UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

KEN WIWA, *et al.*, Plaintiffs, – against – ROYAL DUTCH PETROLEUM COMPANY, *et al.*, Defendants.	96 Civ. 8386 (KMW)(HBP)

REPLY MEMORANDUM OF LAW IN SUPPORT OF RULE 12(b)(1) MOTION TO DISMISS *WIWA* PLAINTIFFS' RICO CLAIM FOR LACK OF SUBJECT MATTER JURISDICTION

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Citation Conventions

"Defs.' Mem.": Memorandum of Law in Support of Rule 12(b)(1) Motion to Dismiss *Wiwa* Plaintiffs' RICO Claim for Lack of Subject Matter Jurisdiction (*Wiwa* Docket No. 309)

"Millson Ex. __": Exhibit to the Declaration of Rory O. Millson in Support of Defendants' Rule 12(b)(1) Motion to Dismiss *Wiwa* Plaintiffs' RICO Claim for Lack of Subject Matter Jurisdiction (*Wiwa* Docket No. 310)

"Millson 2d Ex. __": Supplemental Declaration of Rory O. Millson in Support of Defendants' Rule 12(b)(1) Motion to Dismiss *Wiwa* Plaintiffs' RICO Claim for Lack of Subject Matter Jurisdiction

"[Name] Tr.": Transcript of the Deposition of [Name]

"Pls.' Opp'n": Plaintiffs' Opposition to Defendants' Motion to Dismiss RICO Claims (*Wiwa* Docket No. 313)

"Pls' Ex.": Exhibits to Declaration of Jennifer Green (*Wiwa* Docket No. 325, 326, 327)

"Pls.' Resps. to Defs.' RICO Interrogs.": *Wiwa* Plaintiffs' Response to Defendants' Interrogatories Regarding RICO Claims, dated December 17, 2008

"RICO Statement": *Wiwa* Plaintiffs' RICO Statement, filed June 18, 1997 (*Wiwa* Docket No. 10)

"12/7/04 Defs. Special Master Mem.": Defendants' Memorandum of Law in Support of Their Motion to Appoint a Special Master to Investigate the Subornation of Perjury by the Benin Witnesses, dated December 7, 2004 (*Wiwa* Docket No. 177)

"11/6/08 Order": November 6, 2008 Order of the Court (*Wiwa* Docket No. 283)

"11/24/08 MTC Reply": Reply Memorandum in Support of Shell Transport and Trading Company, LTD.'s Motion to Compel *Kiobel* Plaintiffs' Responses to Interrogatories (*Kiobel* Docket No. 242)

Preliminary Statement

Plaintiffs do not even try to establish facts that would support subject matter jurisdiction of their RICO claim. Instead, plaintiffs devote almost all of their brief to a "counterstatement of facts" about the alleged predicate acts, which are irrelevant to the substantial effects that plaintiffs must show to justify extraterritorial application of RICO. (See Pls.' Opp'n 3-20.) Since this Court instructed the parties that this motion includes matters "solely to the extent that they relate to the Court's subject matter jurisdiction over these claims" (11/6/08 Order at 8), we focus on the jurisdictional facts, not plaintiffs' unsupported counterstatement.[1]

Plaintiffs' theory of subject matter jurisdiction over their RICO claim was based initially on production of oil in Ogoniland. (RICO Statement at 20-22, Millson Ex. A.) This Court in 2002 stated:

> "Plaintiffs allege that 90 percent of Nigeria's crude oil yield comes from the Niger Delta (the region in which Ogoni is located) and that defendants' commission of predicate acts was designed to facilitate the *exploitation of the Ogoni oil fields*. Plaintiffs further allege that 40 percent of Nigeria's oil production is exported to the United States. . . . [P]laintiffs claim that defendants' unlawful *exploitation of the Ogoni oil fields* resulted in lower production costs and thus an unfair advantage in the United States oil

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[1] Plaintiffs' "counterstatement of facts" does not set forth any evidence that *defendants* were involved in any way in the alleged predicate acts. The vast majority of the counterstatement focuses on acts by the Nigerian Government without any reference to defendants. Plaintiffs offer no evidence to impute liability to *defendants* for those acts. In addition, plaintiffs, when they seek to assert evidence against SPDC (not defendants), rely on the testimony of three of the Benin 7 witnesses. (Pls.' Opp'n 5, 10-11, 13-14.) Reliance on that testimony is improper. Payments were made to the Benin witnesses in connection with their testimony, although the *Kiobel* plaintiffs have frustrated defendants' attempts to learn the full extent of the payment of witnesses. And at the Benin depositions, the witnesses gave false testimony. We do not believe that those witnesses should be allowed to testify at trial. (*See* 11/24/08 MTC Reply at 1; *see also* 12/7/04 Defs.' Special Master Mem. at 3 n.4 (citing *Golden Door Jewelry Creations, Inc. v. Lloyds Underwriters Non-Marine Ass'n*, 865 F. Supp. 1516, 1519 (S.D. Fla. 1994)).)

