UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

KEN WIWA, et al., Plaintiffs,	:	96 Civ. 8386 (KMW) (HBP)
-against-	:	
ROYAL DUTCH PETROLEUM COMPANY and SHELL TRANSPORT AND TRADING COMPANY, Defendants.	:	
KEN WIWA, et al., Plaintiffs,	:	01 Civ. 1909 (KMW) (HBP)
-against-	:	ORDER
BRIAN ANDERSON, Defendant.	:	

WOOD, U.S.D.J.:

Plaintiffs filed suit against Royal Dutch Petroleum Company and Shell Transport and Trading Company (together "Corporate Defendants") on November 6, 1996 and against Brian Anderson, former managing director of the Corporate Defendants' Nigerian subsidiary, on March 5, 2001. Defendants subsequently moved to dismiss both actions pursuant to Federal Rule of Civil Procedure 12(b)(6). On February 28, 2002, this Court granted Defendants' motion with respect to the Alien Tort Claim Act claims of plaintiff Owens Wiwa and denied Defendants' motion in all other

respects. The Court gave Plaintiffs thirty days to re-plead the dismissed claims.

Plaintiffs filed amended complaints in both actions on June 16, 2003. The Second Amended Complaint (against Brian Anderson) names five new plaintiffs, and the Third Amended Complaint (against the Corporate Defendants) names seven new plaintiffs.

On December 2, 2003, Defendants filed a motion to dismiss the new plaintiffs' claims. Defendants argue that: (1) the claims are barred by the act of state doctrine, or, in the alternative, that the Court should seek comment from the Executive Branch as to whether allowing these actions to continue in New York federal court would damage American-Nigerian relations; (2) plaintiff David Kiobel's wrongful death claim fails for lack of standing; and (3) Michael Tema Vizor's civil RICO claim and the new plaintiffs' supplemental state law tort claims are barred by the applicable statutes of limitations. Defendants also move to strike paragraph 45 of the Third Amended Complaint on the ground that it contains false information.

On March 31, 2006, Magistrate Judge Henry Pitman issued a Report and Recommendation ("Report"), familiarity with which is assumed, recommending that Defendants' motion be granted in part and denied in part. Plaintiffs and Defendants timely objected.

The Court must consider Plaintiffs' and Defendants' objections de novo. See 28 U.S.C. § 636(b)(1); Fed. R. Civ. P.

72(b). In reaching its decision, the Court has carefully considered the Report, and the arguments contained therein, as well as the briefs that the parties have submitted.

Plaintiffs did not object to Magistrate Judge Pitman's recommendation that David Kiobel's wrongful death claim be dismissed for lack of standing. Defendants likewise did not object to Magistrate Judge Pitman's decision not to consider whether the Court should strike paragraphs 3, 48, 144, 147-48, 92, 197(d), and 198-200 from the Third Amended Complaint. The Court agrees with Magistrate Judge Pitman's analysis as to these issues and adopts his recommendation and reasoning, which are laid out on pages 10 and 16-17 of the Report.

In addition, having reviewed Defendants' objections to Magistrate Judge Pitman's (1) recommendation that the Court not abstain from adjudicating this action pursuant to the act of state doctrine,(2) recommendation that the Court deny Defendants' motion to dismiss the negligence claims against Brian Anderson, and (3) refusal to consider whether the wrongful death claims of the newly added plaintiffs other than David Kiobel should be dismissed for lack of standing, the Court is persuaded that these objections are without merit. The Court thus adopts in full the relevant portions of Magistrate Judge Pitman's recommendations,

which are laid out on pages 10-15 and 29-30 of the Report.[1]

There remain, then, three of Defendants' objections – that the Court should seek guidance from the Executive Branch as to whether this litigation should proceed in a New York federal court, that the Court should strike Paragraph 45 of the Third Amended Complaint, and that Plaintiffs should not be given leave to re-plead their dismissed claims – and one of Plaintiffs' objections – that Magistrate Judge Pitman improperly rejected their equitable tolling arguments.

