

UNITED STATES DISTRICT COURT  
 SOUTHERN DISTRICT OF NEW YORK

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ESTHER KIOBEL, <u>et al.</u> ,	:	
	:	
Plaintiffs,	:	02 Civ. 7618 (KMW) (HBP)
	:	
-against-	:	<u>OPINION AND ORDER</u>
	:	
ROYAL DUTCH PETROLEUM COMPANY,	:	
<u>et al.</u> ,	:	
	:	
Defendants.	:	

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WOOD, U.S.D.J.:

This action is the last remaining in a set of four related actions involving allegations of human rights violations in Nigeria in the 1990s by various Royal Dutch/Shell entities.<sup>1</sup>

Currently before the Court is Plaintiffs' motion for reconsideration, pursuant to Local Rule 6.3, of the Court's March 4, 2008 Order, Kiobel v. Royal Dutch Petroleum Co., No. 02 Civ. 7618, 2008 WL 591869 (S.D.N.Y. March 4, 2008), dismissing Defendant Shell Petroleum Development Company of Nigeria ("SPDC" or "Defendant") from the action for lack of personal jurisdiction.

On June 3, 2009, the Second Circuit issued a Summary Order

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<sup>1</sup> The related actions, Wiwa v. Royal Dutch Petroleum Co., No. 96 Civ. 8386 ("Wiwa I"); Wiwa v. Brian Anderson, No. 01 Civ. 1909 ("Wiwa II"); and Wiwa v. Shell Petroleum Development Corp., No. 04 Civ. 2665 ("Wiwa III"), settled on June 8, 2009.

vacating the Court's decision in an appeal brought by plaintiffs in one of the related actions where SPDC was also named as a defendant. Wiwa v. Shell Petroleum Development Corp., No. 08 Civ. 1803, 2009 WL 1560197 (2d Cir. June 3, 2009).

For the reasons discussed below, the Court GRANTS Plaintiffs' motion for reconsideration. Upon reconsideration, the Court denies Defendant's motion to dismiss for lack of personal jurisdiction without prejudice, and grants leave to re-file at the conclusion of limited jurisdictional discovery.

#### **BACKGROUND**

The facts and underlying procedural history of this case are set forth in the Court's prior orders, familiarity with which is assumed. They are summarized here only to the extent they are relevant.

Plaintiffs filed this putative class action on September 30, 2002 (the "Kiobel action"), which was consolidated for discovery and other pre-trial purposes with the prior related Wiwa actions.<sup>2</sup> On April 6, 2004, Wiwa Plaintiffs commenced a separate action against SPDC ("Wiwa III"), and on May 17, 2004 Kiobel

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<sup>2</sup> In Wiwa, Royal Dutch Petroleum Company and Shell Transport and Trading Company were named as defendants in Wiwa I, and Brian Anderson, a senior SPDC executive, was named as a defendant in a separate action, Wiwa II. When the Kiobel Plaintiffs brought this action, they named both Royal Dutch/Shell and Brian Anderson as defendants in a single action.

Plaintiffs added SPDC as a defendant in this action.<sup>3</sup> SPDC is a foreign corporation, organized under the laws of Nigeria, primarily engaged in the exploration, production, and sale of Nigerian oil and natural gas. See Kiobel, 2008 WL 591869 at \*1. In November 2004, Defendant SPDC filed, in both actions, a motion to dismiss for lack of personal jurisdiction and a motion to preclude any further jurisdictional discovery.<sup>4</sup>

In its March 8, 2008 Order, the Court granted SPDC's motion. The Court found that Plaintiffs failed "to establish a prima facie case of sufficient minimum contacts" with the forum - here the United States - for the Court to exercise jurisdiction over SPDC. 2008 WL 591869 at \*10. The Court also found that Plaintiffs' jurisdictional allegations were "too vague and conclusory" to warrant further jurisdictional discovery. Id. In making these findings, the Court relied on the fact that Plaintiffs "[had] access to the extensive discovery taken in connection with the prior related actions, including discovery from SPDC." Id. at \*2.

