

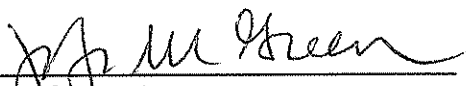
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CERTIFICATE OF SERVICE

I, Jennifer Green, hereby certify under penalty of perjury that service of the *Wiwa* Plaintiffs' Opposition to Defendants' Motion to Dismiss Plaintiffs' RICO Claims; Declarations of Jennifer Green; and Appendices Vol. 1, 2, and 3 in *Wiwa et al. v. Royal Dutch Petroleum*, 96 Civ. 8386 (KMW) were made on this 9th day of January 2009, via ECF to the following recipients.

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TABLE OF CONTENTS

Page

| | |
|--|----|
| INTRODUCTION | 1 |
| COUNTERSTATEMENT OF FACTS | 3 |
| A. The Goal of the Enterprise..... | 3 |
| B. RICO Injuries..... | 4 |
| 1. Karalolo Kogbara..... | 4 |
| 2. Owens Wiwa..... | 6 |
| C. Additional Predicate Acts | 7 |
| 1. Racketeering acts against Plaintiff Michael Vizor | 7 |
| 2. The murder of Uebari N-Nah | 8 |
| 3. The kidnapping of Plaintiff James N-nah | 9 |
| 4. Murder, arson, and destruction of property at Umuechem | 9 |
| 5. Acts of murder in August and September 1993..... | 10 |
| 6. The arrests, trial and murder of the Ogoni 9..... | 12 |
| 7. Acts of arson | 13 |
| 8. Kidnapping and the intimidation of those detained in 1994-96 | 13 |
| 9. Bribery and SPDC's role in the murder of the Ogoni 9 | 15 |
| D. Defendants' Conduct | 15 |
| E. The Importation Of Crude Oil Into The United States | 19 |
| ARGUMENT..... | 20 |
| A. There is Subject Matter Jurisdiction Based on the Effects Test Derived From Securities Cases..... | 20 |
| B. There Is Subject Matter Jurisdiction Based on the Effects Test Derived from Antitrust Cases | 23 |
| C. Principles of Comity Are Not Implicated By Plaintiffs' RICO Claims | 24 |
| CONCLUSION..... | 25 |

TABLE OF AUTHORITIES

| | Page(s) |
|--|------------|
| CASES | |
| <i>Bowoto v. Chevron Corp.</i> , 481 F. Supp. 2d 1010 (N.D. Cal. 2005) | passim |
| <i>Colorado River Water Conservation Dist. v. United States</i> , 424 U.S. 800 (1976) | 24 |
| <i>Consol. Gold Fields PLC v. Minorco, S.A.</i> , 871 F.2d 252 (2d Cir.1989) | 20 |
| <i>Hartford Fire Ins. v. California</i> , 509 U.S. 764 (1993) | 24 |
| <i>Interbrew v. Edperbrascan Corp.</i> , 23 F. Supp. 2d 425 (S.D.N.Y. 1998) | 22 |
| <i>Norex Petroleum Ltd. v. Access Indus. Inc.</i> , 540 F. Supp. 2d 438 (S.D.N.Y. 2007) | 21, 22, 23 |
| <i>North South Finance Corp. v. Al-Turki</i> , 100 F.3d 1046 (2d Cir. 1996) | 20, 22, 23 |
| <i>Philan Ins. v. Frank B. Hall & Co.</i> , 748 F. Supp. 190 (2d Cir. 1990) | 22 |
| <i>Royal and Sun Alliance Ins. Co. of Canada v. Century Intern. Arms, Inc.</i> , 466 F.3d 88 (2d Cir. 2006) | 24 |
| <i>Stolow v. Greg Manning Auctions, Inc.</i> , 258 F. Supp. 2d 236 (S.D.N.Y. 2003) | 23 |
| <i>United States v Barton</i> , 647 F.2d 224 (2d Cir.1981) | 3, 23 |
| <i>United States v. Parness</i> , 503 F.2d 430 (2d Cir.1974) | 3, 22 |
| <i>Wiwa v. Royal Dutch</i> , 226 F.3d 88 (2d Cir. 2000) | 17, 22 |
| <i>Wiwa v. Royal Dutch Petroleum Co.</i> , No. 96 CIV. 8386, 2002 WL 319887 (S.D.N.Y. February 28, 2002) | 23 |
| <i>In re Yukos, Oil Co. Sec. Litig.</i> , No 01 Civ. 5243, 2006 WL 3026024 (S.D.N.Y. Oct, 25, 2006) | 22 |

INTRODUCTION

Discovery has established that Defendants'¹ holdings in Nigeria represented the Group's² largest hydro-carbon reserve and that Defendants placed a high priority on making use of that asset. Ex. 1-1: DEF000567-DEF000570 at 570 (excerpts).³ Through their subsidiary SPDC, Defendants exploited this asset and were able to produce crude oil in Nigeria under the cost incurred by other producers in Nigeria. Defendants' ability to produce oil at reduced costs was critical to the survival of the military government of Nigeria.

Discovery further established that by the fall of 1992, Ken Saro-Wiwa and MOSOP had mounted an organized and international campaign to demand changes in the manner of Defendants' operations in Ogoni. 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. Meeting the Ogonis' demands that Shell remediate the environmental damage caused by Shell's operations, provide reparations, and end its environmentally injurious practices would have raised the cost of Defendants' operation. One of the environmental changes Ken Saro-Wiwa and MOSOP sought was an end to the gas flaring associated with the production of crude oil. Ex. 1-2: C003116-7 at 3116. Documentaries and non-governmental organization reports that followed Ken Saro-Wiwa and MOSOP also publicized the environmental effects of Shell's operation in Ogoni, in particular the effect of gas flaring. Ex. 1-3: A0000100-104 at 102; Ex. 1-4: A000127-132 at 127. However, the cost of reducing gas flaring was, according to Defendants, too high, Ex. 2-1: Anderson Dep. at 94:4-6, and Defendants were

¹ "Defendants" as used herein includes Shell Transport and Trading, Ltd, Royal Dutch Petroleum Company and their successors Shell Petroleum, N.V. and Royal Dutch Shell, p.l.c.

² "Group" as used herein indicates the Royal Dutch/Shell Group of Companies, including (a) Shell Petroleum N.V., (b) The Shell Petroleum Company Limited, (c) Shell Petroleum Inc., and (d) any companies and other entities in which one or more of these three companies hold interests, either directly or indirectly.