> market." *Wiwa v. Royal Dutch Petroleum Co.*, No. 96 Civ. 8386, 2002 WL 319887, at *22 (S.D.N.Y. Feb. 28, 2002) (emphases added) (quotations omitted).

But that theory failed because it is undisputed that SPDC has not operated in Ogoni since 1993. (Defs.' Mem. 5; Pls.' Opp'n 2; *see also* Pls.' Resps. to Defs.' RICO Interrogs. No. 10 at 17, Millson Ex. B.)

By June 2004, plaintiffs knew that these allegations were baseless. So plaintiffs offered a new theory in their reply in support of their motion to compel further discovery of defendants' oil exports, dated June 8, 2004. They argued that subject matter jurisdiction lies because "[b]y preventing the protests in Ogoni from spreading to *other* oil producing areas of Nigeria, . . . Defendants were able to keep their production costs low". (11/6/08 Order at 5 (emphasis added).) The subsequent discovery confirmed that there was no evidentiary support for this theory. Indeed, in their responses to defendants' interrogatories, plaintiffs reverted back to the initial Ogoni theory, contending that the purpose of the enterprise was "to suppress any opposition to their exploitation of the petroleum resources *of the Ogoni region of Nigeria*". (Pls.' Resps. to Defs.' RICO Interrogs. No. 4 at 16, Millson Ex. B (emphasis added).)

Plaintiffs have now dropped this second theory altogether.[2] They offer three new theories, none of which has evidentiary support (and indeed all of which largely reiterate the initial theory).

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[2] Plaintiffs' Opposition offers only one conclusory statement, with neither a cite nor any evidentiary basis, that "Shell was deeply concerned that Ken Saro-Wiwa's mobilization of the Ogoni, through MOSOP, would embolden other oil producing communities in Nigeria to make similar demands". (Pls.' Opp'n 1.)

First, plaintiffs assert that "[t]he enterprise's racketeering activities affected U.S. commerce because the crude oil it produced entered the U.S. market and gave Defendants a competitive advantage in the sale of their stocks and ADR in the United States by increasing their margin of returns over investments". (Pls.' Opp'n 3.) This new theory is too late. It is not mentioned in the RICO Statement (Millson Ex. A) or in the RICO Interrogatory responses (Millson Ex. B). And plaintiffs put forward no evidence to support it.

Second, plaintiffs claim that the "racketeering activity, *in addition to suppressing opposition to Shell's operations in Ogoni*, allowed Defendants to continue to operate at lower costs than other Nigerian producers". (Pls.' Opp'n 2 (emphasis added).) This assertion is not relevant to effects in the United States.

Third, plaintiffs assert that MOSOP and Ken Saro-Wiwa and others "focused on the environmental effects of Shell's operation *in Ogoni*, in particular the effect of gas flaring" and that "[r]ather than meet MOSOP's environment demands" due to high costs associated with reducing gas flaring, "Defendants and the military government of Nigeria joined in an enterprise aimed at suppressing MOSOP and diminishing Ken Saro-Wiwa's influence". (*Id.* at 21 (emphasis added).) This, plaintiffs claim, is the "concrete support" (*id.*) that was lacking in *Bowoto v. Chevron Corp.*, 481 F. Supp. 2d 1010 (N.D. Cal. 2007). It is not. We repeat, SPDC withdrew from Ogoni in January 1993. So there was no flaring of SPDC gas resulting from the production of oil.[3]

[3] Although SPDC left Ogoni in January 1993, each well had been set on automatic production and continued running until the well was tampered with or malfunctioned, at which point it would automatically turn off. (Achebe Tr. 97-98, Millson 2d Ex. D.)