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<sup>3</sup> As the Second Circuit noted in its Summary Order, the original deadline for new discovery requests in Wiwa I, Wiwa II, and Kiobel was May 31, 2004, and was extended for limited matters to July 19, 2004 - only a short time after SPDC had been named a defendant in Wiwa III and Kiobel.

<sup>4</sup> On September 6, 2007, this Court withdrew the reference to Magistrate Judge Pitman with respect to the motion to dismiss.

On April 16, 2008, the Wiwa III Plaintiffs appealed the Court's March 4, 2008 Order. The March 4, 2008 Order was a final ruling in Wiwa III (as it dismissed the sole defendant), but the Order dismissing SPDC from the Kiobel Amended Complaint was not a final ruling, and, therefore, was not ripe for appeal.

On June 3, 2009, the Second Circuit vacated this Court's March 4, 2008 Order. The Second Circuit concluded that it was "clear error" for this Court to find that "discovery conducted in the related actions encompassed the issue of personal jurisdiction over SPDC."<sup>5</sup> 2009 WL 1560197 at \*2. As a result, this Court erred when it required Plaintiffs to "include an averment of facts" to support its prima facie case of jurisdiction - the standard courts apply only after discovery has been conducted. See infra Section II.A.3. Plaintiffs also submitted, in their motion to supplement the record on appeal, several documents obtained in discovery after the Court's decision on SPDC's motion to dismiss (the "newly produced documents") that Plaintiffs contend further support their jurisdictional allegations.<sup>6</sup>

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<sup>5</sup> On appeal, Wiwa III Plaintiffs argued that discovery in the related actions was focused on SPDC's conduct in Nigeria, and its relationship to Royal Dutch/Shell, not on personal jurisdiction in the United States over SPDC.

<sup>6</sup> These documents were produced by Defendants in response to the Court's November 6, 2008 Order, ordering Defendants to comply

On remand, in Wiwa III, this Court was instructed to consider the relevance of the documents at issue, and to decide:

[W]hether continuing discovery in the related cases has now been sufficient [1] for [plaintiffs] to adequately allege personal jurisdiction over SPDC, [2] to show that [plaintiffs] are sufficiently unlikely to be able to establish jurisdiction, so as to justify dismissal once more or [3] to allow further jurisdictional discovery.

Id. at \*3. On June 8, 2009, five days later, the three Wiwa actions settled.

Kiobel Plaintiffs now move for reconsideration of the Court's March 8, 2008 Order, which also dismissed SPDC as a defendant from the Kiobel Amended Complaint for lack of personal jurisdiction.

## **DISCUSSION**

### I. Motion to Reconsider the Court's March 4, 2008 Order

#### A. Legal Standard

The standard for a motion for reconsideration pursuant to Local Civil Rule 6.3 is strict. A court will deny reconsideration unless the moving party can establish: (1) that the court overlooked controlling decisions or data; (2) that

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with certain outstanding discovery requests related to Wiwa Plaintiffs' allegations of RICO subject matter jurisdiction.

On March 26, 2009, the Court dismissed the RICO claims in Wiwa, finding that Plaintiffs could not allege sufficient effects in the United States - primarily in regards to the shipment of SPDC-produced oil to the United States market - to justify the Act's extraterritorial application. The Kiobel Plaintiffs made no RICO claims.

there has been a change in controlling law; (3) that new evidence has become available; or (4) that reconsideration is necessary to correct a clear error or prevent manifest injustice. Shrader v. CSX Transp., Inc., 70 F.3d 255, 257 (2d Cir. 1995).

B. Application

The Court concludes that the Second Circuit's June 3, 2009 Summary Order, which vacated the Court's March 4, 2008 Order dismissing Wiwa III, is a "change in controlling law" that warrants reconsideration of the Court's (same) March 4, 2008 Order dismissing the Kiobel claims against SPDC. The Second Circuit's reasoning applies, with equal force, to this action.

