ORAL ARGUMENT SCHEDULED FOR DECEMBER 8, 2014

No. 14-5030

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CHIQUITA BRANDS INTERNATIONAL, INC.,
Plaintiff-Appellant,

v.

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,
Defendant-Appellee,

and

NATIONAL SECURITY ARCHIVE,
Intervenor-Appellee.

On Appeal from the U.S. District Court for the District of Columbia
(Honorable Richard J. Leon)

SUPPLEMENTAL BRIEF FOR INTERVENOR-APPELLEE NATIONAL SECURITY ARCHIVE

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November 24, 2014

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GLOSSARY

ATS	Alien Tort Statute
FOIA	Freedom of Information Act
SEC	U.S. Securities and Exchange Commission

BACKGROUND

This reverse-Freedom of Information Act (FOIA) case concerns records responsive to FOIA requests submitted by the National Security Archive (Archive) to the United States Securities and Exchange Commission (SEC) in November 2008. The SEC determined that the records, which relate to illegal payments Chiquita Brands International, Inc. (Chiquita) made to a terrorist organization in Colombia, do not fall within any of FOIA's exemptions and must be released. Chiquita filed this case to delay the release of the records, arguing that the records are exempt under FOIA Exemption 7(B), which applies to law enforcement records that, if released, "would deprive a person of a right to a fair trial or an impartial adjudication." 5 U.S.C. § 552(b)(7)(B). Chiquita argues that the records are exempt from disclosure under Exemption 7(B) because their release would cause "unfairness" in the pre-trial discovery process of a lawsuit in which it is a defendant, *In re: Chiquita Brands Int'l, Inc. Alien Tort Statute & S'holder Derivative Litig.*, No. 0:08-md-01916-KAM (S.D. Fla. filed Feb. 20, 2008) (the ATS case).

The district court held that Exemption 7(B) does not require the SEC to withhold the records at issue, and Chiquita appealed. At the time the parties filed their opening briefs, the ATS case was on interlocutory appeal to the Eleventh Circuit. On July 24, 2014, the Eleventh Circuit issued an opinion stating that the

complaints in the ATS case do not state claims within the jurisdiction of the United States courts and remanding the matter for the entry of judgments of dismissal. *See Cardona v. Chiquita Brands Int'l, Inc.*, 760 F.3d 1185 (11th Cir. 2014). On September 4, 2014, the Eleventh Circuit denied petitions for panel rehearing, and on October 2, 2014, it denied petitions for rehearing en banc.

On November 14, 2014, this Court ordered the parties in this case to file supplemental briefs addressing the impact of the Eleventh Circuit's opinion in *Cardona* on this appeal. The Court specified that, "[w]hile not otherwise limited, the parties are directed to address the effect, if any, of *Cardona* on the justiciability of the issues raised in this appeal."

SUMMARY OF ARGUMENT

The Eleventh Circuit's decision in *Cardona* does not affect this appeal for two reasons: first, because Exemption 7(B) does not apply to the records at issue in this case regardless of the status of the ATS case, and, second, because *Cardona* did not end the ATS case. Moreover, even when the ATS case ends, that end will not render the claims in this case non-justiciable; it will simply provide an additional reason (in addition to all the reasons set forth in the Archive's and SEC's opening briefs) why the records at issue in this case are not exempt from disclosure under FOIA Exemption 7(B).

ARGUMENT

I. Regardless of the Status of the ATS Case, the Requested Records Are Not Exempt from Disclosure Under FOIA Exemption 7(B).

As the Archive explained in its opening brief, Exemption 7(B) does not exempt records from disclosure whenever they might be of interest to litigants in a case in which discovery has not yet commenced. Rather, in accordance with its plain language, Exemption 7(B) applies only where release of records would deprive litigants of a "fair trial or an impartial adjudication." 5 U.S.C. § 552(b)(7)(B). Because Chiquita cannot show that the release of the records here would deprive it of a fair trial, Exemption 7(B) does not apply to the records at issue, regardless of the status of the ATS case.