Seeking Comment from the Executive Branch

In connection with their motion to dismiss the new plaintiffs' claims pursuant to the act of state doctrine, Defendants raise a new issue, not raised in Kiobel, as to whether the Court should seek comment from the Executive Branch regarding

[1]This ruling is consistent with the Court's ruling in Kiobel v. Royal Dutch Petroleum Co., No. 02-CV-7618. On March 11, 2004, Magistrate Judge Pitman issued a Report and Recommendation in Kiobel ("Kiobel Report"), in which he rejected defendants' argument that the act of state doctrine barred plaintiffs' claims. In rejecting similar arguments made by Defendants in this case, Magistrate Judge Pitman explicitly relied on his reasoning in the Kiobel Report. See Report at 15 ("Since defendants do not argue that this case is distinguishable, I adhere to my analysis in Kiobel and respectfully recommend that the Court should not abstain from adjudicating this action pursuant to the act of state doctrine and that defendants' motion to dismiss on this claim should be denied."). The Court subsequently adopted Magistrate Judge Pitman's recommendation in Kiobel.

the likely impact of this litigation on American-Nigerian relations. Defendants argue that it should. Defendants further argue that Magistrate Judge Pitman erred in failing to consider the impact of the Supreme Court's opinion in Sosa v. Alvarez-Machain. The Court is unpersuaded by Defendants' arguments.

First, Defendants wrongly interpret the Sosa opinion. As Plaintiffs properly point out, Sosa does not stand for the proposition that a court should inquire into the Executive Branch's position whenever Alien Tort Statute litigation raises potential foreign policy implications. Rather, the Supreme Court stated in Sosa that where the Executive Branch has already expressed an opinion regarding the impact of United States litigation on foreign policy relations with other nations, "there is a strong argument that federal courts should give serious weight to the Executive Branch's view." 542 U.S. 692, 733 n.21 (2004)

Moreover, while Defendants cite to a number of decisions in which district courts have consulted with the State Department on matters of foreign policy, these decisions establish only that a court may choose to seek Executive Branch comment. Magistrate Judge Pitman concluded that, "where, as here, an official of the Nigerian government has sent correspondence referencing [the] litigation directly to the Attorney General, a request from the Court for comment is unnecessary." Report at 15-16. The Court

agrees with Magistrate Judge Pitman's recommendation and therefore denies Defendants' request.

Defendants' Motion to Strike

Upon considering Defendants' motion to strike, Magistrate Judge Pitman recommended that the Court grant Plaintiffs leave to amend the Third Amended Complaint to delete paragraph 45. The Court recognizes that the Federal Rules of Civil Procedure allow for liberal amendment of pleadings. See Fed. R. Civ. P. 15(a). The Court also agrees with Magistrate Judge Pitman that allowing Plaintiffs to delete the paragraph at issue would not prejudice Defendants. See Yankelevitz v. Cornell Univ., No. 95 civ. 4593, 1997 WL 115651, at *4 (S.D.N.Y. Mar. 14, 1997) (suggesting that the absence of prejudice to the opposing party is the most important factor for a court to consider in deciding whether to give leave to amend) (quoting State Teachers Ret. Bd. v. Fluor Corp., 654 F.2d 843, 856 (2d Cir. 1981)). Moreover, the end result is the same whether the Court grants Defendants' motion to strike or gives Plaintiffs leave to amend. The Court therefore adopts Magistrate Judge Pitman's recommendation and grants Plaintiffs leave to amend. However, in light of the evidence that Defendants have offered in support of their motion to strike, see Defs.' Objections at 6-8, the Court emphasizes that it is granting leave to amend specifically, and only, for the

purpose of allowing Plaintiffs to delete paragraph 45. See Fed. R. Civ. P. 11.

Plaintiffs' Equitable Tolling Arguments

Magistrate Judge Pitman recommended dismissal of several of the new plaintiffs' claims on the ground that they are time-barred by the applicable statutes of limitations. Report at 24, 30. In their objections to the Report, Plaintiffs assert a new argument not previously considered by Magistrate Judge Pitman – that the statutes of limitations for each of these claims should be tolled until the Nigerian election of 2003, allegedly the first peaceful election following the end of Nigeria's military rule in 1999. Plaintiffs argue that until the 2003 election, the political climate in Nigeria was such that the new plaintiffs feared that they or their family members would be harmed if they took legal action against Defendants. This new argument is unpersuasive.

