly left to a further panel of this Court.

With these considerations in mind, I concur.

Appendix B

United States District Court,

E.D. New York.

Nayeem Mehtab CHOWDHURY, Worldtel Bangladesh Ltd. and World Communications Investment Incorporated, Plaintiffs,

v.

WORLDTEL BANGLADESH HOLDING, LTD. and Amjad Hossain Khan, Defendants.

No. 08 Civ. 1659(BMC).
Sept. 16, 2009.

Mark Allen Robertson, Fulbright & Jaworski LLP, New York, NY, for Plaintiffs.

J. Eric Charlton, Hiscock & Barclay, LLP, Syracuse, NY, for Defendants.

MEMORANDUM DECISION AND ORDER

COGAN, District Judge.

This case is before the Court on defendants' motion for judgment as a mailer of law or, in the alternative, a new trial. Familiarity with the facts is assumed. The motion is denied.

The evidence at the trial was not only legally sufficient to present the case to the jury, but one sided in plaintiff's favor. Plaintiff's parents both testified that they met with the individual defendant

and defendant admitted knowledge that plaintiff was being tortured; that defendant had attended the torture; and that defendant said he could stop the torture if plaintiff left Bangladesh and gave up control of the company. There was undisputed evidence that the Rapid Action Battalion is known for committing torture. The RAB did not come upon plaintiff by accident; there was no dispute that defendant contacted the RAB for the express purpose of having it take action against plaintiff. Plaintiff also testified that during his ordeal, his torturers made it clear they were acting at the behest of defendant.

The email that defendant admittedly sent to plaintiff's associate after plaintiff's arrest was particular damning—"fun starts now, if you know what I mean." Defendant's testimony both on direct and cross-examination that he was being "sarcastic" in this email was somewhat shocking as the sarcasm was precisely the point of plaintiff offering this evidence. The jury easily understood that torture is not fun. Defendant's statement in the same email that "I am sure I will find out how much [plaintiff] bribed you to sign the unauthorized documents" supported an inference by the jury that defendant had access to the fruits of the torture and thus a co-conspiratorial or agency relationship with the torturers.

This evidence disposes of all of defendants' claims on this motion.

Judgment as a matter of law is appropriate only when "'a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a

reasonable jury to find for that party on that issue.'" *Jarvis v. Ford Motor Co.*, 283 F.3d 33, 43 (2d Cir. 2002) (quoting Fed. R. Civ. P. 50(a)). 1 am required to "consider the evidence in the light most favorable to the party against whom the motion [is] made" and "give that party the benefit of all reasonable inferences that the jury might have drawn in his favor from the evidence." *Id.* (quoting *Tolbert v. Queens College*, 242 F.3d 58, 70 (2d Cir. 2001)) (internal quotation marks omitted). The Court "cannot assess the weight of conflicting evidence, pass on the credibility of witnesses, or substitute its judgment for that of the jury" *Tolbert v. Queens College*, 242 F.3d 58, 70 (2d Cir. 2001) (quotation marks and citation omitted).

Defendants do not come near to meeting this difficult standard. All of their arguments are based on their assumption that the jury cannot be permitted to draw inferences from the evidence that is not only logical, but compelled. Defendants' crabbed view of the evidence would apparently require plaintiff to show that defendants met with the torturers in a hotel room and committed their plan to writing. Of course, the law recognizes that such agreements are rarely provable by direct evidence and must frequently be established by inferences based on known facts. "[C]onspiracies are by their very nature secretive operations, and may have to be proven by circumstantial, rather than direct, evidence." *Pangburn v. Culbertson*, 200 F.3d 65, 72 (2d Cir. 1999). The facts set forth above together with the other facts at trial were more than sufficient to

permit the jury to infer that defendant had a deal with the torturers to extract business concessions from plaintiff by doing what they do best. That is sufficient for agency or conspiracy. *See Doro v. Sheet Metal Workers Int'l Ass'n*, 498 F.3d 152, 156 (2d Cir. 2007); *Bondi v. Grant Thornton Int'l.* 421 F.Supp.2d 703, 719 (S.D.N.Y. 2006).