Argument

The "ultimate inquiry" is "whether Congress would have wished the precious resources of United States courts . . . to be devoted to [these foreign events] rather than leave [them] to foreign countries". *North South Fin. Corp. v. Al-Turki*, 100 F.3d 1046, 1052 (2d Cir. 1996) (quotation omitted). Because of the general "presumption against extraterritorial application of United States statutes . . . 'unless a contrary intent appears'", *Smith v. United States*, 507 U.S. 197, 203-04 (1993), plaintiffs must show that Congress would have intended RICO to be applied extraterritorially to a case involving foreign plaintiffs, foreign defendants and given "the exclusively foreign nature of the transactions in question". *Nasser v. Andersen Worldwide Societe Coop.*, No. 02 Civ. 6832, 2003 WL 22179008, at *6 (S.D.N.Y. Sept. 23, 2003).

It is plaintiffs' burden to come forward with facts that establish subject matter jurisdiction over their RICO claim. *See Nuevo Mundo Holdings v. Pricewaterhouse Coopers LLP*, No. 03 Civ. 0613, 2004 WL 2848524, at *2 (S.D.N.Y. Dec. 9, 2004). "[J]urisdiction must be shown affirmatively, and that showing is not made by drawing from the pleadings inferences favorable to the party asserting it". *OSRecovery, Inc. v. One Groupe Int'l, Inc.*, 354 F. Supp. 2d 357, 364 (S.D.N.Y. 2005) (quoting *Shipping Fin. Servs. Corp. v. Drakos*, 140 F.3d 129, 131 (2d Cir. 1998).

In order to justify applying RICO extraterritorially, plaintiffs must establish that the foreign event "has substantial effects within the United States". *North South Fin.*, 100 F.3d at 1051 (quotation omitted). "The 'effect' must be a 'direct and

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Until that occurred, gas would still be flared from those wells. By about May 1993, however, all of the oil wells had turned off. (*Id.* at 98.)

foreseeable result' of the conduct alleged"—"'remote and indirect effects in the United States do not qualify as substantial'". *Nuevo Mundo*, 2004 WL 2848524, at *3 (quoting *Consol. Gold Fields Plc v. Minorco, S.A.*, 871 F.2d 252, 261-62 (2d Cir. 1989) and *North South Fin.* 100 F.3d at 1052.). "'[G]eneralized effects' on the U.S. market are insufficient". *Nasser*, 2003 WL 22179008, at *6. Rather, there must be "specific palpable effects in the United States resulting from the foreign conduct". *Philan Ins. Ltd. v. Frank B. Hall & Co., Inc.*, 748 F. Supp. 190, 194 (S.D.N.Y. 1990). (Defs.' Mem. 8-14.)

This undisputed law (Pls.' Opp'n 20) mandates that plaintiffs' RICO claim be dismissed for lack of subject matter jurisdiction.

Plaintiffs do not put forward any evidence of "substantial effects". All their "theories" fail—plaintiffs have no evidence that there was any effect in the United States, whether in the sale of defendants' stocks or oil, as a direct and foreseeable result of the alleged predicate acts committed by the Nigerian Government in Nigeria. (Defs.' Mem. 11-13.) Here, as in *In re South African Apartheid Litigation*:

> "It is difficult to imagine how the alleged murders, tortures, crimes against humanity, and other heinous acts committed in South Africa had direct and substantial effects here, and why Congress would have intended to exercise jurisdiction over these actions instead of 'leav[ing] the problem to foreign countries'". *In re S. Afr. Apartheid Litig.*, 346 F. Supp. 2d 538, 556 (S.D.N.Y. 2004) (quotation omitted). *aff'd in part, vacated in part*, *Khulumani v. Barclay Nat. Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007).

Plaintiffs do not specify the harm in the United States. Indeed, the alleged "harm" seems to be that there were lower oil prices. (*See* Defs.' Mem. 12.) Plaintiffs' alleged harm is too vague and conclusory to establish substantial effects. *See, e.g.*, *Nuevo Mundo*, 2004 WL 2848524, at *4 (no substantial effects where allegations based on

"vague and conclusory" assertions that certain notes payable to U.S. investors lost value and where "[p]laintiffs provide[d] no specific factual allegations regarding the number of U.S. investors or the amount of monetary loss incurred"). (*See also* Defs.' Mem. 11-13.)[4]

Moreover, plaintiffs cannot satisfy any of the additional requirements imposed by either the securities or antitrust effects tests. (*See* Defs.' Mem. 10-14.)

