UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

**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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**Preliminary Statement**

RICO should not be applied where, as here, the case involves "solely personal harms suffered overseas that only marginally—and tangentially—impact American commerce". *John Doe I v. State of Israel*, 400 F. Supp. 2d 86, 115-16 (D.D.C. 2005). The "ultimate inquiry" as to whether the Court has jurisdiction to apply RICO extraterritorially is "whether Congress would have wished the precious resources of United States courts . . . to be devoted to [foreign transactions] rather than leave the problem to foreign countries". *North South Fin. Corp. v. Al-Turki*, 100 F.3d 1046, 1052 (2d Cir. 1996) (quotation omitted). "It is unlikely that Congress intended for federal courts to devote precious resources to claims based on foreign injuries resulting from a foreign company's foreign conduct. To hold otherwise would be to extend RICO liability over the world". *OSRecovery, Inc. v. One Groupe Int'l, Inc.*, 354 F. Supp. 2d 357, 367 (S.D.N.Y. 2005). Although RICO is to be "liberally construed to effectuate its remedial purpose, . . . it may not be transformed into an avenue through which to litigate the political crises of the global community". *John Doe I*, 400 F. Supp. 2d at 115. As Judge Sprizzo stated in dismissing RICO claims for lack of subject matter jurisdiction 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 leaving the problem to foreign countries". *In re S. African Apartheid Litig.*, 346 F. Supp. 2d 538, 556 (S.D.N.Y. 2004) (quotation omitted).

The Second Circuit has held that "we have no doubt that the district court was without jurisdiction over a controversy involving foreign victims who sold a foreign entity to foreign defrauders in a foreign transaction lacking significant and material

contact with the United States". *North South Fin.*, 100 F.3d at 1052. This case is no different. This case is about a controversy involving foreign plaintiffs who allege that they were the victims of human rights violations that took place in Nigeria by Nigerians, with no significant and material effects in the United States. Congress would not have intended to devote this Court's resources to this claim.

## Statement of Facts[1]

### A. Plaintiffs' RICO Claim[2]

Plaintiffs' RICO claim challenges conduct by the Nigerian Government against Nigerians occurring solely in Nigeria, specifically against Ogonis in the Ogoni region of the Niger Delta. (Fourth Am. Compl. ¶¶ 178-193.) Plaintiffs allege that the Nigerian Government and defendants formed an "enterprise" in Nigeria and that they "conspired to and did conduct the affairs of the enterprise [in Nigeria] through a pattern of racketeering activity", including "arson", "murder", "bribery", "wire fraud", and "extortion" against Ogonis. (*Id.* ¶¶ 187-188; *see also* Pls.' Resps. to Defs.' RICO

[1] "Federal courts need not accept as true contested jurisdictional allegations in considering a motion to dismiss for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1)". *Nuevo Mundo Holdings v. Pricewaterhouse Coopers LLP*, No. 03 Civ. 0613, 2004 WL 2848524, at *2 (S.D.N.Y. Dec. 9, 2004) (quotation omitted). "The court may resolve the disputed jurisdictional fact issues by referring to evidence outside the pleadings". *Id.* (citing *Zappai Middle E. Constr. Co. v. Emerate of Abu Dhabi*, 215 F.3d 247, 253 (2d Cir. 2000)).

[2] Plaintiffs added a RICO claim against Royal Dutch and Shell Transport in their Amended Complaint (Count XII), filed April 29, 1997. "[P]laintiffs do not assert a RICO claim against Anderson". *Wiwa v. Royal Dutch Petrol. Co.*, No. 96 Civ. 8386, 2002 WL 319887, at *3 (S.D.N.Y. Feb. 28, 2002).

Although that count asserted violations of 18 U.S.C. § 1962(b), (c) and (d), plaintiffs withdrew their claim under § 1962(b) in June 1997. (RICO Statement at 23.) Despite the fact that the Fourth Amended Complaint still refers to this withdrawn claim (*see* Fourth Am. Compl. ¶ 183), we do not discuss it further in light of its withdrawal.