³ Plaintiffs' Exhibits are divided into three volumes and are cited as "Ex. [Volume number]-[Exhibit number]."

unwilling to invest in reduction. Ex. 1-5: A000040 at 44; Ex. 1-6: DEF002013 at 2015. *See also* Ex. 1-7: A000120-22 at 120. Despite public opposition, promoted by MOSOP and Ken Saro-Wiwa, to the environmental and health effects of gas flaring, Shell did not expend the capital necessary to end the practice of gas flaring to any significant extent, even when it became engaged in the production of liquefied natural gas (NLNG). Ex. 1-8: DEF005413-15 at 14. Indeed, although significant improvements to Shell's environmental performance in the Niger Delta required significant financial expenditures, such improvements were not part of SPDC's long range planning in the period between 1992 and 1995. Ex. 1-5 at 48.⁴ For these reasons, Defendants and the military government of Nigeria joined in an enterprise aimed at suppressing MOSOP and diminishing Ken Saro-Wiwa's influence.

By late 1993, Defendants abandoned oil production in Ogoni,⁵ but not their attempts to intimidate the Ogoni and to destroy the campaign led by Ken Saro-Wiwa and MOSOP by engaging, with the Nigerian military regime and its security forces, in a pattern of racketeering activities which included murder, kidnapping, arson and bribery. This 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. Crude oil produced by Defendants' Nigerian operations was imported into the United States.

⁴ Defendants only changed this policy in 1998. A corporate review of strategy for Nigeria concluded that as it was "no longer acceptable to plan to continue flaring and reject gas conservation projects because they fail to meet traditional economic screening criteria, in the future either an oil project with its associated gas conservation costs will be regarded as economic, and be carried out in full including gas conservation on an identified time scale, or the project will be rejected. Ex. 1-9: DEF0020231 at 20238.

⁵ Defendants claim that they made Ogoni a no-go area because of violence there. Def. Mem. at 5. However, in early 1993, there were areas outside of Ogoni where there was violence aimed specifically at Shell where they continued to operate. Ex. 1-10: C000881-82; Ex. 1-11: C000897; Ex. 1-12: C002089-90.

Defendants' hearsay evidence of Ken Saro-Wiwa's supposed intention to provoke violence from the military, Def. Mem. at 5, n.3, is inadmissible, irrelevant and contradicted by evidence that Ken Saro-Wiwa asked that a peacekeeping force be sent in because armed military personnel were inside Ogoni, being paid to attack people. Ex. 2-6: Owens Wiwa Dep. 178:4-17.

The 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.

The fact that the Plaintiffs' RICO injuries occurred in Nigeria is irrelevant to the Court's subject matter jurisdiction. *United States v. Parness*, 503 F.2d 430, 439 (2d Cir. 1974). As the Second Circuit explained, "[RICO] legislative history leaves no room for doubt that Congress intended to deal generally with the influences of organized crime on the American economy and not merely with its infiltration into domestic enterprises." *Id. See also United States v. Barton*, 647 F.2d 224 (2d Cir. 1981) (finding that "impact need not be great so long as activities of enterprise affect interstate commerce;...interstate commerce is affected if defendant resides in New York and purchases a house in New Jersey in connection with the illegal enterprise"). It is sufficient that Defendants' foreign corrupt practices have material effects in the United States. The evidentiary record supports the conclusion that it did so.

COUNTERSTATEMENT OF FACTS

Defendants formed a racketeering enterprise with their subsidiary, SPDC, the military government of Nigeria, and at times Willbros West Africa, Inc. From 1993 until at least 1996, they engaged and conspired to engage in racketeering activities that included murder, bribery, arson, kidnapping and extortion. The object of this enterprise was to suppress opposition to the manner of Defendants' operations in Nigeria and to protect their ability to operate at low cost.

A. The Goal Of The Enterprise

SPDC had the biggest "low cost hydrocarbon reserve base in the Group [Defendants and the operating companies]." Ex. 1-9 at 232. SPDC operated in Nigeria pursuant to an agreement with the military government of Nigeria. Ex. 1-13: B000113. SPDC's sole purpose was to generate profits for the benefit of Defendants. Ex. 3-1: B000923-927 at 923. *See also* Ex. 2-2:

Jennings Dep. at 94:18-95:9. SPDC was the lowest- cost foreign petroleum operator in Nigeria; it was significant to Nigeria's military government because the government received its greatest profit per barrel from its joint venture with SPDC. Ex. 1-14: C002738. As Defendants and the Nigerian government acknowledge, Shell contributed to the survival of the military government of Nigeria. *Id.*

Ken Saro-Wiwa's and MOSOP's demands and the organized nature of their protests were a challenge to SPDC's manner of operation and Defendants' international position. Meeting these demands would have cost money for, among other things, environmental remediation and past losses to the community. Ex. 1-15: C002153, items 1 and 4.⁶ Defendants were distressed by the organized nature of the opposition presented by Ken Saro-Wiwa and MOSOP, the popular grassroots and international support the movement received, and the possibility that it would spread to other communities. Ex. 1-16: C000954 -57; Ex. 1-17: A000289-A000306; Ex. 1-18: A001592; Ex. 1-5 at 58; Ex. 1-3; Ex. 1-7; Ex. 2-3: Watts Dep. at 118, 328. The goal of the enterprise and its individual participants – Defendants, SPDC, Willbros and the Nigerian military government – was to end Ken Saro-Wiwa's Ogoni movement and maintain the low cost of Shell's operations.

B. RICO Injuries

RICO injuries were suffered by Plaintiff Karalolo Kogbara and Owens Wiwa.

1. Karalolo Kogbara

On October 29, 1990, SPDC demanded that the Nigerian government send in security

⁶ Any costs Defendants incurred as a result of violence or instability in the region did not substantially affect their business. *See, e.g.*, Ex. 1-22: DEF0010084; Ex. 1-23: DEF000750; Ex. 1-24: DEF000765-766; Ex. 1-25: DEF000665. In contrast, here Defendants admit that the cost of gas flaring was high and that undertaking remediation would substantially affect their production costs. Ex. 1-9 at 20238. *Cf. Bowoto v. Chevron Corp.*, 481 F.Supp.2d. 1010 (N.D. Cal. 2005) (finding a lack of evidence that violence and instability decreased, rather than increased, production costs).

protection (“preferably the Mobile Police Force”) in anticipation of a demonstration at SPDC facilities near Umeuchem. Ex. 1-19: C0004465. On November 1, 1990, the Nigerian forces killed approximately 13 villagers, damaged property, and committed arson. Ex. 1-20: C003459-3471 at C003469. This conduct was subsequently condemned by a government investigation into the incident. *Id.* at C003468-69. In response to a World in Action Programme, Defendants stated that they had learned from the incident and made it “publicly clear that ...[SPDC] will not operate under security force protection.” Ex. 1-21: A002750.