With respect to the securities effects test, courts have refused to find subject matter jurisdiction where the plaintiffs themselves have not "'suffered any effects in the United States attributable to Defendants' alleged securities fraud'" or where "[U.S.] investors were neither the intended nor the actual 'victims' of Defendant's purported scheme to defraud". *Norex Petroleum Ltd. v. Access Indus., Inc.*, 540 F. Supp. 2d 438, 446 (S.D.N.Y. 2007). Here, it is undisputed that "plaintiff is not alleging any harm in America to the plaintiff . . . , but is instead alleging harm to others". *Id.*; (*see also* Defs.' Mem. 11). Thus, plaintiffs' RICO claim fails to meet the securities effects test for this additional reason.

Plaintiffs do not even attempt to distinguish *Norex*. They argue that "other than *Norex*, no court in this jurisdiction has required that plaintiffs' RICO injury occur in the United States". (Pls.' Opp'n 22.) That is not correct. *See OSRecovery, Inc.,* 354 F.

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[4] Even if plaintiffs had provided some broad estimate of the profits gained by defendants or the harm caused to American oil companies—which plaintiffs failed to do—such an estimate alone would not be enough to establish substantial effects. *See Nat'l Group for Commc'ns & Computers Ltd. v. Lucent Techs., Inc.*, 420 F. Supp. 2d 253, 261-62 (S.D.N.Y. 2006) (finding there were no "substantial" effects even though the "plaintiff suggests that [the defendant, an American company] benefited in an amount between $10 and $35 million from the [alleged RICO conduct]" because "[a]ny distorting impact on [the defendant's] profits or stock price is purely speculative").

Supp. 2d, 367.[5] Moreover, plaintiffs do not cite any contrary authority.[6] Although plaintiffs argue that the securities test is meant "only as a guide" and that the Court should disregard it, they offer no principled reason why *Norex* and *OSRecovery* are "inconsistent with the purposes of RICO". (Pls.' Opp'n 22.) In fact, *Norex* is entirely consistent with the Second Circuit's "ultimate inquiry", which focuses on the United States' interest in the foreign transactions. This interest is minimal where there is no harm suffered in the United States by the alleged victims of the RICO acts.

With respect to the antitrust effects test, plaintiffs do not dispute that in order to satisfy that test, plaintiffs must establish that "the conduct [was] 'intended to and actually d[id] have an effect on United States imports or exports which the state reprehends'". (Pls.' Opp'n 23 (quoting *North South Fin.*, 100 F.3d at 1052).) They concede that "'a U.S. effect is not enough' and that there must be a corresponding intent to affect the United States". (*See* Pls.' Opp'n 23); *Norex*, 540 F. Supp. 2d at 448. But

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[5] In *OSRecovery*, cited in defendants' opening brief (Defs.' Mem. 1), the court found that the alleged effects were insufficient to confer subject matter jurisdiction as to the foreign plaintiffs' claims because even though"[the defendant's] conduct allegedly caused effects in the United States by injuring domestic . . . account holders[,] [s]uch domestic injuries, however, were independent of the injuries allegedly suffered by foreign plaintiffs". 354 F. Supp. 2d at 367.

[6] Plaintiffs' citation to *Stolow v. Greg Manning Auctions, Inc.*, 258 F. Supp. 2d 236 (S.D.N.Y. 2003) (Pls.' Opp'n 22-23 n.11), is misplaced. That case did not involve extraterritorial application of RICO; the issue was whether the United States plaintiff had standing. *Stolow*, 258 F. Supp. 2d at 245-47. Plaintiffs are also wrong in arguing that two Second Circuit cases from 1974 and 1981 show that "[t]he fact that the Plaintiffs' RICO injuries occurred in Nigeria is irrelevant to the Court's subject matter jurisdiction" (Pls.' Opp'n 3 (citing *United States v. Parness*, 503 F.2d 430, 439 (2d Cir. 1974); *United States v. Barton*, 647 F.2d 224 (2d Cir. 1981)).) Neither case applies the effects test. Both cases predate (by 15-20 years) the *North South Finance* case. In addition, *Parness* involved conduct that took place in the United States, 503 F.2d at 438-39, and *Barton* did not even involve extraterritorial application of RICO, 647 F.2d at 228-29, 233-34.

plaintiffs offer no evidence that defendants intended the alleged violations to provide defendants with a competitive advantage in the United States oil market, or any market for that matter. *See, e.g.*, *Bowoto*, 481 F. Supp. 2d at 1014-15; (*see also* Def. Mem. 14).