The Second Circuit found that this Court committed clear error in finding that the prior related discovery included the relevant jurisdiction discovery with respect to SPDC. As a result, this Court applied the wrong standard on SPDC's motion to dismiss for lack of personal jurisdiction. The Court is also persuaded that this error impacted the Court's decision to preclude any further jurisdictional discovery. That decision assumed that it was unlikely Plaintiffs could, given the prior related discovery, uncover additional facts necessary to sustain jurisdiction. See Kiobel, 2008 WL 591869 at \*10 (noting the "extensive discovery against all Defendants, including SPDC, in these and their related cases over the past ten years").

Therefore, the Court grants Plaintiffs' motion for reconsideration of the Court's March 4, 2008 Order dismissing SPDC as a defendant for lack of personal jurisdiction.

## II. Reconsidering the Court's March 4, 2008 Order

As the Second Circuit explained in its Wiwa III decision, this Court could find, on remand, that in light of continuing discovery in the related actions (1) plaintiffs can adequately allege personal jurisdiction over SPDC, (2) plaintiffs are sufficiently unlikely to be able to establish jurisdiction (so as to justify dismissal), or (3) further jurisdictional discovery is warranted. Id. at \*3. As set forth below, the Court concludes that the most appropriate course is to permit further limited jurisdictional discovery with respect to SPDC. Once discovery has been completed, the Court will be in a position to consider, with the benefit of a more complete evidentiary record, any renewed motion to dismiss filed by SPDC for lack of personal jurisdiction.

### A. Applicable Law

#### 1. Rule 4(k)(2) jurisdictional analysis

To establish personal jurisdiction over a defendant pursuant to Federal Rule of Civil Procedure 4(k)(2), a plaintiff must show that (1) the plaintiff's cause of action arises under federal law, (2) the defendant is not subject to the jurisdiction of any

one state, and (3) the exercise of personal jurisdiction over the defendant is consistent with the requirement of due process. Porina v. Marward Shipping Co., Ltd., 521 F.3d 122, 127 (2d Cir. 2008); Daventree Limited v. Republic of Azerbaijan, 349 F. Supp. 2d 736, 760 (S.D.N.Y. 2004) (“Rule 4(k)(2) is designed to fill a gap in the enforcement of federal law . . . over defendants having sufficient contacts with the United States [as a whole] . . . but having insufficient contact with any single state to support jurisdiction under state long-arm legislation.” (quoting Fed. R. Civ. P. 4(k)(2), adv. comm. note (1993))). Because the first two elements of the Rule 4(k)(2) analysis are not in dispute, the existence of personal jurisdiction will turn on whether the exercise of personal jurisdiction is consistent with the requirement of due process.

## 2. Due process inquiry

The due process inquiry for personal jurisdiction has two related components: the “minimum contacts” test and the “reasonableness” test. Metropolitan Life Ins. Co. v. Robertson-Ceco Corp., 84 F.3d 560, 567 (2d Cir. 1996). First, a court must determine whether the defendant has sufficient minimum contacts with the forum to justify the exercise of personal jurisdiction. Porina, 521 F.3d at 127. Where, as here, a plaintiff relies on the court’s general jurisdiction, he must demonstrate that the



defendant has maintained "continuous and systematic general business contacts" with the United States.<sup>7</sup> Metropolitan Life, 84 F.3d at 568-69 (quoting Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 416 (1984)). The relevant time period for this inquiry is "a period that is reasonable under the circumstances - up to and including the date the suit was filed." Id.; see Daventree, 349 F. Supp. at 765.

If a plaintiff is able to demonstrate the requisite minimum contacts, courts then ask whether the assertion of jurisdiction comports with "traditional notions of fair play and substantial justice," i.e., whether it is "reasonable under the circumstances" of the particular case. Metropolitan Life, 84 F.3d at 568.