Despite this public statement, SPDC routinely paid, supplied, transported, and housed MOPOL and other Nigerian armed forces in Ogoni – beyond the supernumerary SPY police – to patrol its facilities and keep out unwanted locals. Ex. 2-4: Nwiyon Dep. 35:5-17, 46:18-47:11, 49:4-60:1, 138:16-142:21, 148:5-12, 219:24-222:19. During at least one of these patrols, Major Paul Okuntimo ordered troops to use violent or even lethal force on any troublemakers. *Id.* at 35:6-12, 35:24-36:3.

On March 13, 1993, MOSOP held a “survival vigil” in Ogoni. Ex. 1-26: C004767. Ken Saro-Wiwa and other MOSOP leaders were detained. *Id.* On March 18, 1993, SPDC pressed a demand that the military, rather than the police, support the construction of SPDC’s Trans Niger Pipeline through Ogoni by Willbros. Ex. 1-27: C002119-121. On April 28, 1993, Defendants, acting through their agent, SPDC, demanded and obtained the Nigerian government’s agreement to send in the military, rather than the police, in support of the construction of the pipeline. *Id.* On April 29, 1993, Willbros West Africa, Inc., the SPDC contractor for the project, as well as a participant in the racketeering enterprise and a co-conspirator, bulldozed locals’ crops in the Ogoni village of Biara. The military shot Plaintiff Karalolo Kogbara while she was crying over her destroyed crops. Ex. 2-5: Kogbara Dep. 50:11-14. After shooting Ms. Kogbara, the military

took her to a SPDC hospital and then to a military hospital, detaining her there without providing adequate medical care. *Id.* at 57:15-58:13, 60:16-25, 66:10-70:8, 74:19-75:6. The shooting of Ms. Kogbara, which caused her to endure the amputation of an arm, was an attempted murder and an act of intimidation and extortion. Her subsequent detention, without medical care, was kidnapping. Plaintiff Kogbara suffered economic injury from by the loss of her crops and her ability to engage in her business as a farmer and trader.

2. Owens Wiwa

Plaintiff Owens Wiwa was detained without charges from December 26, 1993 to the night of January 4, 1994 to prevent him from organizing for and participating in a planned demonstration to protest, among other things, Shell's despoliation of the Ogoni environment. Ex. 2-6: Owens Wiwa Dep. 370:25-371:3, 374:20-22, 380:8-382:7. That evening, he was taken from his home unlawfully and without being charged with any offense and then moved through various villages, eventually spending several days under armed guard at an abandoned building in Port Harcourt before being freed. *Id.* 370:25-374:22. Owens Wiwa was again detained from April 6, 1994 to April 20, 1994 on false charges of murder. *Id.* at 428:8-15, 433:10-14, 439:12-440:4, 441:3-442:2. When they were arrested, Owens Wiwa and his fellow arrestee, Noble Obani-Nwibari, were told to face the woods and guns were put to their heads. *Id.* 433:6-14. While in detention, Owens Wiwa was beaten. *Id.* 442:4-22.

In late May 1994, Ken Saro-Wiwa, the brother of Plaintiff Owens Wiwa and the leader of the international campaign against Defendants' destructive Ogoni operations, was arrested and detained on fabricated criminal charges along with other movement activists. Defendants' agent Brian Anderson, the Managing Director of SPDC, made an offer to Owens Wiwa to obtain Ken Saro-Wiwa's release from prison if Ken Saro-Wiwa and MOSOP would end the international campaign against Defendants and drop their demands. Ex. 2-6 at 247:14-248:4.

In October 1994, Plaintiff Owens Wiwa was arrested and held for eight hours for possessing letters written by Ken Saro-Wiwa. Ex. 2-6 at 448:16-449:15, 455:8-11. He was arrested again without being charged in or around August 1995 and held for 5-6 hours for having the foreign telephone numbers of human rights groups around the world in his possession. *Id.* 456:15-458:20, 459:8-14.

On November 13, 1995, Owens Wiwa, fled Nigeria because he feared arbitrary arrest, torture and death. Ex. 2-6 at 16:4-12. The detentions of Owens Wiwa were kidnappings. The detentions, the mistreatment, the offer to obtain his brother's freedom and the threats to the life of Owens Wiwa were acts of intimidation and extortion. He suffered economic injury from the loss of his profession and medical practice.

C. Additional Predicate Acts

In addition to the foregoing acts against Karalolo Kogbara and Owens Wiwa, Defendants are responsible for numerous other predicate acts, including the following:

1. Racketeering acts against Plaintiff Michael Vizer

On April 30, 1993, Plaintiff Michael Tema Vizer was arrested and detained for four days without charge for participating in a peaceful demonstration against Shell protesting the bulldozing of crops and the shootings in Biara. Ex. 2-7: Vizer Dep. 106:3-12, 108:13-16. During his detention, Nigerian military repeatedly told him that he was under arrest for opposing Shell, that Shell would kill him, and that the military would do anything Shell asked. *Id.* at 48:22-49:15. Mr. Vizer was admonished on multiple occasions by a Shell contractor and a Shell employee that Shell and the government would kill him for his participation in MOSOP and opposition to Shell. *Id.* at 15:2-16:5, 17:8-20:25, 29:17-21, 32:2-25. He was also told by Shell contractors and employees that he would be paid in return for withdrawing his support for Ken Saro-Wiwa and stopping the National Youth Council of the Ogoni People's (NYCOP) protests against Shell. *Id.*

21:8-28:23. In July 1994, soldiers arrived at Mr. Vizor's home and beat him in the presence of his children. They then took him away. *Id.* 136:25-137:1, 139:10-25. While he was in detention, Mr. Vizor's daughter was kidnapped and raped. Ex. 2-8: Expert Report of Dr. Hawthorne Smith ("Smith Report") at 3-4.