Indeed, plaintiffs have no evidence of defendants' intent. Under the heading "Defendants' Conduct" of plaintiffs' counterstatement, plaintiffs rely on an alleged "corporate structure" expert to support their assertion that "[D]efendants exercised control over SPDC" and thus should be held liable for SPDC's alleged (but unsupported) secondary liability for the Nigerian Government' conduct. (*See* Pls.' Opp'n 15-17 (citing Siegel Report ¶¶ 18, 24-25, Pls.' Ex. 2-23).) Reliance on Professor Siegel is wholly misplaced. Under Professor Siegel's theory, virtually every large multinational company would be liable for the acts of its subsidiaries. This theory has no basis in law or in fact.

Professor Siegel's theory ignores black letter corporate law that parents are not liable for their subsidiaries absent unique circumstances. *See, e.g.*, *Jazini v. Nissan Motor Co., Ltd.*, 148 F.3d 181, 183-85 (2d Cir. 1998). Professor Siegel's theory also has no basis in fact. He finds nothing unique about the structure of the Royal Dutch/Shell Group of Companies that distinguishes it from most large multinationals. (Siegel Tr. 39 (stating with respect to a list of 24 of the largest multinationals in the world, including the Royal Dutch/Shell Group, that "I would expect them more often than not to be highly integrated"), Millson 2d Ex. E.)[7] Indeed, Professor Siegel

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[7] Indeed, in his view this is true of "healthy" enterprises. (Siegel Tr. at 13 (his examination of the Royal Dutch/Shell Group was "highly indicative of a healthy strong principal/agent relationship in a business sense", Millson 2d Ex. 2.) Professor Siegel's theory is that, "in all multinationals the agent should be acting on behalf of and at the

acknowledged that "there were legitimate business reasons explaining th[e] organization" of the Royal Dutch/Shell Group (*id.* at 243), and recognized that SPDC observed corporate formalities such as the maintenance of a separate board of directors and the keeping of its own books and records (*id.* at 245).

Moreover, plaintiffs argue that "[c]omity considerations do not arise unless a conflict exists between the laws of the United States and a foreign state" (Pls.' Opp'n 24), but fail altogether to address the remaining factors in considering whether comity considerations militate against extraterritorial application of RICO.[8] Plaintiffs also ignore the Second Circuit's statement that because RICO provides for treble damages, there is a "heighten[ed] concern[] about international comity and foreign enforcement". *North South Fin.*, 100 F.3d at 1052. It is the additional factors from *Timberlane Lumber Co. v. Bank of Am.*, 549 F.2d 597, 614-15 (9th Cir. 1976), coupled with the Second Circuit's "heighten[ed] concern[]" that weigh against devoting the

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behest of the principal, which is the parent company". (*Id.* at 9.) The "highly integrated" structure of the Royal Dutch/Shell Group (*id.* at 243) is the norm of corporate behavior the Harvard Business School teaches its students (*id.* at 21 ("What we teach to our students . . . is how to conduct a healthy principal/agent relationship".); *id.* at 26 ("[W]e are teaching our students that more often than not if you're going to have a diversified corporation, you need to have integration.").)

[8] Plaintiffs assert that "[t]his court already considered and dismissed the applicability of principles of international comity when it decided to apply the effects test to the issue of jurisdiction for Plaintiffs' RICO claims". (Pls.' Opp'n 24 (citing *Wiwa*, 2002 WL 319887, at *21).) Plaintiffs are wrong. *First*, this case is well beyond the pleading stage and inferences are no longer drawn in plaintiffs' favor. *Second*, this Court noted principles of comity only in remarking that it is unclear which effects test should apply because while "'the civil action provision of RICO was patterned after the Clayton Act", "RICO (like the antitrust laws) provides for treble damages, which heightens concerns about international comity and foreign enforcement". *Wiwa*, 2002 WL 319887, at *21 (quotation and citations omitted).

Court's resources to these alleged transactions by Nigerians against Nigerians in Nigeria. (Defs.' Mem. 14-15.)

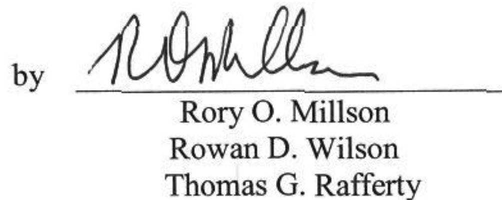
Conclusion

For the foregoing reasons, defendants respectfully request that the Court dismiss *Wiwa* plaintiffs' RICO claim for lack of subject matter jurisdiction.

January 16, 2009

Respectfully submitted,

CRAVATH, SWAINE & MOORE LLP,

by 

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