There is nothing speculative about plaintiff's case; in fact, it was defendants who wanted the jury to speculate as they offered no evidence why the Rapid Action Battalion would arrest and torture plaintiff if not to accomplish defendants' business goal. The strongly compelled inference from the evidence was that defendants wanted to achieve their result by any means available, and when defendants filed their complaint against plaintiff with the RAB, they did it because they knew torture could achieve their goal. Similarly, there was ample evidence of ratification—defendant's statement to plaintiff's parents that he would get the torture to stop if plaintiff yielded the company and left Bangladesh was sufficient to get to the jury on that theory.

For similar reasons, the verdict was in no way against the weight of the evidence. I recognize that I have significant discretion in deciding whether to grant a motion for a new trial. *See, e.g., Amato v. Citv of Saratoga Springs*, 170 F.3d 311, 314 (2d Cir. 1999). Tn determining whether to order a new trial under Rule 59, the Court may independently weigh the evidence. *See, e.g., Song v. Ives Labs., Inc.*, 957 F.2d 1041, 1047 (2d Cir. 1992). A jury's verdict,

however, should not be disturbed unless it is seriously erroneous:

> The trial judge, exercising a mature judicial discretion, should view the verdict in the overall setting of the trial; consider the character of the evidence ...; and abstain from interfering with the verdict unless it is quite clear that the jury has reached a seriously erroneous result. The judge's duty is essentially to see that there is no miscarriage of justice.

Bevevino v. Saydjari, 574 F.2d 676, 684 (2d Cir. 1978); *see also Caruolo v. John Crane, Inc.*, 226 F.3d 46, 54 (2d Cir. 2000) ("A motion for a new trial ordinarily should not be granted unless the trial court is convinced that the jury has reached a seriously erroneous result or that the verdict is a miscarriage of justice.") (quotation marks and citation omitted). Here, the jury did not reach a seriously erroneous result. Indeed, based on the record that I have reviewed, it would be far more likely that a new trial would be necessary if the jury had ruled in defendants' favor.

In addition, I reject defendants' evidentiary challenges. First, defendants' objection to the RAB's statement to plaintiff that they were torturing him at defendant's behest was proper as either an agency or co-conspirator statement, as there was sufficient evidence *aliunde*, described above, of an agency and conspiracy. The statement was authorized by the agency and in furtherance of the conspiracy; the jury could reasonably infer that the reason the RAB let plaintiff know why they were torturing him was to

induce surrender which would further the aims of the agency and conspiracy.

Second, there was no error in admitting the reputation evidence of the RAB as an organization that commits torture. The reputation evidence was not offered to prove that RAB actually tortured plaintiff—there was already plenty of evidence of that, and indeed defendants did not seriously dispute that plaintiff was tortured by the RAB. Rather, the evidence was offered to show that defendant knew, when he caused the RAB to arrest plaintiff, that torture would result. The evidence of reputation tended to rebut defendant's claim that what the RAB did was without his knowledge or participation.

Finally, I reject defendants' challenge to the jury instruction. The premise of the challenge is that plaintiff's agency theory and ratification theory are mutually exclusive. Defendants' effectively argue that if they had an agreement with the RAB to torture plaintiff, then they could not ratify what the RAB did since that was already part of their agreement. However, with defendants denying both any agreement with the RAB and after-the-fact ratification of the torture, it would have been fundamentally unfair to require plaintiff to elect either theory. The evidence allowed the jury to make inferences as to both, and they were properly instructed as to the factors for each. Moreover, there was no inconsistency. The evidence allowed the jury to find that defendant had a chance to stop the torture he had initiated and instead, he facilitated its continuation. In addition, there was more than

sufficient evidence that defendant willfully participated with the RAB in the torture, and the instruction on that theory was therefore proper as well.