Interrogs. (Millson Decl. Ex. B) at 4-24.) Plaintiffs claim that "[t]he goal of the enterprise . . . was to end the movement of the Ogoni headed by Ken Saro-Wiwa" (Pls.' Resps. to Defs.' RICO Interrogs. at 18-19) and that "[t]he predicate acts of murder, arson, bribery, false imprisonment and extortion relate to each other as part of a common plan by defendants to suppress any opposition to their exploitation of the petroleum resources of the Ogoni region of Nigeria". (*Id.* at 16.) Plaintiffs allege further that "[a]s a direct and proximate result", plaintiffs Karalolo Kogbara and Owens Wiwa, both Ogonis, suffered an injury to their business or property in Nigeria, which was allegedly "reasonably foreseeable or anticipated by the Defendants as the natural consequence of Defendants' acts". (Fourth Am. Compl. ¶¶ 191-193.)

It is undisputed that none of this alleged harm was suffered in the United States.

Plaintiffs' entire jurisdictional allegation in the Complaint—from April 1997 to date—is that "Defendants' acts alleged herein have substantial effect within the United States". (*Id.* ¶ 190.) Plaintiffs' RICO Statement, filed on June 18, 1997 (Millson Decl. Ex. A), states that this alleged "effect" relates to defendants' alleged exploitation of oil in Ogoni, which was shipped to the United States:

- "The predicate acts are part of a pattern of racketeering in that these acts are part of a common plan by defendants and their agents and co-conspirators *to exploit the oil reserves in Ogoni* in disregard for the life, safety and property of the people *in the region*, and to suppress any opposition to that exploitation". (RICO Statement at 20 (emphasis added).)

- "The enterprise is an association-in-fact among defendants, their subsidiaries, including SPDC and the Nigerian regime, whose purpose is to extract petroleum *from the Ogoni region* of Nigeria without regard to the effects of their operation on the life, safety

and property *of the Ogonis* living in the area". (*Id.* at 21 (emphasis added).)

- "[D]efendants have acted in concert with the Nigerian regime to exploit petroleum resources without regard to the life, safety and property *of the Ogonis* and to suppress all opposition to such exploitation. To obtain that end, the enterprise has murdered its opponents, burned and destroyed the property *of the Ogonis*, and misrepresented the situation *in Ogoni* by knowingly making false accusations against its opponents". (*Id.* (emphasis added).)

- "The usual and daily activities of the enterprise are the exploration for, extraction of and exportation of petroleum from *the Ogoni region* of Nigeria for profit without regard for the lives, safety and property of *the area's residents*. The racketeering activities have the purpose of suppressing opposition to the enterprise's usual and daily activities, so that those activities may continue unimpeded". (*Id.* at 22 (emphasis added).)

- "The enterprise derives benefits from the racketeering activity in the form of profits from the sales of petroleum extracted from *the Ogoni region* of Nigeria. The racketeering activities alleged have had the effect of suppressing opposition so that the enterprise might continue the exploitation of the petroleum resources in a manner which maximizes its profits but disregards the lives, safety and property *of the Ogonis* living in the area". (*Id.* (emphasis added).)

- "The activities of the enterprise affect foreign and interstate commerce in that petroleum extracted by the enterprise is exported to the U.S.". (*Id.*)

This Court in 2002 held that the allegations contained in the Complaint and the RICO Statement, while "less [than] explicit", when "read favorably to plaintiffs", could survive a motion to dismiss. The Court held:

> "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. . . . Plaintiffs 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 market". *Wiwa*, 2002 WL 319887, at *22 (emphasis added) (quotations omitted).

