09-2778-cv(L), 09-2779-cv(CON), 09-2780-cv(CON), 09-2781-cv(CON), 09-2783-cv(CON), 09-2785-cv(CON), 09-2787-cv(CON), 09-2792-cv(CON), 09-2801-cv(CON), 09-3037-cv(CON)

United States Court of Appeals

for the

Second Circuit

SAKWE BALINTULO, as personal representative of Saba Balintulo, DENNIS VINCENT FREDERICK BRUTUS, MARK FRANSCH, as personal representative of Anton Fransch, ELSIE GISHI,

(For Continuation of Caption See Inside Cover)

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

SUPPLEMENTAL BRIEF OF *AMICI* PROFESSORS OF CIVIL PROCEDURE IN SUPPORT OF PLAINTIFFS-APPELLEES

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Plaintiffs-Appellees,

– v. –

DAIMLER AG, FORD MOTOR COMPANY, INTERNATIONAL BUSINESS MACHINES CORPORATION,

Defendants-Appellants.

GENERAL MOTORS CORPORATION, RHEINMETALL AG,

Defendants.

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STATEMENT OF AMICI INTEREST

Amici are scholars of civil procedure, the federal courts, and clinical appellate practice in the United States. A number of the *Amici* submitted a previous brief on the collateral order doctrine on November 30, 2009 ("Procedure Amicus I"). On this brief, they are joined by others, who are also scholars in these fields, and all of the *Amici* are listed in the Appendix. *Amici* file this additional brief in response to questions raised in this Court's order of December 4, 2009 ("Order") because the Supreme Court's ruling in *Mohawk Indus., Inc. v. Norman Carpenter*, No. 08 678, -- S.Ct. --, 2009 U.S. LEXIS 8942 (Dec. 8, 2009) ("*Mohawk*") further illuminates the position taken in Procedure Amicus I.[1]

SUMMARY OF THE ARGUMENT

On December 8, 2009, four days after this Court's Order for additional briefing, the Supreme Court issued its ruling in *Mohawk* addressing the question of whether an order requiring the disclosure of documents over which a litigant claimed attorney-client privilege was immediately appealable as a collateral order.

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[1] On December 18, 2009, this Court granted Defendants' request for a remand to the District Court to permit Defendants to move, pursuant to 28 U.S.C. § 1292(b), for certification of an interlocutory appeal of the District Court's April 8, 2009 order denying Defendants' motion to dismiss. *Amici* express no view on the propriety of certification under 1292(b).

The Supreme Court focused on what is often described as the third prong of the test for the application of the collateral order doctrine set forth in *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949)—whether an issue being considered for collateral order review is "effectively unreviewable" on appeal from a final judgment. *Mohawk*, 2009 U.S. LEXIS 8942, at *14. The Supreme Court acknowledged the important public policy interests entailed in the attorney-client privilege, but held that "the crucial question, however, is not whether an interest is important in the abstract; it is whether deferring review until final judgment so imperils the interest as to justify the cost of allowing immediate appeal of the entire class of relevant orders." *Id.* at *16. Despite arguments that the mandated disclosure would be functionally unreviewable at the conclusion of the lawsuit, the Court held that the order was not immediately appealable. *Id.* at *25-*26.

Mohawk makes plain that Defendants are not properly before this Court because, unlike the cases for which collateral order review is available, decisions on motions to dismiss in litigation between private litigants involving legal rights under federal statutes are not generally subject to review under 28 U.S.C. § 1291. Rather, as the Supreme Court has underscored repeatedly, litigants must generally wait until the district court has entered a final judgment. *See, e.g., Mohawk*, 2009 U.S. LEXIS 8942, at *16; *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 868 (1994). The Supreme Court's decision in *Mohawk* underscored that a few

areas—such as double jeopardy and immunity—have been identified as functionally final within the meaning of 28 U.S.C. § 1291. In contrast, the class of claims at issue in this litigation, like most issues addressed on motions to dismiss, can be adequately vindicated after final judgment.