Defendants' motion is therefore denied.

SO ORDERED.

Appendix C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

NAYEEM MEHTAB CHOWDHURY,	:	
	:	
Plaintiff,	:	**VERDICT**
- against -	:	**FORM**
	:	
WOLDTEL BANGLADESH	:	CV-08-1659 BMC)
HOLDING, LTD., and	:	
AMJAD HOSSAIN KHAN,	:	
	:	
Defendants	:	

1. Did plaintiff prove by a preponderance of the evidence that defendant Khan is liable for torture?

YES X NO _____

2. Did plaintiff prove by a preponderance of the evidence that defendant Worldtel Bangladesh Holding, Ltd. is liable for torture?

YES X NO _____

3. If your answer to either Question 1 and/or Question 2 is "YES," what is the total amount you find in compensatory damages? $1.5 million

4. If your answer to Question 1 is "YES," did plaintiff prove by a preponderance of the evidence that punitive damages should be awarded against defendant Khan?

YES X NO _____

5. If your answer to Question 4 is "YES," what is the total amount you find in punitive damages against defendant Khan? $250,000

6. If your answer to Question 2 is "YES," did plaintiff prove by a preponderance of the evidence that punitive damages should be awarded against defendant Worldtel Bangladesh Holding, Ltd.?

YES _____ NO X

7. If your answer to Question 6 is "YES," what is the total amount you find in punitive damages against defendant Worldtel Bangladesh Holding, Ltd.? _____

We, the Jury duly empanelled and sworn in the above-entitled action, upon our oaths, do find the above verdict.

Foreperson

Dated: Brooklyn, New York
August 4, 2009

Appendix D

HISCOCK & BARCLAY LLP

J. Eric Charlton
Partner

May 10, 2013

Via Electronic Mail and First Class U.S. Mail
civilcases@ca2.uscourts.gov

Office of the Clerk of Court
U.S. Court of Appeals, Second Circuit
United States Court House
40 Foley Square
New York, NY 10007

Re: Chowdhury v. WorldTel Bangladesh Holding Ltd., *et al.*, Docket No. 09-4483-cv

May It Please the Court:

I represent WorldTel Bangladesh Holding, LTD ("WorldTel") and Amjad Khan ("Khan"), the Defendants-Appellants herein. Pursuant to this Court's Order dated April 19, 2013, I submit this letter brief addressing the question presented therein, namely, the effect, if any, that the decision of the Supreme Court in *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491, slip op. (U.S. Apr. 17, 2013) has on the pending appeal.

Because all of the events in the case pending before this Court took place in the Country of Bangladesh and outside the territory of the United States, *Kiobel* compels the conclusion that the District Court erred in not dismissing the claims of Nayeem Mehtab Chowdhury ("Chowdhury") against WorldTel and Khan under the Alien Tort Statute, 28 U.S.C. §1350 ("ATS") (also referred to as the Alien Tort Claims Act or "ATCA") for failure to state claims upon which relief could be granted under Fed. R. Civ. P. 12(b)(6). The Judgment as against WorldTel and Khan arising under the ATS and the Judgment against Khan arising under the Torture Victim Protection Act, 28 U.S.C. §1350 note 2(a)(l) ("TVPA") should be vacated and the case dismissed, and or, alternatively, Khan should be granted a new trial on the TVPA claim.