**B. SPDC Quit Ogoni in 1993 in the Face of Violence**

The allegations that formed the basis for the Court's 2002 decision are contrary to the undisputed facts. SPDC ceased its operations in Ogoni in January 1993. Following SPDC's withdrawal from Ogoni in January 1993, SPDC tried to have discussions with Ken Saro-Wiwa without success. At meetings between SPDC and Mr. Saro-Wiwa, Mr. Saro-Wiwa stated that MOSOP would continue to prevent SPDC from operating in Ogoniland until MOSOP's demands were met and that escalating the issue to violence was part of his strategy. In October 1993, following the signing of the Ogoni/Andoni accord, the civilian Governor of River State met with Egbert Imomoh, then General Manager of SPDC, and asked SPDC to resume operations in Ogoniland, but Mr. Imomoh told the Governor that "we are not in a hurry to go back to Ogoni. I told him that I was not prepared to risk one drop of blood, one drop of blood either side for a million barrels, I wasn't prepared to risk it".[3] (*See* Defs.' Int'l Law Mem. at 11.)

There has thus been no "exploitation of the Ogoni oil fields". We repeat, the allegations that the predicate acts "were designed to facilitate the exploitation of the Ogoni oil fields" and that the "unlawful exploitation of the Ogoni oil fields resulted in lower production costs and this provided defendants with an unfair advantage in the

[3] There *was* an army in Ogoni, but not at SPDC's request—Mr. Saro-Wiwa "begged" General Abacha to send in the army. Plaintiffs' own witnesses demonstrate that the Nigerian military was not in Ogoniland "in support" of defendants but rather that they were there at the request of Mr. Saro-Wiwa himself. Moreover, at a June 7, 1993 meeting between Emeka Achebe of SPDC and Mr. Saro-Wiwa, Mr. Saro-Wiwa stated, among other things, that it was a good thing the Nigerian military had entered Ogoniland because it would draw additional attention to the situation, and that he "goaded" the Nigerian military so that they would "massacre" people to draw attention to his cause—he "goaded" the Nigerian military so that there would be "blood" as evidence that the Ogoni were being victimized. (*See* Defs.' Int'l Law Mem. at 11.)

United States oil market" are completely contrary to the undisputed facts revealed in discovery.

**C. Plaintiffs' Latest Unsupported and Unsupportable Theory**

Plaintiffs thus have no basis to rely on Ogoni oil production as the basis of subject matter jurisdiction. Indeed, plaintiffs now concede that they no longer contend "that the benefit [from the racketeering activity] was in the form of profits from the sale of petroleum extracted from Ogoni". (Pls.' Resps. to Defs.' RICO Interrogs. No. 10 at 17.)

Now, without amending their complaint or their RICO Statement, plaintiffs argue 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); *see also* 3/16/04 Letter from J. Chomsky to M. Reynolds (Millson Decl. Ex. C) at 2.) Plaintiffs, however, fail to apply their new theory consistently. Although they no longer claim defendants profited from oil in Ogoni, plaintiffs still inexplicably contend 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 (emphasis added).)

In any event, plaintiffs' theory in essence is that defendants' conduct in Ogoni enabled them to obtain a competitive advantage, *i.e.*, that they could sell oil from other areas in Nigeria more cheaply in the United States. Plaintiffs have offered no evidence that defendants were able to keep their production costs low, let alone that they

were able to do so as a direct and foreseeable consequence of alleged human rights violations in Ogoni.[4]

Plaintiffs' basis for RICO jurisdiction in this case is the same as the court found insufficient in *Bowoto v. Chevron*, 481 F. Supp. 2d 1010 (N.D. Cal. 2007). In *Bowoto*, plaintiffs presented evidence that "defendants export a great deal of oil to the United States"; that "defendants' oil extraction activities have negatively impacted the environment and the sources of livelihood of surrounding communities"; and that "one of the goals of the protests allegedly repressed by defendants was to persuade defendants to improve their treatment of the surrounding communities".[5] *Id.* at 1014.