Michael Vizor was charged with murder on January 28, 1995. During his detention, Michael Vizor was asked to confess to the murders. When he refused, he was beaten and tortured. Ex. 2-7 at 203:23-204:5. While in jail, he was denied medical assistance for his injuries. Ex. 2-8 at 4. Mr. Vizor was detained in various locations until October 30, 1995. Ex. 2-7 at 139:22-140:24, 141:19-142:6, 143:4-23, 147:4-20, 151:3-14. While he was in prison, at least one Shell contractor looked in on his cell. On the orders of these contractors and other visitors, Mr. Vizor's captors tortured him repeatedly, including suspending from the ceiling, beating him severely, and threatening him with death. Ex. 2-7 at 142:7-19, 147:21-148:18, 201:22-202:13; Ex. 2-8 at 4; Ex. 2-9: Expert Report of Dr. Allen Keller at 6-8, 12.

The use of detention and torture to force Michael Vizor to confess to a murder he did not commit were predicate acts of kidnapping, intimidation and extortion, as was his detention in 1993.

2. The murder of Uebari N-Nah

On or about October 24, 1993, SPDC personnel came to Korokoro as part of a joint inspection team with military and police personnel. Ex. 1-28: C000499-502; Ex. 1-29: C000505; Ex. 1-30: C003518-19. When the inspection team arrived, the people of the village were mourning the death of a villager. Ex. 2-10: N-nah Dep. at 72:2-9. The armed personnel who arrived in Korokoro announced that Shell had sent them and began harassing villagers to show them the location of Shell vehicles that were allegedly in the village. *Id.* 40:21-41:4, 80:15-81:8. They then attacked the villagers. Uebari N-Nah was killed by the head of the task force, who

deliberately shot him as he walked down the road on the way home from the market. *Id.* 49:19-22, 54:21-56:23. Two other villagers, Eran Mbo and Paul Sunday, were wounded by soldiers at this time, and Mr. Mbo later died from the gunshot wound. *Id.* 57:15-58:2, 59:2-15, 61:15-21, 63:14-18. The troops involved in the incident were paid “field allowances” by SPDC and praised for their efforts. Ex. 1-31: C0002292-93.

The killings of Uebari N-nah and Eran Mbo were predicate acts of murder, and the attempted killing of Paul Sunday was attempted murder. Furthermore, the attacks on the villagers were predicate acts of intimidation and extortion.

3. The kidnapping of Plaintiff James N-nah

The day following the murder of Uebari N-nah, armed personnel returned to Korokoro, where they arrested James N-nah and other villagers, held them without charges, and tortured them. Paul Okuntimo, the leader of the force, told the villagers that the only reason he wasn’t killing them was that he had already killed one person at Korokoro. Ex. 2-10 at 92:4-21, 176:1-178:5, 179:14-23. The detention and torture of James N-nah and other villagers were predicate acts of kidnapping, intimidation, and extortion.

4. Murder, arson, and destruction of property at Umuechem

On October 30 and November 1, 1990, youths in Umuechem demonstrated against Shell, protesting environmental damage and the lack of socioeconomic benefits derived from Shell’s presence in the community. In response, Mobile Police who had been dispatched at Shell’s request attacked the village, razing hundreds of houses and killing scores of villagers. A Judicial Commission of Enquiry found that while the demonstrations may have been misdirected, long-term causes for the “disturbances” included the exposure of Umuechem villagers to the “hazards of oil exploration” without adequate compensation, a lack of meaningful communication between oil companies and oil-producing communities, and the neglect of and discrimination against oil-

producing communities by the Federal Government. Ex. 1-20 at C003461-2.

The Commission concluded that responsibility for “all the havoc done at the village” rested with the Mobile Police, who “threw all human reasoning to the wind” and “forgot that their duty was to protect life and property and not to destroy them.” *Id.* at C003466. The Commission confirmed the identities of seven people killed and six wounded in the attack, while recognizing its inability to conclusively identify or confirm an unspecified number of the dead. *Id.* at C003466-71. It also confirmed that 495 houses were either completely burnt or badly damaged by grenade fire and that an indeterminate amount of personal property was destroyed. *Id.* at C003467-8. In all cases of death, injury, or damage, the Commission reiterated that the Mobile Police Force – which was in Umuechem at Shell’s request – was responsible and recommended that the Government pay compensation. *Id.* at C003466-71. The killing of the villagers and the burning of four hundred ninety-five houses and untold articles of personal property by grenade fire were predicate acts of murder and arson.

5. Acts of murder in August and September 1993

In August and September 1993, the Rivers State Internal Security Task Force, consisting of combined military forces of MOPOL, Navy, and Army, attacked Ogoni villages close to the Andoni border, including Kaa. They disguised their incursions as invasions of Ogoni by the neighboring Andoni tribe. These invasions were conducted on behalf of and with the substantial assistance of SPDC in retaliation for Ogoni opposition to Shell’s Ogoniland operations. Ex. 2-4 at 26:4-28:17; Ex. 2-11: Nwidoh Dep. at 10:2-12:1; Ex. 2-12: Ikari Dep. at 20:12-17; Ex. 2-13: Miller Dep. at 131:19-132:13. During the invasions, helicopters and boats contracted by SPDC transported MOPOL and brought them food. Ex. 2-4 at 12:17-18, 14:16-15:2. SPDC also routinely transported MOPOL with loaded weapons on Shell helicopters. Ex. 2-11 at 111:3-20. This campaign involved multiple predicate acts of murder, attempted murder, intimidation, and

extortion.

In one incident, eight MOPOL and one inspector were assembled in Port Harcourt and transported to Andoni in a helicopter with the Shell emblem from the helipad at the Shell Industrial Area and paid from an envelope given to the inspector by Shell staff. Ex. 2-4 at 16:19-17:8, 17:23-18:12, 23:11-14. They were carrying several types of arms and large quantities of ammunition. *Id.* at 20:5-8.

In August 1993, SPDC flew MOPOL and regular military police to the scene of an anti-Shell protest in Bonny, where these forces killed Omosa Brown. Ex. 2-11 at 13:11-16:20, 84:16-85:18. This was a predicate act of murder and intimidation.

In August, 1993, the military entered the Ogoni village of Kaa and shot many villagers, some of who were later given medical treatment by Owens Wiwa. Ex. 2-6 at 154:24-155:13. This attack included multiple predicate acts of attempted murder, if not completed murder.

In September 1993, multiple Ogoni were killed in the attack and burning of the village of Kpaen by the military. Ex. 2-14: Wifa Dep. at 241-12-19. The attack on Kpaen included multiple predicate acts of murder and attempted murder. Monday Witah was murdered by the soldiers during an attack on the village of Kewigbara in the Bane area in 1993, along with other people. Ex. 2-15: Kote-Witah Dep. at 178:17-179:21; Ex. 2-16: Nwidor Dep. at 108:18-109:4. The killing of Monday Witah and other villagers constituted predicate acts of murder and intimidation.