The Plaintiffs' initial Complaint purported to state four claims for relief: first, by Chowdhury against both WorldTel and Khan alleging violations of the TVPA; second, by Chowdhury, WorldTel Bangladesh Ltd., and World Communications Investment Incorporated (the "corporate plaintiffs") under the ATS alleging violations of the law of nations; third, by Chowdhury against both WorldTel and Khan alleging aiding and abetting liability under the TVPA; and, fourth, by Chowdhury and the corporate plaintiffs under the ATS alleging aiding and abetting liability for violations of the law of nations. By Memorandum Decision and Order of the District Court dated December 5, 2006 (A. 18-37), all claims brought by the corporate plaintiffs were dismissed with prejudice; Chowdhury's aiding and abetting claims and

Chowdhury's claim under the TVPA against WorldTel were dismissed with prejudice. *Id.*, A. 37. The remaining claims (that is, Chowdhury's claims under the ATS against WorldTel and Khan for violations of the law of nations and Chowdhury's claim under the TVPA against Khan) were dismissed, with leave to replead. *Id.*, A. 37.

Thereafter, Chowdhury filed his First Amended Complaint asserting a claim against both Khan and WorldTel for violations of the law of nations under the ATS, and a claim against Khan under the TVPA (A. 38-47).

There is no dispute that all of the conduct giving rise to the claims took place in the Country of Bangladesh. See First Amended Complaint, A. 38-47; testimony of Chowdhury, A. 85-113.

The Defendant-Appellant WorldTel is a Mauritius corporation, with ownership interests in WorldTel Bangladesh Ltd., the holder of a license to provide fixed telephone service in a designated area in Bangladesh. First Amended Complaint, 5, 6, 7, 8; A. 39-40. There is nothing in the record reflecting any connection between WorldTel and United States.

Chowdhury is a citizen of Bangladesh. First Amended Complaint 4; A. 39. During the events giving rise to this action, Chowdhury was the managing director of WorldTel Bangladesh Ltd., and divided his time between Bangladesh and the United States under a permanent resident visa. A. 32. Khan is also a citizen of Bangladesh, and during the events giving rise to this action, was a resident of Bangladesh, along with his

wife and children. A. 87, 88. Khan also holds a permanent resident visa and maintains a residence in the United States. A. 140, 141.

Chowdhury's claims arose out of a corporate dispute relating to control of WorldTel Bangladesh Ltd. Based on letters from Khan to various governmental and police agencies in Bangladesh reporting claims of fraudulent activity committed by Chowdhury (Trial Exhibits. D-G; A. 233-242), Chowdhury was arrested by the Bangladesh Rapid Action Battalion ("RAB"), and held for a few days. A. 92. Chowdhury testified that while in custody, he was subjected to only **one** episode of "physical abuse". A. 95, 112. That abuse consisted in Chowdhury being handcuffed, blindfolded and escorted to another location in the facility where he was subjected to the application of electric shocks by a device not observeable by Chowdhury. A. 98, 99. Then he was able to walk back to the holding cell, and the following day he was delivered to the custody of the local prison hospital where he received ointments and pain treatments. A. 100. *Compare* , *Filartiga v. Pena-Irala*, 630 F.2d 876, 878 (2d Cir. N.Y. 1980) ("Joelito Filartiga was kidnapped and tortured to death by Pena, who was then Inspector General of Police in Asuncion, Paraguay. Later that day, the police brought Dolly Filartiga to Pena's home where she was confronted with the body of her brother, which evidenced marks of severe torture.") *See also*, *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82 (D.C. Cir. 2002).

> The critical issue is the degree of pain and suffering that the alleged torturer intended to,

> and actually did, inflict upon the victim. The more intense, lasting, or heinous the agony, the more likely it is to be torture. See S. EXEC. REP. NO. 101-30, at 15 ("The United States understands that, in order to constitute torture, an act must be a deliberate and calculated act of an extremely cruel and inhuman nature, specifically intended to inflict excruciating and agonizing physical or mental pain or suffering.") (internal quotation marks omitted). This understanding thus makes clear that torture does not automatically result whenever individuals in official custody are subjected even to direct physical assault. Not all police brutality, not every instance of excessive force used against prisoners, is torture under the [Foreign Sovereign Immunities Act, 28 U.S.C. § 1602-1611 *et seq.*].

Id. at 93.