The *Bowoto* court, however, found that there was no evidence linking the alleged conduct in Nigeria and lower costs and increased profits in the United States. "Plaintiffs fail . . . to provide any evidence that defendants' treatment of the environment, the local community, oil protestors generally, or these specific plaintiffs, generated any impact on the United States economy". *Id.* The court rejected plaintiffs' assertion that "[s]uppressing protest allows defendants to escape paying for measures that would avoid

[4] Discovery has closed. Plaintiffs must now come forward with evidence to support their new theory on which they base subject matter jurisdiction.

[5] Like this Court, the *Bowoto* court had previously found that the facts alleged in the *Bowoto* complaint were sufficient to satisfy the effects test for purposes of withstanding defendants' motion to strike plaintiffs' RICO claim. *Bowoto*, 481 F. Supp. 2d at 1014 (citing *Wiwa*, 2002 WL 319887, at *20). *Bowoto* plaintiffs, like plaintiffs here, had alleged that "Nigeria exports 40% of its oil to the United States"; that "the majority of its oil comes from the regions where the attacks have occurred"; that "Chevron exports much of its oil from Nigeria to the United States"; that "the manner of production exploited the environment and indigenous communities"; that "the intent of such practices was to secure competitive advantages in the United States"; and that "the predicate acts, defendants' attempts to quash the protests and defendants' false statements to the media about the protest, were undertaken for the purpose of gaining a competitive advantage in the United States". *Id.* (quotation omitted).

and remediate the harms caused by the extraction, thereby lowering the cost of extraction and increasing profits earned by defendants from the sale of Nigerian oil in the U.S." because it "lack[ed] any evidentiary support":

> "Plaintiffs present no evidence that killing or otherwise suppressing protestors saves defendants money, or otherwise increases their profit margin. Plaintiffs therefore fail to present evidence that defendants gained a competitive advantage in the United States, or impacted the U.S. economy, by engaging in the alleged racketeering activity". *Id.* at 1014-15 (citations omitted).

Nor could a reasonable jury infer from the evidence presented that suppressing protest allows defendants to lower the cost of production and increase profits because the court found that it is "equally likely that the defendants' alleged exploitation and abuses have led to increased instability and violence in the region, resulting in increased production costs and decreased output" and that "defendants' alleged actions might have had both deleterious and beneficial effects, resulting in no net impact on the United States' economy". *Id.* at 1015 n.3.

**Argument**

"Plaintiffs, as parties 'seeking to invoke the subject matter jurisdiction of the district court,' bear[] the burden of demonstrating that there is subject matter jurisdiction in the case". *Nuevo Mundo Holdings v. Pricewaterhouse Coopers LLP*, No. 03 Civ. 0613, 2004 WL 2848524, at *2 (S.D.N.Y. Dec. 9, 2004) (quoting *Scelsa v. City Univ. of N.Y.*, 76 F.3d 37, 40 (2d Cir. 1996)).

"The RICO statute is silent as to its extraterritorial application". *Wiwa v. Royal Dutch Petrol. Co.*, No. 96 Civ. 8386, 2002 WL 319887, at *20 (S.D.N.Y. Feb. 28, 2002) (citing *North South Fin.*, 100 F.3d at 1051). There is a 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) (refusing to extend sovereign immunity waiver of the FTCA to an alleged tort in Antarctica). In determining whether RICO should apply extraterritorially, courts look to "'precedents concerning subject matter jurisdiction for international securities transactions and antitrust matters'".[6] *Wiwa*, 2002 WL 319887, at *20 (quoting *North South Fin.*, 100 F.3d at 1051).