In September 1993, the military shot at villagers in the Ogoni village of Eeken. Benson Magnus Ikari was shot and injured, and a man named Shob was killed along with several others, including a little girl. Ex. 2-12 at 16:24-17:2, 25:8-21; Ex. 2-14 at 234:25-235:13. The deaths and injuries at Eeken constituted multiple predicate acts of murder and attempted murder.

6. The arrests, trial and murder of the Ogoni 9

On May 21, 1994, four Ogoni leaders were murdered in the Ogoni village of Giokoo. On May 23, 1994, Lt. Col. Komo announced that a number of MOSOP members, including Ken Saro-Wiwa, were responsible for the killings. Ex. 3-2: K00604. None of the accused was even present at the time of the murders. In November, 1994, a three-man tribunal ("Civil Disturbances Special Tribunal") was created and specially appointed by the Nigerian military regime to try Ken Saro-Wiwa, John Kpuinen, Dr. Barinem Kiobel, and other Ogoni leaders for the murder of the four Ogoni tribal leaders. After spending months in prison, Ken Saro-Wiwa, John Kpuinen, Dr. Barinem Kiobel, Felix Nuate, Friday Doobee, Daniel Gbokoo and Michael Vzor were finally charged on January 28, 1995 with the murders. It was for refusing to confess to these murders that Michael Vzor was tortured in jail. *See supra* at 7-8.

In a report to Defendants of his July 1995 meeting with Nigerian military Head of State General Sani Abacha, SPDC Managing Director Brian Anderson described that he had explained that Shell was under pressure and had to publicly tread lightly on the Ogoni issue but that Shell was trying to get the public "to better understand what the real facts were" with regard to the Ogoni issue. He also told Defendants that Ken Saro-Wiwa would be convicted. Ex. 1-32: A002909-2915. Ken Saro-Wiwa, John Kpuinen, Dr. Barinem Kiobel, Felix Nuate, Friday Doobee, and Daniel Gbokoo were convicted on October 30, 1995 and hanged on November 10, 1995.

The Special Tribunal proceedings lacked fundamental elements of fair legal process. Ex. 3-3: E-MB02494-2516. The killings of the nine unjustly accused Ogoni were predicate acts of murder.

7. Acts of arson

Sometime after Ogoni Day in 1993, the Nigerian military attacked and burned houses in the village of Tanama. Ex. 2-14 at 223:8-16, 226:12-25, 228:15-21.

In August 1993, military forces attacked and destroyed the village of Kaa. Ex. 1-33: C004176. The houses were "raked down," and people and livestock were injured. Ex. 2-15 at 140:4-6; Ex. 2-17: Charles Wiwa Dep. 285:18-23.

Military forces burned and razed the village of Kpaen in September 1993; they left messages on the burnt walls to the effect that the military would fight to suppress the Ogoni's attempts to keep Shell out. Ex. 2-17 at 34:3-10; Ex. 2-18: Nwinee Dep. at 36:14-38:21; Ex. 2-14 at 241:10-14. Among the people whose houses were burnt were Pius Nwinee and Letam Biranee, who was inside his house when it was burnt and suffered injuries. Ex. 2-18 at 109:23-110:3, 110:25-111:3.

Homes in Kewigbara were burned when the military attacked the village in 1993. Ex. 2-15 at 134:14-135:19.

Each of these attacks involved the predicate act of arson.

8. Kidnapping and the intimidation off those detained in 1994-96

When Israel Nwidor was arrested on May 25, 1994, he was told that it was because of his involvement in demonstrations against Shell. Ex. 2-16 at 18:7-9, 72:6-25. He was subjected to threats and repeated beatings and forced to sign a document promising that he would never again agitate against Shell. *Id.* at 199:15-200:1.

On June 22, 1994, when Blessing Israel returned from working in Cameroon, 11 Shell police identified him as an Ogoni and beat him with batons. He was then detained and interrogated by policemen who asked why Ogoni opposed Shell. He was given 50 strokes with a ridged whip and forced to sign a statement which said that Shell would be allowed to come into

Ogoni. The Shell police handed him over to Major Paul Okuntimo at the military camp in Kpor. Blessing Israel was held for a year and a half without legal process. During that time he was subject to further interrogations about Shell and repeated beatings. Ex. 2-19: Israel Dep. at 12:6-14:13, 15:4-37:6.

Freddie Idamkue was detained unlawfully and against his will by Major Obi when he went to visit Ken Saro-Wiwa in prison in October 1995, transferred to another facility, and beaten. He was told that the beating was because he and others "don't want Shell anymore in Ogoni." Ex. 2-20: Idamkue Dep. at 253:25-254:7, 255:15-259:4.

Bishop John Miller was detained by the military in October or November of 1995 and only released when he agreed to sign a statement promising not to protest against Shell in the future. Ex. 2-13 at 204:15-205:9.

Kendricks Nwikpo organized a demonstration after the execution of the Ogoni 9 in his home town. On the way back from the demonstration, he was arrested without charges and tortured. After he took part in the organization of Ogoni Day in 1996, several of his family members were tortured and abused, including the rape of his sister. Ex. 2-21: Nwikpo Dep. at 195:15-198:9.

On January 4, 1996, Pius Nwinee was arrested by military personnel after taking part in a protest against Shell. A loaded gun was pointed at his head, and he knocked unconscious and beaten severely. Ex. 2-18 at 131:18-24, 134:19-141:21.

In July 1995, Victor Wifa was detained by the military, severely beaten for several days, and then injured in his hand because he refused to sign a document swearing not to protest against Shell. Ex. 2-14 at 104:3-21, 105:12-15, 106:15-23, 122:4-123:11, 132:25-135:3, 147:21-149:12.

Charles Wiwa was arrested by the Nigerian military on January 3, 1996, the day after he

spoke at a prominent MOSOP rally, beaten severely, and detained for several days. Ex. 2-17 at 199:17-204:6, 206:14-207:1.

On May 25, 1994, Israel Nwidor was detained by the police without charge, tortured repeatedly, and forced to sign a statement swearing that he would never again protest against Shell. Ex. 2-16 at 178:1-179:1, 187:3-200:5.

Each of the above acts involved the predicate acts of kidnapping and intimidation.