II. The ATS Case Is Ongoing.

Although the Eleventh Circuit issued a decision in *Cardona*, the ATS case is not over. On October 6, 2014, plaintiffs in that case filed a motion requesting that the mandate be stayed while the plaintiffs petition the United States Supreme Court for a writ of certiorari. *See Motion for Stay of Mandate*, No. 12-14898 (11th Cir.) (filed Oct. 6, 2014). Although the Eleventh Circuit denied the motion to stay, the motion shows that plaintiffs in that case intend to petition the Supreme Court for review. Thus, the ATS case will be pending at least during the time it takes the Supreme

Court to consider the yet-to-be-filed petition, and, if the petition is granted, may proceed for many years after that.

In addition, on November 7, 2014, plaintiffs in *Cardona* filed a motion for an extension of time to file a motion for reconsideration of the denial of their petition for rehearing and rehearing en banc in light of *Mastafa v. Chevron Corp.*, 770 F.3d170 (2d Cir. 2014). The Eleventh Circuit has not yet ruled on that motion.

Finally, although *Cardona* remanded the case for dismissal, in their petition for rehearing, plaintiffs in *Cardona* noted that "the panel did not mention Plaintiffs' non-federal claims based on diversity jurisdiction or Plaintiffs' [Torture Victim Protection Act] claims against individual defendants." *Petition for Rehearing and Rehearing En Banc* 12-13, No. 12-14898 (11th Cir.) (filed Aug. 14, 2014). In denying the petition for rehearing, the Eleventh Circuit clarified that it "decided only those questions presented affecting the parties to the appeal. Only the corporate defendants appealed, and our judgment disposes only of the claims against them." *Order*, No. 12-14898 (11th Cir.) (filed Sept. 4, 2014). In a later filing, the plaintiffs stated that "Plaintiffs-Appellees have other claims against Chiquita under diversity jurisdiction as well as claims against individual Chiquita executives under the Torture Victim Protection Act" and that "[r]egardless of what happens with Plaintiffs-Appellees' ATS claims at the Supreme Court, the remaining claims will

proceed." *Plaintiffs-Appellees-Cross-Appellants' Response to Attorney Paul Wolf's Motion for Stay of Mandate* 2, No. 12-14898 (11th Cir.) (filed Oct. 14, 2014). Thus, it appears that there will be further proceedings in the district court and that certain claims will proceed on the merits.

III. Even If *Cardona* Had Ended the ATS Case, the Claims in This Case Would Remain Justiciable.

Even if *Cardona* had marked the end of the ATS case, that decision would not affect the justiciability of this appeal. This case presents the question whether the SEC may release records responsive to the Archive's FOIA requests. As long as Chiquita continues to oppose the release of records and pursue this appeal, that issue remains a live controversy between the parties that this Court can and should resolve.

Rather than rendering this appeal non-justiciable, a decision ending the ATS case would provide an additional reason why Chiquita's argument that the requested records are exempt under FOIA Exemption 7(B) is wrong. The Archive's opening brief already demonstrated that Exemption 7(B) does not exempt records from disclosure simply because those records might lead to "unfairness in discovery" and that, in any event, release of the requested records would not affect the fairness of the ATS discovery process. A decision ending the ATS case would further undercut

Chiquita's argument because there would then be no pre-trial discovery process in that case to render unfair.

As explained above, the ATS case may not be over for years. In the meantime, additional delay in this case would be contrary to "FOIA's goal of prompt disclosure of information." *Stonehill v. IRS*, 558 F.3d 534, 539 (D.C. Cir. 2009); *see also*, *e.g.*, *id*. at 538 (describing the statutory goals of "efficient, *prompt*, and full disclosure of information" (citation omitted)); H.R. Rep. No. 93-876 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6267, 6267 (explaining that "fuller and faster release of information . . . is the basic objective of the Act"). As Congress has recognized,"information is often useful only if it is timely." 1974 U.S.C.C.A.N. at 6271. The Archive has waited more than six years for the records it requested, and should not be required to wait longer based on the possibility that, at some point in the future, Chiquita might change its position in this case.

CONCLUSION

This Court should proceed to hear and decide this case and should affirm the district court's decision.

Respectfully submitted,

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November 24, 2014

CERTIFICATE OF SERVICE

I certify that on November 24, 2014, I caused the foregoing to be filed with the Clerk of the Court through the Court's ECF system, which will serve notice of the filing on all filers registered in this case.

/s/ *Adina H. Rosenbaum*
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