Although courts within the Second Circuit generally follow two tests for determining whether subject matter jurisdiction exists for extraterritorial application of RICO—the "conduct test" and the "effects test"—*Wiwa* plaintiffs "rely exclusively on the 'effects test' to justify subject matter jurisdiction". *Id.* at *21. Of the courts that have addressed RICO jurisdiction under the effects test, not all have expressly delineated which version of the test they were applying. Indeed, often the two versions are conflated. The discussion below addresses each test independently, although the tests for both in large part overlap. Under both versions of the effects test, "the reasoning behind the test is to protect . . . domestic markets from corrupt foreign influences".[7]

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[6] As this Court has recognized, "the tests developed in securities and antitrust cases may not provide perfect models because they are 'premised upon congressional intent in enacting the Securities Exchange Act and the antitrust statutes, not the intention of Congress concerning RICO'". *Wiwa*, 2002 WL 319887, at *20 (quoting *North South Fin.*, 100 F.3d at 1052). Although the *North South Finance* court suggested that the antitrust effects test may be "more appropriate" given that civil RICO was patterned after the Clayton Act, it expressly declined to decide which "effects test" should be used. *Id.* at *21.

[7] In determining whether Congress intended RICO to apply extraterritorially, the legislative history is instructive. When it passed RICO, Congress was concerned with the harmful effect of organized crime on legitimate businesses and the economy of the United States, not with the type of conduct alleged in this case. The legislative history states:

> "The Congress finds that (1) organized crime in the United States is a highly sophisticated, diversified, and widespread activity that annually

*Id.* (quotation omitted). Plaintiffs have no evidence to support subject matter jurisdiction under either of these tests.

### A. Plaintiffs Cannot Establish Subject Matter Jurisdiction Under the Securities Fraud Effects Test.

Under the securities fraud effects test, subject matter jurisdiction for extraterritorial application will exist where "a predominantly foreign transaction has substantial effects within the United States". *North South Fin.*, 100 F.3d at 1051 (quotation omitted). Where a transaction has "only remote and indirect effects in the United States", those effects "do not qualify as substantial" and there will be no subject matter jurisdiction. *Id.*; *see also Consol. Gold Fields Plc v. Minorco, S.A.*, 871 F.2d 252, 262 (2d Cir. 1989). 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, 194-95 (S.D.N.Y. 1990). Moreover, since "[t]he 'effect' must be a 'direct and foreseeable result' of the conduct alleged", only events that plaintiffs allege to have caused their RICO injuries are relevant to the "effects test" inquiry. *Nuevo Mundo,* 2004 WL 2848524, at *3 (quoting *Consol. Gold Fields*, 871 F.2d at 261-62). Courts have refused to find subject matter jurisdiction under the effects test where the specific

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> drains billions of dollars from America's economy . . . (3) this money and power are increasingly used to infiltrate and corrupt legitimate business and labor unions and to subvert and corrupt our democratic processes; (4) organized crime activities in the United States weaken the stability of the Nation's economic system, harm innocent investors and competing organizations, interfere with free competition, seriously burden interstate and foreign commerce, threaten the domestic security, and undermine the general welfare of the Nation and its citizens". RICO Statement of Findings and Purpose, Pub. L. No. 91-452, 84 Stat. 922 (1970), 91st Cong., 2d Sess., reprinted in 1970 U.S. Code Cong. & Admin. News 1073, 1073.

plaintiffs themselves had 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 Petrol. Ltd. v. Access Indus., Inc.*, 540 F. Supp. 2d 438, 446 (S.D.N.Y. 2007) (quoting *In re Yukos Oil Co. Sec. Litig.*, No. 04 Civ. 5243, 2006 WL 3026024, at *11 (S.D.N.Y. Oct. 25, 2006), and citing *Interbrew v. Edperbrascan Corp.*, 23 F. Supp. 2d 425, 430 (S.D.N.Y. 1998)).[8]

Plaintiffs do not claim that there was any effect at all on *them* in the United States. Indeed, plaintiffs' RICO claim alleges harm only to plaintiffs Karalolo Kogbara and Owens Wiwa in Nigeria, none of which was suffered in the United States.

Instead, plaintiffs claim that the "effect" is that defendants' oil has a competitive advantage in the United States. This assertion does not meet the effects test for three reasons.