There was no testimony adduced at trial as to any corrupt influence or methods or means by which Khan was alleged to have had anything to do with the treatment Chowdhury received at the hands of the RAB, which Khan denied. A. 161.

There was no evidence offered at trial that anything relating to the events giving rise to this action touches or concerns the United States, other than the fact that Chowdhury and Khan have permanent resident visas.

In reliance on the grant of jurisdiction under the ATS, the case proceeded to trial on both the ATS

and the TVPA claims, and was presented to the jury without differentiation, which returned a general verdict. See, District Court's charge to the jury, A. 159 ("Plaintiff claims that he suffered torture in violation of a law known as the Alien Tort Claims Act, and a law known as the Torture Victim Protection Act"); Verdict Form, A. 243.

In *Kiobel*, while the Supreme Court affirmed the Second Circuit's dismissal of the petitioners' claims, it did so on the ground that the presumption against extraterritorial application of a statute applies to claims under the ATS, and therefore the petitioners failed to state a claim upon which relief could be granted where the conduct complained of occurred outside the territory of the United States and within the territory of another sovereign state (in that case, Nigeria). *Kiobel*, slip op. at 13. That is precisely the circumstances in case before the Court, and *Kiobel* mandates dismissal of Chowdhury's claims under the ATS against both WorldTel and Khan.

Kiobel did not involve a TVPA claim, and thus after *Kiobel* the only claim in the pending action that is not resolved by the holding in *Kiobel* is the single claim against Khan under the TVPA. Based on the evidence adduced at trial, and for the reasons set forth in the Brief and Reply Brief of Defendants-Appellants, the TVPA claim also should have been dismissed because, *inter alia*, the alleged physical abuse not only fails, as a matter of law, to satisfy the TVPA's rigorous definition of torture, which must be compared to the standard for determining violations of the law of nations under the ATS, such

as "torture, genocide, or the equivalent". *Kiobel*, slip op. at 14 (Breyer, J.) (concurring), but a finding otherwise also ignores relevant considerations of public and foreign policy.

Kiobel follows *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), in indicating that such claims should be limited to a narrow set of cases where the alleged acts not only meet the strict statutory definition of torture, but also outweigh the policy concerns of permitting specific TVPA causes of action to proceed in U.S. courts. *Kiobel*, slip op. at 9; Brief of Defendants-Appellants, Point II, at 25-31. In *dictum*, Chief Justice Roberts, writing for the Court, explained that, in the context of the TVPA, "identifying [torture as] such a norm is only the beginning of defining a cause of action. See *id.*, §3 (providing detailed definitions for extrajudicial killing and torture); *id.*, §2 (specifying who may be liable, creating a rule of exhaustion, and establishing a statute of limitations). Each of these decisions carries with it significant foreign policy implications." *Kiobel*, slip op. at 9. This reinforces the responsibility of the court to exercise its "vigilant door keeping" function. *Sosa*, 542 U.S. at 732-33. The facts of this case simply do not "touch and concern" the United States and are insufficient to satisfy the statutory and policy considerations Congress intended TVPA claims to meet. The District Court should have dismissed the claim as asserted against Khan.

Another effect of the *Kiobel* holding on the pending appeal is that the dismissal of the ATS claims against both Khan and WorldTel supports

Khan's post-trial motion for a new trial under the TVPA based on the general verdict rule which provides that in cases involving multiple claims, one or more of which is found to be invalid, a general verdict must be reversed and a new trial ordered because it is impossible to determine whether the verdict was based upon a valid or invalid theory. *Bruneau v. S. Kortright Cent. Sch. Dist.*, 163 F.3d 749, 759 (2d Cir. 1998); *Katara v. D.E. Jones Commodities, Inc.*, 835 F.2d 966, 971 (2d Cir. 1987). See also *Sunkist Growers, Inc. v. Winckler & Smith Citrus Prods. Co.*, 370 U.S. 19, 29-30 (1962); *Yates v. United States*, 354 U.S. 298, 311-12 (1957); *Northeastern Tel. Co. v. American Tel. and Tel. Co.*, 651 F.2d 76, 94-95 (2d Cir. 1981); *Borger v. Yamaha Int'l Corp.*, 625 F.2d 390, 398 (2d Cir. 1980).