Tolling applies "'as a matter of fairness' where a plaintiff has been 'prevented in some extraordinary way from exercising his rights.'" Johnson v. Nyack Hosp., 86 F.3d 8, 12 (2d Cir. 1996) (emphasis added) (quoting Miller v. Int'l Tel. & Tel. Corp., 755 F.2d 20, 24 (2d Cir. 1985)). As Defendants argue in their response papers, Plaintiffs mistakenly rely on Chavez v. Carranza, Arce v. Garcia, and Jean v. Dorelian to support their

requests for equitable tolling. In none of these cases did courts find that the relevant statutes of limitations should be tolled until the first "relatively peaceful" democratic election following a period of military dictatorship. See 407 F. Supp. 2d 925, 929-30 (W.D. Tenn. 2004) (tolling statute of limitations until El Salvador's first national elections following civil war, but declining to rule on whether the toll should be extended until the first relatively peaceful elections, which took place three years later); 434 F.3d 1254, 1264-65 (11th Cir. 2006) (tolling statute of limitations until the end of civil war in El Salvador); 431 F.3d 776, 781 (11th Cir. 2005) (tolling statute of limitations until a democratically elected government resumed power in Haiti).[2]

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[2]Plaintiffs' tolling argument, in addition to lacking a legal basis, is factually unpersuasive. Plaintiffs fail to establish that the 2003 election marked a significant turning point in Nigerian politics, such that fear of retaliation was legitimate before, but not after, it took place. Plaintiffs rely on the Department of State's 1999-2003 Country Reports on Human Rights Practices to support their argument that conditions in Nigeria following the end of military rule in 1999 were bad enough to warrant tolling of the statutes of limitations. Plaintiffs highlight a portion of the 2002 report that states, "[t]he national police, military, and security forces committed extrajudicial killings." Pls.' Objections at 3. However, the 2004 and 2005 reports indicate that the government had a poor human rights record during those years as well, and that even after the 2003 election, Nigerian security forces continued to commit extrajudicial killings. If, as Plaintiffs claim, the conditions following the 2003 election did not amount to extreme circumstances warranting tolling of the statutes of limitations, then neither did the conditions preceding the 2003 election.

Accordingly, for these reasons as well as those elaborated in Magistrate Judge Pitman's Report, see Report at 17-30, the Court adopts Magistrate Judge Pitman's recommendation that Defendants' motion to dismiss be granted with respect to: (1) plaintiff Michael Tema Vizor's civil RICO claim; (2) newly added claims for wrongful death brought on behalf of plaintiffs other than David Kiobel; (3) the new plaintiffs' claims for assault and battery and intentional infliction of emotional distress; and (4) the new plaintiffs' negligence and negligent infliction of emotional distress claims against all defendants other than Brian Anderson. Although Magistrate Judge Pitman did not reach this issue in the Report, see Report at 17 n.7, the Court concludes that David Kiobel's wrongful death claim should be dismissed for the same reasons.

Granting Plaintiffs Leave to Re-Plead Their Dismissed Claims

As discussed above, the Federal Rules of Civil Procedure provide that leave to amend shall be "freely given." Fed. R. Civ. P. 15(a). However, a court need not grant leave to amend where a plaintiff's claims are barred by the statute of limitations, because amendment in such instances would be futile. De La Fuente v. DCI Telecomms., Inc., 206 F.R.D. 369, 387 (S.D.N.Y. 2002); In re Merrill Lynch & Co., 273 F. Supp. 2d 351, 393 (S.D.N.Y. 2003); In re Tamoxifen Citrate Antitrust Litig.,

429 F.3d 370, 404 (2d Cir. 2005); Jones v. N.Y. State Div. Of Military & Naval Affairs, 166 F.3d 45, 50 (2d Cir. 1999); Acito v. IMCERA Group, Inc., 47 F.3d 47, 55 (2d Cir. 1995).

The Court agrees with Magistrate Judge Pitman's recommendation that the following claims be dismissed: claims seven through nine of the Second Amended Complaint as brought by the new plaintiffs; claims seven through eleven of the Third Amended Complaint as brought by the new plaintiffs; and claim twelve of the Third Amended Complaint as brought by Michael Tema Vizor.[3] However, the Court denies Plaintiffs leave to re-plead their claims because amendment would be futile.

SO ORDERED.

Dated: New York, New York
September 29, 2006

Kimba M. Wood
United States District Judge

[3]Section III.B.3.a of the Report should be titled "Civil RICO Claim in Third Amended Complaint 96 Civ. 8386."