*First*, "plaintiff is not alleging any harm in America to the plaintiff itself, but is instead alleging harm to others". *Id.* (holding that the securities effects test was not met even where the harmed plaintiff, Norex, was a wholly owned subsidiary of an American corporation because Norex's beneficial owner, who ultimately suffers the harm, was a Canadian citizen).

[8] Similarly, in *National Group for Communications and Computers Ltd. v. Lucent Technologies Inc.*, the court found that the securities fraud effects test was not met even though "Lucent is an American company, and plaintiff suggests that Lucent benefited in an amount between $10 and $35 million from the cancellation of the . . . subcontract in Saudi Arabia" which resulted from the bribery, because "it is not clear that the cancellation of the Saudi contracts had a 'substantial' or intentional domestic effect". 420 F. Supp. 2d 253, 261-62 (S.D.N.Y. 2006). The court stated that "[a]ny distorting impact on Lucent's profits or stock price is purely speculative". *Id.* at 262.

*Second*, plaintiffs' generalized allegations of competitive harm are insufficient to meet the effects test. *See Norex*, 540 F. Supp. 2d at 446 (securities fraud effects test was not met where there were only "vague allegations of indirect harm accruing from, *inter alia*, harm to corporations in which U.S. entities may have at times invested, by means of suppressed competition, diverted profits or the takeover of affiliates, and failure of U.S. citizens to pay taxes on income arising from transactions among entities used to pay bribes to foreign officials"). Plaintiffs do not even identify which oil companies allegedly suffered a competitive harm in the United States. And the alleged effect of this harm on the United States economy as a whole, if any, was lower oil prices. *See Nasser v. Andersen Worldwide Societe Coop.*, No. 02 Civ. 6832, 2003 WL 22179008, at *6 (S.D.N.Y. Sept. 23, 2003) ("'[G]eneralized effects' on the U.S. market are insufficient to meet the requirement for 'substantial effects'").

*Third*, plaintiffs have no evidence that the alleged human rights violations committed against plaintiffs in Ogoni directly and foreseeably caused the alleged competitive harm to oil companies in the United States. *Bowoto*, 481 F. Supp. 2d at 1014-15 (finding that plaintiffs' RICO claim failed to meet the "effects" test).[9] As in *Bowoto*, the lack of evidence that "killing or otherwise suppressing protestors saves defendants money, or otherwise increases their profit margin" is fatal to plaintiffs' RICO claim. *Id.* at 1015. Moreover, "[i]t is equally likely that defendants' alleged exploitation and abuses have led to increased instability and violence in the region, resulting in increased production costs and decreased output" and that "defendants' alleged actions

[9] The *Bowoto* Court did not distinguish between the securities version and the antitrust version. However, the discussion makes clear that neither version of the test was satisfied.

might have had both deleterious and beneficial effects, resulting in no net impact on the United States' economy". *Id.* at 1015 n.3; *see also Boyd v. AWB Ltd.*, 544 F. Supp. 2d 236, 252 (S.D.N.Y. 2008) (plaintiffs failed to establish subject matter jurisdiction under the effects test where the purported effect, namely a decrease in prices, was "not a 'direct' result of th[e] conduct" and the conduct "was simply one factor among many that affected . . . prices [] in the United States" and thus, the injury "could very well have resulted from factors wholly unrelated to the alleged RICO conspiracy"); *Giro v. Banco Espanol de Credito, S.A.*, No. 98 Civ. 6195, 1999 WL 440462, at *3 (S.D.N.Y. June 28, 1999) (causal chain with numerous intermediate links "too remote and indirect to confer jurisdiction under the effects test"), *aff'd*, 208 F.3d 203 (2d Cir. 2000).[10]

**B. Plaintiffs Cannot Establish Subject Matter Jurisdiction Under the Antitrust Effects Test.**

Under the antitrust effects test, subject matter jurisdiction lies "if the 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 Am.*, 148 F.2d 416, 443-44 (2d Cir. 1945) (setting forth the effects test for antitrust cases)). "[A] U.S. effect is not enough", however; there must be