As discussed above, at the District Court, Chowdhury's case proceeded to trial on the ATS claim as against both Khan and the corporate defendant WorldTel, and on the TVPA claim against Khan only. The matter was presented to the jury without differentiation, which then returned a general verdict. See District Court's charge to the jury, A. 159 ("Plaintiff claims that he suffered torture in violation of a law known as the Alien Tort Claims Act, and a law known as the Torture Victim Protection Act"); Verdict Form, A. 243. Consequently, it is not possible on the existing record to determine whether the jury relied on the invalid ATS theory of liability in reaching its verdict, and the application of the general verdict rule indicates that Khan's post-trial

motion for a new trial should have been granted on the only surviving claim, that is, under the TVPA. *See* Brief of Defendants-Appellants, at 13-14.

This Court has determined that the general verdict rule does not mandate reversal in all circumstances. *Bruneau v. South Kortright Cent. Sch. Dist.*, 163 F.3d 749, 759 (2d Cir. 1998) ("We have specifically recognized the possibility of applying harmless error analysis where appropriate to avoid the usual course of reversal and new trial."). Here, the error is not harmless. Not only was the jury wrongly asked to determine whether Khan violated the "law of nations" under the ATS, the jury was also wrongly asked to assess Khan's liability in association with the corporate defendant, World Tel. The impact of this error on the jury's verdict cannot reasonably be determined to be harmless. *Kotteakos v. United States*, 328 U.S. 750, 764, 90 L. Ed. 1557, 66 S. Ct. 1239 (1946) ("We look to see 'what effect the error had or reasonably may be taken to have had upon the jury's decision.'").

Moreover, in weighing the effect that the error may reasonably be taken to have had, it is appropriate to consider the other errors that are brought up on this appeal; namely the erroneous charges on ratification and willful participation, and the admission of critical and damaging hearsay testimony that deprived Khan of any opportunity to cross-examine or otherwise impeach the out of court statement of an unidentified declarant. *See* Brief of Defendants-Appellants, Point I, at 12-22, and Point III, at 31-38. "As was stated of a general verdict in

Maryland v. Baldwin, 112 U.S. 490, 493 (1884), "Its generality prevents us from perceiving upon which plea they found. If, therefore, upon any one issue error was committed, either in the admission of evidence, or in the charge of the court, the verdict cannot be upheld . . . ." *Sunkist Growers, Inc .v. Winckler & Smith Citrus Products Co.*, 370 U.S. 19, 30 (U.S. 1962).

Accordingly, and in addition to the reasons set forth in Appellants Brief and Reply Brief, the Judgment should be vacated and the case dismissed, or a new trial should be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NAYEEM MEHTAB CHOWDHURY,

Plaintiff-Appellee,

WORLDTEL BANGLADESH LTD., WORLD COMMUNICATIONS INVESTMENT INCORPORATED

Plaintiffs,

vs.

WORDTEL BLANGLADESH HOLDING, LTD. and AMJAD HOSSIAN KHAN

Defendants-Appellants.

CERTIFICATE OF SERVICE

Docket No. 09-4483-cv

I, J. Eric Charlton, Esq., hereby certify that a copy of the foregoing Letter Brief, dated the May 10, 2013, was served via First Class Mail upon the following:

Evan Sarzin, P.C.
1501 Broadway
12th Floor
New York, NY 10036-5501

/s/
J. Eric Charlton

ANTI-VIRUS CERTIFICATION FORM

See Second Circuit Interim Local Rule 25(a)6.

CASE NAME: **Chowdhury v. WorldTel Bangladesh Holding, Ltd., et al.**

DOCKET NUMBER: **09-4483-CV**

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