9. Bribery and SPDC's role in the murder of the Ogoni 9.

In the presence of an SPDC representative, Naayone Nkpah and Charles Danwi were threatened and offered money, jobs and the promise of contracts with "Shell" in return for false testimony against Saro-Wiwa and the other MOSOP leaders. Mr. Nkpah was abducted after writing a statement that he was unaware of who had killed the four Ogoni leaders and refusing instructions to accuse the Ogoni 9. Ex. 2-22: Nkpah Dep. at 102:24-103:11, 105:3-109:19. While in detention, he was brought a statement accusing Ken Saro-Wiwa and the Ogoni 9 of the murders and induced to sign it; at this meeting, he was introduced to Shell's lawyer, Mr. Okocha, who witnessed the entire proceedings. *Id.* at 110:15-116:16. Charles Danwi also signed a written declaration that he had been bribed to falsely accuse the Ogoni 9 of the murders. Ex. 3-4: E-MB02045; Ex. 3-5: K00658-752 at 752. Both men's false testimony was entered into evidence against the Ogoni 9 while Mr. Okocha was in attendance at the Tribunal hearing. Ex. 3-4; Ex. 3-5 at K03862.

D. Defendants' Conduct

At all relevant times, Defendants exercised control over SPDC, which acted as their agent and for their benefit. Through and on behalf of SPDC, then, it conducted a public relations campaign designed to cover up and support the enterprise's racketeering activities.

Defendants controlled its subsidiaries, including SPDC,⁷ in the following ways:

- Appropriating all operating profits as dividends. Ex. 2-2 at 83:21-85:1
- Overseeing all critical aspects of Defendants' conduct, including specifically their security arrangements. *See* Ex. 2-23: Expert Report of Dr. Jeffrey Siegel ("Siegel Report") at para. 18; *see also* Ex. 1-34: DEF0010192-204.
- Approving and developing business plans, and deciding on the allocation of resources between subsidiaries. *See* Ex. 2-23 at paras. 18, 24.
- Reviewing and controlling SPDC's relationship with the military government of Nigeria, and profiting from it. *See, e.g.*, Ex. 1-9 at 20237.
- Reviewing environmental policies. Ex. 1-9 at 20240; Ex. 1-35: DEF028760.
- Setting the return on average capital employed (ROACE) that SPDC operations were to achieve. Ex. 1-9 at DEF0020253; Ex. 2-2 at 82:7-10.
- Setting compensation and pension benefits for SPDC executives, even when such policies would affect the costs borne by subsidiaries. Ex. 1-36: DEF001495; Ex. 1-37: DEF0057769-58029 at 58022.

Defendants internal documents show that they were fully aware of the human rights problems in Ogoni, *see, e.g.*, Ex. 1-38: DEFF00119 at 21 and Ex. 1-39: C000961-C000963, and that SPDC officers kept Defendants constantly updated about political developments and their contacts with highly placed Nigerian leaders, *see, e.g.*, Ex. 1-40: DEF005431 and Ex. 1-41: DEF005441. Fittingly, the Second Circuit found in an earlier ruling in this case that an executive individual nominally employed by the subsidiary SPDC was actually employed by the parent

⁷ Nigeria had major significance to Shell's immediate and future profitability. It held 25% of group equity reserves. Ex. 1-1 at 570.

companies. *Wiwa v. Royal Dutch*, 226 F.3d 88, 95 (2d Cir. 2000).

Defendants controlled the statements of SPDC, providing answers to public relations questions and in many cases speaking on behalf of SPDC in ways that hid the human rights abuses in which the enterprise was engaged and protected its participants from pressure. *See* Ex. 2-23 at para. 25; *see also* Ex. 1-17 at A000289-307; Ex. 1-42: DEF0014284; Ex. 1-43: DEF0014349; Ex. 1-44: DEF0014382-14429; Ex. 1-45: DEF001804-07; Ex. 1-46: DEF001808-

22. This was part of Defendants' long-running public relations campaign aimed at the United States, by which it has attempted to influence both the U.S. government and private parties. Ex. 3-6: DEF014149-68; Ex. 3-7: A004304-08; Ex. 3-8: A004312-14; Ex. 3-9: C001002-15; Ex. 3-10: C004629; Ex. 3-11: C004637-39; Ex. 3-12: DEF14214-16; Ex. 3-13: DEF0011300-01; Ex. 3-14: C002729-30; Ex. 3-15: A00064; Ex. 3-16: C005058-59; Ex. 3-17: C005128-5136. For example, Defendants' public relations organization had a public relations strategy for U.S. non-governmental organizations and media that included SPDC. SPDC was meant to – and did – use contacts and relationships with U.S.-based groups such as Human Rights Watch as well as members of the international press corps and the policy making community, supplying briefings, spokespersons, and film footage. Ex. 3-6 at DEF014149-68; Ex. 3-7 at A0004304-08; Ex. 3-12 at DEF14214-16; Ex. 3-15 at A00064; Ex. 3-16 at C005058-9; Ex. 3-18: DEF0014620-31; Ex. 3-8 at A004312-14. The intention was to prepare the ground for the planned reopening of SPDC facilities in Ogoni. *See, e.g.*, Ex. 3-12 at DEF14214-16; Ex. 1-47: DEF000185-187 at 186; Ex. 1-48: DEF001850-55.

Defendants made false public statements to obscure the relationship between Shell and the military and to cover up the human rights violations committed against the Ogoni, including:

- That Ken Saro-Wiwa and MOSOP were not non-violent. Ex. 1-49: B000601-02; Ex. 3-19:

B00511-13.

- That SPDC only asked for assistance because it was required by law. Ex. 1-17 at A000302.
- That most of the MOSOP's demands were outside the business scope of oil-operating companies. Ex. 1-17 at A000302.
- That compensation is given for the surface rights of all land acquired for SPDC use and for damage to land from subsequent activity.
- That Shell's meeting on March 16, 1995 with representatives of the Nigerian High Commission, the Nigerian Army and the Nigerian Police was to discuss arrearages in NNPC's payments to SPDC. Ex. 3-20: A000685-86.
- That Shell played no part in the arrest, trial or execution of Ken Saro-Wiwa, and Defendants' Chairman made an appeal for clemency to the Gen. Abacha before the execution. Ex. 1-50: A000882.
- That SPDC sent an attorney to the Tribunal for a single day under the misapprehension that the Tribunal would deal generally with civil disturbances. Ex. 1-51: DEF001266 at 74.
- That under the joint venture's funding arrangement, a percentage of revenues from oil exploration are set aside for community development. Ex. 1-52: A000973.
- That SPDC ensures that all operations are conducted in an environmentally sound and safe way. Ex. 1-52 at A000977.
- That the contractor Willbros experienced incessant unprovoked attacks by Ogoni people on its workers and equipment, before SPDC's demand for military assistance in Ogoni. Ex. 1-53: A0001150.