ARGUMENT

I. THIS COURT LACKS JURISDICTION BECAUSE, AS REITERATED IN *MOHAWK*, THE COLLATERAL ORDER DOCTRINE IS A NARROW INTERPRETATION OF THE FINALITY RULE AND THE DECISION BELOW DOES NOT QUALIFY FOR ITS APPLICATION

On November 30, 2009, *Amici* filed a brief offering their views on appellate jurisdiction. *Amici* believe that a district court's denial of a party's motion to dismiss on the grounds that the case was justiciable does not qualify for immediate appeal under the collateral order doctrine. Under that doctrine, first recognized by the Supreme Court in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), interlocutory review is available under 28 U.S.C. § 1291 from a "small class" of lower-court rulings that are, as a practical matter, final. In their original brief, *Amici* discussed the three requirements for invocation of the collateral order doctrine: the order must: (1) "conclusively determine the disputed question"; (2) "resolve an important issue completely separate from the merits of the action"; and (3) "be effectively unreviewable on appeal from a final judgment." Procedure Amicus I at 7-8, citing *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978).

The Supreme Court's December 8, 2009 decision in *Mohawk* makes plain that the collateral order doctrine has a narrow band of applicability, and that the Order at issue here, including the questions posed by this Court on December 4, 2009, may not be addressed on appeal under § 1291 at this stage of the litigation. These questions do not satisfy the third prong—that the issues posed be "effectively unreviewable on appeal from a final judgment." *See Coopers*, 437 U.S. at 468.

The Supreme Court in *Mohawk* stated that access to appellate courts under the collateral doctrine rule does not turn alone on the value of the rights at stake. "We routinely require litigants to wait until after final judgment to vindicate valuable rights, including rights central to our adversarial system." *Id.* at *16. As Justice Sotomayor explained for the Court, "[a]s long as the class of claims, taken as a whole, can be adequately vindicated by other means, "the chance that the litigation at hand might be speeded, or a 'particular injustic[e]' averted," does not provide a basis for jurisdiction under § 1291. *Id.* at *14.

In *Mohawk*, the Court addressed the question whether an order requiring the disclosure of documents, despite a claim of attorney-client privilege, qualified for review as an appealable collateral order. *Id.* at *7. The litigant seeking to avert disclosure argued not only that the confidentiality of important communications would be "irreparably destroyed absent immediate appeal" but that important

institutional interests—the adversarial system's reliance on frank exchanges between attorneys and clients—were at stake. *Id.* at *15. The Supreme Court acknowledged the importance of the policies entailed in the attorney-client privilege, for the attorney-client privilege is "one of the oldest recognized privileges" which promotes "broader public interests in the observance of law and administration of justice." *Id.* at *15 (internal citations omitted).

Nonetheless, the Court held that "the crucial question" was "whether deferring review until final judgment so imperils the interest as to justify the cost of allowing immediate appeal of the entire class of relevant orders." *Id.* at *16. *Mohawk* emphasized that the fact "[t]hat a ruling 'may burden litigants in ways that are only imperfectly reparable by appellate reversal of a final district court judgment … has never sufficed.'" *Id.* at *13 (ellipsis in original; internal citations omitted). In making that determination, the Court emphasized, as it has before, that its "focus is on 'the entire category to which a claim belongs.'" *Id.* at *14 (internal citations omitted). The Supreme Court explained that "[a]s long as the class of claims, taken as a whole, can be adequately vindicated by other means," the prospect that an individual case "might be speeded" or a "particular injustic[e] averted" does not provide a basis for jurisdiction under the collateral order doctrine. *Id.* (quoting *Van Cauweberghe v. Biard*, 486 U.S. 517, 529 (1988) (alteration in original)).

This Court has asked for additional briefing to address whether corporations can be liable under the Alien Tort Statute, 28 U.S.C. § 1350 (ATS), for customary international law violations, and whether claims brought under the ATS may encompass non-criminal conduct. Order at 1-2. As was detailed in Procedure Amicus I, the proposed appeal does not fit within the *Cohen* requirement that the issue be "severable" from the merits. Procedure Amicus I at 7. In this supplemental amicus filing, we focus on the question central to *Mohawk*: functional unreviewability.