### 3. Jurisdictional allegations

On a Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction, the plaintiff bears the burden of showing that the court has jurisdiction over the defendant. Metropolitan Life, 84 F.3d at 566. A plaintiff's burden, however, "varies with the procedural posture of the case." Daventree, 349 F. Supp. 2d at 757. Prior to discovery, a plaintiff can defeat a Rule 12(b)(2)

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<sup>7</sup> The existence of general jurisdiction over a defendant demands the application of this "more stringent minimum contacts test than that applicable to specific jurisdiction." Metropolitan Life, 84 F.3d at 568.

motion to dismiss by pleading "good faith, legally sufficient allegations of jurisdiction, i.e., by making a prima facie showing of jurisdiction." Jazini v. Nissan Motor Co., 148 F.3d 181, 184 (2d Cir. 1998) (internal quotations marks and citations omitted). After discovery, a plaintiff's prima facie showing must be factually supported, that is, it must "include an averment of facts that, if credited by [the ultimate trier of fact], would suffice to establish jurisdiction over the defendant."<sup>8</sup> Metropolitan Life, 84 F.3d at 567 (alteration in original) (quoting Ball v. Metallurgie, 902 F.2d 194, 197 (2d Cir. 1990)).

4. Possibility of further jurisdictional discovery

\_\_\_\_\_ "It is within a district court's discretion to determine whether a plaintiff is entitled to conduct jurisdictional discovery and to 'devis[e] the procedures [to] ferret out the facts pertinent to jurisdiction.'" Daventree, 349 F. Supp. 2d at 761 (alteration on original) (quoting APWU v. Potter, 343 F.3d 619, 627 (2d Cir. 2003)).

Such discovery may be authorized where a plaintiff has made "a threshold showing that there is some basis for the assertion

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<sup>8</sup> Where a defendant contests the plaintiff's factual allegations, an evidentiary hearing is required, at which point a plaintiff must prove the existence of jurisdiction by a preponderance of the evidence. Metropolitan Life, 84 F.3d at 567; Ball, 902 F.2d at 197 & n.3.

of jurisdiction.” Daval Steel Prods. v. M.V. Jurac Dalmatinac, 718 F. Supp. 159, 162 (S.D.N.Y. 1989); see Strategem Dev. Corp. v. Heron Int’l, N.V., 153 F.R.D. 535, 547-48 (S.D.N.Y. 1994) (authorizing jurisdictional discovery where plaintiff made a “sufficient start” toward establishing jurisdiction); see also Ayyash v. Bank Al-Madina, No. 04 CV 9201, 2006 WL 587342, at \*6 (S.D.N.Y. Mar. 9, 2006). The Second Circuit has explained that jurisdictional discovery in such cases is appropriate even in the absence of a prima facie showing as to the existence of jurisdiction. In re Magnetic Audiotape Antitrust Litig., 334 F.3d 204, 207-08 (2d Cir. 2003) (per curium); see Ehrenfeld v. Mahfouz, 489 F.3d 542, 550 n.6 (2d Cir. 2007) (stating that it would be “legal error” for a district court to “forbid[] jurisdictional discovery any time a plaintiff does not make a prima facie showing of jurisdiction”).

A court, however, is not required to subject a foreign corporation to discovery where the allegations fail to state a basis for the exercise of jurisdiction, or where a plaintiff’s proposed discovery, even if permitted, would not uncover facts sufficient to sustain jurisdiction. Jazini, 148 F.3d at 185-86.

#### B. Application

On reconsideration, Plaintiffs ask the Court to find that they have established a prima facie case of jurisdiction over

SPDC, or, in the alternative, that further jurisdictional discovery is warranted. Defendant responds, arguing that (1) Plaintiffs' allegations, even if construed under the pre-discovery standard, do not support a prime facie case of jurisdiction over SPDC, and (2) subsequent discovery in the related actions adds nothing new to the jurisdictional inquiry to warrant further jurisdictional discovery.