- That the deployment of the military to accompany Willbros was made by the government and that “according to the report of the security team leader, no casualty was sustained by the villagers.” Ex. 1-53 at A0001150-51.
- That SPDC called for assistance at Umuechem after SPDC’s facilities had been shut down. Ex. 1-54: A0001342.

This campaign of falsehoods was meant to support the enterprise’s racketeering activities.

E. The Importation Of Crude Oil Into The United States

Oil exports account for 90% of Nigeria’s foreign revenue, and nearly 50% of the exported crude oil is exported to the United States, most of it by Shell. Ex. 2-2 at 105:12-18. Formally, Shell International Trading Company (SITCO) purchases oil from SPDC, and ownership passes from SPDC to SITCO as the oil is loaded onto the ship in Nigeria. Ex. 1-57: DEF0057693-57723. SITCO is “the central oil trading company of the Royal Dutch/Shell Group and all affiliates of SPDC” and is qualified to receive all those privileges to which SPDC is entitled. Ex. 3-21: DEF005686.

A substantial amount of SPDC’s crude oil is imported into the United States. For the period from January 1990 to June 1996, an average of approximately 3.5 million barrels of SPDC crude was imported into the U.S. each month. Ex. 3-22. The vast quantity of SPDC crude that is continuously destined for the United States is evidenced in internal Shell memos concerning negotiations over SPDC’s agreement with the Nigerian National Petroleum Company (NNPC). Ex. 3-23; Ex. 3-22; Ex. 3-24: A002338. Formally, SPDC crude is sold in the U.S. by SITCO. Ex. 3-21. However, SPDC has manifested the authority to speak for and negotiate on behalf of SITCO. In a memorandum to other Shell officials, the managing director of SPDC proposed to present a plan to the Nigerian Minister of Petroleum in which SITCO would purchase crude from

Nigeria and SPDC would receive the payments. Ex. 3-25: C004834-37. That crude oil would then be imported to the U.S. Ex. 3-22; Ex.3-24. SITCO itself was losing money in its dealings with SPDC. Ex. 3-28: A002347-08.

ARGUMENT

As Defendants explain, securities and antitrust law provide slightly different “effects” tests, and both are used as “guidance” by courts in this jurisdiction to determine whether subject matter jurisdiction exists over RICO claims. *North South Finance Corp. v. Al-Turki*, 100 F.3d 1046, 1051 (2d Cir. 1996). Plaintiffs meet both tests.

A. There is Subject Matter Jurisdiction Based on the Effects Test Derived From Securities Cases

The effects test derived from securities cases holds that jurisdiction over a predominantly foreign entity exists when the entity’s activities have “substantial effects within the United States.” *Id.* Remote and indirect effects do not qualify as substantial. *Id.* Here, the effect is a “direct and foreseeable result,” *Consol. Gold Fields PLC v. Minorco, S.A.*, 871 F.2d 252, 261-62 (2d Cir.1989), of the conduct alleged: Defendants’ racketeering activities were directed toward keeping down the cost of extracting oil from Nigeria which they intended for export to the United States.

Defendants’ argument appears to rely on two misguided contentions: 1) the U.S. effects of Defendants’ racketeering activities are insufficient under *Bowoto v. Chevron*, 481 F. Supp. 2d. 1010 (N.D. Cal. 2005), and 2) RICO claims must be based on injuries that occur within the United States. As to the first contention, Defendants distort the finding of *Bowoto* by ignoring the fact that the court’s conclusion was based on an absence of evidence, evidence which *is* available in the present case. *Bowoto* found that the plaintiffs in that case had failed to present evidence showing that plaintiffs demanded measures to avoid and remediate harms caused by extraction;

that remediating the harms caused by extraction would be costly; and paying for remediation would increase the cost of extraction and decrease profits from oil imported in the U.S. from Nigeria – evidence that if present would be sufficient to enable Plaintiffs’ RICO claims to survive a motion for summary judgment. Unlike in *Bowoto*, Plaintiffs here have such evidence in the form of Defendants’ own documents.

Defendants’ internal discussions of the cost of ending the practice of flaring gas provides concrete support for this analysis and goes beyond the speculation that was rejected in *Bowoto*. As described above, among other environmental measures, MOSOP demanded an end to the gas flaring associated with the production of crude oil. Ex. 1-2 at 116. The documentaries and non-governmental organization reports associated with Ken Saro-Wiwa also focused on the environmental effects of Shell’s operation in Ogoni, in particular the effect of gas flaring. Ex. 1-3 at 102; Ex. 1-4 at 127,129. However, the cost of reducing gas flaring was high, and Defendants were unwilling to invest in reduction. Ex. 1-5 at 44; Ex. 1-6 at 2015. In fact, Shell balked at incurring expense of capturing associated gas to any significant extent, even when it began producing liquefied natural gas (NLNG) in Nigeria. Ex. 1-8 at 14. In 1995, Defendants’ long-range environmental plan continued to preclude a significant reduction in flaring because of the cost. Ex. 1-5 at 48.⁸ Rather than meet MOSOP’s environmental demands, Defendants and the military government of Nigeria joined in an enterprise aimed at suppressing MOSOP and diminishing Ken Saro-Wiwa’s influence.

As to their second contention, citing *Norex Petroleum Ltd. v. Access Indus. Inc.*, 540 F. Supp. 2d 438 (S.D.N.Y. 2007), Defendants argue that under the effects tests derived from

⁸ Defendants only changed their gas flaring policy in 1998. *See supra* n. 3.

securities law, Plaintiffs themselves⁹ must have “suffered any effects in the United States attributable to Defendants’ alleged securities fraud.”¹⁰ No Second Circuit case supports the application of this additional requirement to the application of the effects test in the RICO context. Indeed, other than *Norex*, no court in this jurisdiction has required that plaintiffs’ RICO injury occur in the United States.