[10] Nor does the fact that defendants' stock is traded in the United States markets (RICO Statement at 23) suffice to constitute substantial effects for subject matter jurisdiction. *See, e.g.*, *Nasser*, 2003 WL 22179008, at *6 (decline of United States equity markets alleged to have resulted from defendant's conduct is a "generalized effect" as opposed to a "substantial effect").

a corresponding intent to affect the United States.[11] *Norex*, 540 F. Supp. 2d at 448 (holding that plaintiffs failed to meet the antitrust effects test where the goal of the alleged RICO scheme was to "take over a substantial part of the Russian oil industry", and where the plaintiff cited only the "ripple effect" on United States commerce).

Plaintiffs simply have no evidence that the alleged human rights violations were intended 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. Nor do plaintiffs have any evidence that the conduct did in fact detrimentally affect United States imports. At best, plaintiffs rely on an inferential "ripple effect", which is far from sufficient to establish this Court's jurisdiction. *See, e.g.*, *Norex*, 540 F. Supp. 2d at 448.

### C. Principles of Comity Weigh Against Devoting the Court's Resources on This Foreign RICO Claim.

Principles of comity weigh against extending RICO extraterritorially under the alleged facts of this case. Indeed, the Second Circuit has noted 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.

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[11] In *Aluminum Co. of America*, the Second Circuit, in setting forth the effects test for antitrust cases, stated:

> "There may be agreements made beyond our borders not intended to affect imports, which do affect them, or which affect exports. Almost any limitation of the supply of goods in Europe, for example, or in South America, may have repercussions in the United States if there is trade between the two. Yet when one considers the international complications likely to arise from an effort in this country to treat such agreements as unlawful, it is safe to assume that Congress certainly did not intend the [Sherman] Act to cover them". *Aluminum Co. of Am.*, 148 F.2d at 443.

In assessing the reasonableness of extraterritorial application of RICO, some courts have looked to the *Timberlane* factors, which include: (1) the degree of conflict with foreign law or policy; (2) the extent to which enforcement by either state can be expected to achieve compliance; (3) the relative significance of effects on the United States as compared with those elsewhere; (4) the extent to which there is an explicit purpose to harm or affect American commerce; and (5) the foreseeability of such an effect. *See, e.g.*, *John Doe I*, 400 F. Supp. 2d at 116 (citing *Timberlane Lumber Co. v. Bank of Am.*, 549 F.2d 597, 614 (9th Cir. 1976)). Here, these factors weigh against exercising jurisdiction over plaintiffs' RICO claim: the entirety of plaintiffs' case is governed by international and foreign law; the conduct at issue was of the Nigerian Government, who is not a party and whose treatment of Nigerian citizens would not likely be affected by enforcement of the RICO statute; the effects in the United States, if any, are *de minimis* compared to the effects in Nigeria; there was no intent or purpose, let alone an explicit purpose to harm or affect American commerce; and even if there were any effects in the United States, they were not direct or foreseeable results of the alleged conduct. *Cf. id.* (finding that it was highly unlikely that the enforcement of RICO to the alleged human rights violations in Israel would affect how Israelis would treat the plaintiff or other Palestinians and the "primary and significant effects . . . are felt abroad, not in the United States" and that "any effect on American commerce has been negligible, unforeseeable, and unintended").

* * *

Plaintiffs cannot offer any evidence that directly links the alleged human rights violations—against Ogonis in general let alone against RICO plaintiffs Owens

Wiwa and Karalolo Kogbara—to any substantial effects in the United States, intended or unintended. Plaintiffs rest solely on the fact that some of SPDC's oil may have been imported into the United States. That alone is not enough. There is no basis offered by plaintiffs that should lead this Court to conclude that "Congress would have wished the precious resources of United States courts to be concerned with the transactions at hand".

**Conclusion**

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

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Respectfully submitted,

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