For the reasons stated below, the Court exercises its discretion to order further limited jurisdictional discovery with respect to SPDC's contacts with the United States. At the conclusion of this discovery, the Court will consider, on a more complete evidentiary record, the question of personal jurisdiction over SPDC.

1. Plaintiffs' jurisdictional allegations and the need for further jurisdictional discovery

Plaintiffs identify roughly six categories of general business contacts between SPDC and the United States: (1) approximately 50% of SPDC's oil production was imported into the United States between January 1990 and June 1996 (i.e., 3.5 million barrels of crude oil each month), and Shell International Trading Company ("SITCO"), a separate Shell entity, acted as SPDC's agent in doing so; (2) SPDC targeted the U.S. with a public relations campaign relating to SPDC's operations in Nigeria; (3) SPDC recruited employees in the U.S. through another

Shell entity, Shell People Services ("SPS"); (4) SPDC employees came to the U.S. for training, and to attend seminars and conferences; (5) SPDC entered into contracts for services in the U.S., including the construction of a barge in New Orleans for use in Nigeria; and (6) SPDC partnered on projects with, and received financial assistance from, the United States Agency for International Development ("USAID").<sup>9</sup>

a. SPDC's Alleged Sales of Oil in the U.S.

Plaintiffs' primary jurisdictional allegations, both here and in prior briefing, concern the shipment of SPDC-produced crude oil to the United States, and SPDC's relationship with SITCO, the importing entity.

In its March 4, 2008 Order, this Court found that the fact that a substantial quantity of "crude oil and natural gas produced by SPDC in Nigeria [was] eventually sold on the United States market by third-party entities other than SPDC" did not establish the sort of "systematic" and "continuous" business contacts with the United States necessary to exercise general jurisdiction over SPDC. 2008 WL 591869 at \*6 (emphasis in original). The Court also found that Plaintiffs failed to allege sufficient facts to establish an "agency" relationship between

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<sup>9</sup> These allegations are described in greater detail in the Court's March 4, 2008 Order. See 2008 WL 591869 at \*4-6.

SPDC and SITCO, such that SITCO's contacts with the forum could be imputed to SPDC for jurisdictional purposes.<sup>10</sup> Id. at \*7.

In this motion for reconsideration, Plaintiffs cite several newly produced documents, which identify SPDC as the "shipper" or "consignor" of crude oil destined for the United States, and SITCO as the "consignee" of these shipments. Plaintiffs contend that these shipping records support the proposition that SPDC lent or entrusted oil to SITCO to be sold in the United States "on behalf" of SPDC.

The Court continues to believe that the facts alleged by Plaintiffs appear insufficient for a court to attribute SITCO's sales of oil to SPDC for jurisdictional purposes.<sup>11</sup> There is substantial evidence in the record to support Defendant's contention that SITCO acted merely as a distributor of SPDC-produced oil in the United States. (See Def's Mem. Opp. 15-16; Moskowitz Decl. Ex. 6.) The Court, however, is persuaded that Plaintiffs have made at least a "threshold showing" of a

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<sup>10</sup> Plaintiffs alleged, inter alia, that SITCO is referred to in internal documents as an "affiliate" of SPDC, and that SITCO operated at a loss in its dealings with SPDC. Id. at \*7.

<sup>11</sup> The Court does not address whether Plaintiffs' allegations satisfy the "pre-discovery" standard for a Rule 12(b)(2) motion, because at least some discovery related to the jurisdictional question has taken place. The Court will, instead, consider the jurisdictional question after jurisdictional discovery has been completed.

jurisdictional basis over SPDC with respect to the sale of SPDC oil in the United States, and SPDC's relationship with SITCO. Plaintiffs should, therefore, be afforded the opportunity to "secure and present evidence relevant to the existence of jurisdiction" on this ground. APWU v. Potter, 343 F.3d at 627; see In re Magnetic Auduitape, 334 F.3d at 208 (stating that inquiry concerning allegations of general jurisdiction based on agency relationship "involves a multi-factor test that is very fact-specific," and finding that "it was premature to grant dismissal prior to allowing discovery on plaintiffs' insufficiently developed allegations regarding the relationship between SKM and its [domestic] subsidiary").