While the questions posed by this Court are undeniably important issues of statutory interpretation, *Mohawk* compels the conclusion that rejection of a motion to dismiss on grounds related to the interpretation and reach of a statute creating a cause of action is not appealable as functionally final. At issue is the scope of liability under a particular federal statute, a question routinely addressed after final judgment. Unlike criminal defendants arguing that, because of the protection against double jeopardy, they have a constitutional right not to be tried, or states or government officials asserting that they too are immune from suit, private litigants who feel that a trial judge has erred are required either to wait until the end of a case to bring an appeal or to seek review through 28 U.S.C. § 1292(b) or by way of mandamus. *See Mohawk*, 2009 U.S. LEXIS 8942, at *19-20; *cf. Abney v. United States*, 431 U.S. 651, 660-61 (1977) (double jeopardy); *Mitchell v. Forsyth*, 472

U.S. 511, 527-28 (1985) (qualified immunity).

As Justice Scalia explained in *Midland Asphalt Corp. v. United States*, in which a criminal defendant asserted a violation of the prohibition against grand jury disclosure, "there is a crucial distinction between a right not to be tried and a right whose remedy requires dismissal of charges." 489 U.S. 794, 801 (1989); *see also Digital Equip. Corp.*, 511 U.S. at 873 (noting that "virtually every right that could be enforced appropriately by pretrial dismissal might loosely be described as conferring a 'right not to stand trial'").

In this specific case, the private litigants can identify no interest that would be so imperiled "as to justify the cost of allowing immediate appeal of the entire class of relevant orders." *Mohawk*, 2009 U.S. LEXIS 8942, at *13. Indeed, Defendants present a weaker case for immediate review than did the defendant in *Mohawk*, who argued that complying with disclosure was itself a harm that was not fully redressable after final judgment, a point acknowledged by the Supreme Court. *Id.* at *15. In this case, appeal is sought because of a disagreement about the interpretation of a federal statute—a frequent basis for disagreement. Whether Defendants in this case are in breach of federal rights is a question to be decided either by summary judgment or at trial, rather than interlocutorily through expanding the collateral order doctrine.

Permitting parties to undertake piecemeal appeals whenever they disagree

with decisions on motions to dismiss would unduly delay the resolution of district court litigation and needlessly burden the Courts of Appeals – precisely the outcome that *Mohawk* rejects. *Id.* at *12-13 (internal citations omitted). Moreover, the private defendants here cannot assert that they are representing government interests, and the United States has not joined in a request to obtain collateral review based on some specific governmental interest. *See* Br. of the United States as Amicus Curiae Supporting Appellees, Submitted on Nov. 30, 2009 in *Balintulo v. Daimler AG*, No. 09-2778-cv.

In its ruling in *Mohawk*, the Supreme Court reiterated the admonition of *Will v. Hallock*, 546 U.S. 345, 350 (2006)—that "the class of collateral appealable orders must remain 'narrow and selective in its membership'"—gained "special force in recent years with the enactment of legislation designating rulemaking, not 'expansion by court decision' as the preferred means for determining whether and when prejudgment orders should be immediately appealable." *Mohawk*, 2009 U.S. LEXIS 8942, at *22. That procedure has been used to authorize discretionary reviews for decisions on class action certification. *See* Fed. R. Civ. Pro. 23(f); *see also Sumitomo Copper Litig. v. Credit Lyonnais Rouse, Ltd.*, 262 F.3d 134, 139 (2d Cir. 2001) (addressing the criteria required to grant interlocutory appeal under Rule 23(f)). Moreover, specific legislation can also authorize interlocutory appeals. *See* Federal Arbitration Act (FAA), 9 U.S.C. § 3; *see also Arthur Andersen, L.L.P. v.*

Carlisle, --- U.S. ----, 129 S.Ct. 1896, 173 L.Ed.2d 832 (2009) (holding that § 16(a)(1)(A) of the FAA entitles any litigant asking for a § 3 stay to an immediate appeal). But neither Congress nor the rulemakers have made provisions for the appealability of denials of Rule 12(b)(6) motions to dismiss.

In sum, Congress has mandated that appellate jurisdiction be available after final judgment and the class of orders at issue here—denials of private litigants' motions to dismiss on grounds of statutory and jurisprudential interpretation—are not functionally unreviewable. Hence, this Court's jurisdiction has not properly been invoked.

CONCLUSION

For the reasons set forth, *Amici* respectfully suggest that the Supreme Court's decision in *Mohawk* eliminates any need for further briefing, and calls for the dismissal of Defendants' appeal.

Respectfully submitted,

December 21, 2009

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