In attempting to make this argument, Defendants are picking and choosing the pieces of cases they like, while overlooking the holdings that undermine their case. *Bowoto*, 481 F. Supp. 2d 1010, in fact confirms that RICO claims may be based on extraterritorial predicate acts. *Id.* at 1016. The requirement imposed in *Norex*, 540 F. Supp. 2d 438 – and nowhere else – is misguided because it adopts doctrine unquestioningly from securities law without considering whether that doctrine is consistent with the purposes of RICO. Even assuming that the requirement that plaintiff’s injury occur in the United States is appropriate to securities law, securities law can serve only as a guide rather than as binding authority for RICO cases. *North South Fin.*, 100 F.3d at 1051. The restriction in question would be inconsistent with the purposes of RICO, which is intended to deal generally with the influences of racketeering enterprises on the American economy and not merely with their infiltration into domestic enterprises. *Parness*, 503 F.2d at 439. Tellingly, besides *Norex*, none of the numerous cases citing 18 U.S.C. 1962 impose the requirement that RICO injuries be incurred inside the United States.¹¹ Defendants’

⁹ Defendants apparently concede that plaintiffs Owen Wiwa and Karalolo Kogbara suffered RICO injuries; they dispute only whether the effects test is met.

¹⁰ Defendants’ only case, *Norex*, 540 F.Supp. 2d 438, lifts its relevant language directly from two securities fraud cases, *In re Yukos, Oil Co. Sec. Litig.*, No 01 Civ. 5243, 2006 WL 3026024 at *11 (S.D.N.Y. Oct. 25, 2006) and *Interbrew v. Edperbrascan Corp.*, 23 F. Supp. 2d 425, 430 (S.D.N.Y. 1998)). In *Interbrew*, plaintiffs’ failure to allege any effect on a U.S.-affiliated company which was listed on the Canadian securities exchange proved fatal to their case. 23 F. Supp. 2d at 430. Here Defendants conduct business in the United States and are traded on the New York Stock Exchange. *Wiwa v. Royal Dutch Petroleum Company*, 226 F.3d 88 (2d Cir. 2000).

¹¹ All other cases require only that defendants’ racketeering are the proximate cause of plaintiff’s injury and defendants’ racketeering have substantial effects on interstate commerce. *See, e.g., Philan Ins. v. Frank B. Hall &*

additional argument that to meet the securities effect test, Plaintiffs must show an “anti-competitive” effect is based on misplaced authority. Def. Mem. at 12.

Defendants’ pattern of murder, arson, kidnapping, intimidation, extortion, and bribery enabled Defendants to lower production costs of oil exports, 50% of which was imported by the U.S., thereby substantially affecting interstate commerce. Ex. 2-2 at 105:15-18.

B. There Is Subject Matter Jurisdiction Based on the Effects Test Derived from Antitrust Cases

The effects test borrowed from antitrust cases holds that liability attaches when the extraterritorial conduct is “intended to and actually does have an effect on United States imports or exports which the state reprehends.” *North South Fin.*, 100 F.3d at 1052 (citing *United States v. Aluminum Co. of America*, 148 F.2d 416, 443-44 (2d Cir.1945)).

Defendants cite *Norex* for the proposition that, under the antitrust version of the effects test, “a U.S. effect is not enough” and that there must be a corresponding intent to affect the United States. Def. Mem. at 13-14. Yet *Norex* itself cited *Wiwa* as an example of a case adequately demonstrating intended and actual effects in terms of both “intent and commercial impact.” In making its finding, *Norex* described *Wiwa* as a case involving “Nigerian government collaboration in the forcible takeover of an area in which 90% of Nigeria’s oil was produced” and with “allegations that 40% of Nigeria’s oil was exported to the United States and that the scheme in question was intended to enable the Defendants to ‘gain significant competitive advantage’ in the United States.” 540 F. Supp. 2d at 449, n. 6, citing *Wiwa v. Royal Dutch Petroleum Co.*, No. 96 CIV. 8386, 2002 WL 319887, at *22 (S.D.N.Y. February 28, 2002).

Co., 748 F. Supp. 190 (2d Cir. 1990); *Stolow v. Greg Manning Auctions, Inc.*, 258 F. Supp. 2d 236 (S.D.N.Y. 2003); *United States v. Barton*, 647 F.2d 224 (2d Cir. 1981).

As described above, Plaintiffs have evidence that responding to the demands for changes and remediation of environmental practice would have increased production costs; that the increased costs were unacceptable to Defendants in the competitive environment; that Defendants responded by engaging in racketeering activities aimed at eliminating the demands for change; and that a large percentage of the crude oil produced was imported into the United States and Defendants' stock sold there.

C. Principles of Comity Are Not Implicated By Plaintiffs' RICO Claims

Comity considerations do not arise unless a conflict exists between the laws of the United States and a foreign state. *Hartford Fire Ins. v. California*, 509 U.S. 764, 799 (1993) Defendants fail to point to a single instance in which adherence to the prohibitions against murder, arson, bribery and kidnapping present conflicts with Nigerian law. Def. Mem. at 15.

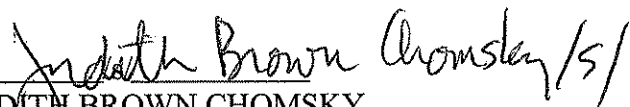
This court already considered and dismissed the applicability of principles of international comity when it decided to apply the effects test to the issue of jurisdiction for Plaintiffs' RICO claims. *Wiwa*, 2002 WL 319887 at *21. Furthermore, case precedent counsels that dismissal on comity grounds should be granted only under exceptional circumstances. *See Royal and Sun Alliance Ins. Co. of Canada v. Century Intern. Arms, Inc.*, 466 F.3d 88, 93 (2d Cir. 2006) (holding that due to the general disfavor of comity abstention, "[o]nly the clearest of justifications will warrant dismissal," citing *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817, 819 (1976).) *See also Bowoto*, 481 F.Supp. 2d at 1014 (finding that "comity concerns arising out of a foreign government's interest in the action are too peripheral to impact our threshold jurisdictional inquiry"). Defendants present no such clear basis for abstention on the grounds of comity.

CONCLUSION

For the reasons set forth above, Defendants' motion to dismiss the RICO claims for lack of subject matter jurisdiction should be denied.

Dated: January 9, 2009
New York, NY

Respectfully submitted,


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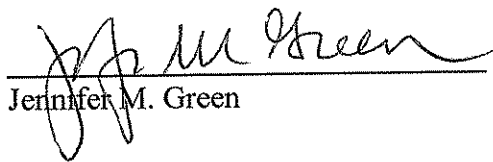
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CERTIFICATE OF SERVICE

I, Jennifer Green, hereby certify under penalty of perjury that service of the *Wiwa* Plaintiffs' Opposition to Defendants' Motion to Dismiss Plaintiffs' RICO Claims; Declarations of Jennifer Green; and Appendices Vol. 1, 2, and 3 in *Wiwa et al. v. Royal Dutch Petroleum*, 96 Civ. 8386 (KMW) were made on this 9th day of January 2009, via ECF to the following recipients.

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