The Court notes that discovery in this and the related actions with respect to oil shipments has focused thus far on the period from 1990-1996. The period most relevant to an assessment of SPDC's contacts with the United States, however, would include the years immediately prior to 2004, when Plaintiffs filed the Amended Complaint adding SPDC as a defendant. Thus, Plaintiffs are entitled to jurisdictional discovery concerning (1) SPDC's shipments of crude oil to the U.S., and (2) SPDC's relationship with SITCO (or any successor entity) during the period from 1996-2004.

b. SPDC's Other Alleged Contacts with the U.S.

In addition to SPDC crude shipments and alleged sales in the United States, Plaintiffs also predicate general jurisdiction on: (1) a public relations campaign in the 1990s aimed at the United States, (2) recruiting of employees in the United States by an alleged "sister" company of SPDC, (3) SPDC employee visits to the United States, and (4) SPDC contracts with U.S.-based companies and receipt of funding from USAID. In its March 4, 2008 Order, the Court found these remaining contacts to be too "sporadic and occasional," even when considered along with SPDC's shipment of oil to the U.S., to find continuous and systematic business contacts. 2008 WL 591869 at \*7 (citing Metropolitan Life, 84 F.3d at 573).

On this motion, Plaintiffs do not cite new documents to support these jurisdictional allegations.<sup>12</sup> Instead, Plaintiffs contend that further jurisdictional discovery is warranted, because discovery thus far has not focused on the jurisdictional

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<sup>12</sup> Plaintiffs do cite a newly produced document that they contend establishes that SPDC maintained a banking relationship with Morgan Stanley in the United States. (D'Avino Decl. Ex. 6.) Although Plaintiffs' characterization appears to overstate the case, Plaintiffs are entitled to discovery concerning SPDC's banking contacts, if any, in the United States during the period 2000-2004, for the reasons discussed above.



question, or the most immediate 2000-2004 time period.<sup>13</sup>

Although admittedly a close question, the Court concludes that Plaintiffs should have the opportunity to engage in limited discovery on these allegations.

The Court is required to assess the defendant's contacts with the forum as a whole to determine whether they satisfy the requirements of due process. See Metropolitan Life, 84 F.3d at 573. At this stage, Plaintiffs have made a sufficient "threshold showing" that these other contacts with the United States - considered in the aggregate and in conjunction with SPDC's oil business - may provide "some basis for the assertion of jurisdiction," such that further development with respect to these other contacts during the period 2000-2004 is appropriate.

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The Court notes that, although discovery on the jurisdictional question may not be complete, there has been extensive discovery in this and the related actions spanning more than a decade. Accordingly, the Court believes discovery on the issues identified herein can be conducted within the time-frame prescribed below, which will allow the Court to turn to the question of personal jurisdiction over SPDC in a timely manner.

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<sup>13</sup> In their motion, Plaintiffs limit their request for jurisdictional discovery to this time period.

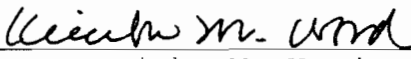


**CONCLUSION**

For the reasons stated above, the Court GRANTS Plaintiffs' motion for reconsideration. (D.E. 273.) On reconsideration, the Court denies without prejudice Defendant's motion to dismiss, with leave to re-file after the conclusion of further jurisdictional discovery. The Court sets the following schedule: (1) jurisdictional discovery to be completed by January 8, 2010; and (2) any renewed motion to dismiss by SPDC for lack of personal jurisdiction to be submitted by January 15, 2010; Plaintiffs' opposition to be submitted by January 29, 2010; any reply by SPDC to be submitted by February 5, 2010.

SO ORDERED.

Dated: New York, New York  
November 13, 2009

  
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Kimba M. Wood  
United States District Judge