



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X  
KEN WIWA, et al.,

Plaintiffs,

-against-

ROYAL DUTCH PETROLEUM CO., et al.,

Defendants.  
-----X

96 Civ. 8386 (KMW) (HBP)

KEN WIWA, et al.,

Plaintiffs,

-against-

BRIAN ANDERSON,

Defendant.  
-----X

01 Civ. 1909 (KMW) (HBP)

ESTHER KIOBEL, et al.,

Plaintiffs,

-against-

ROYAL DUTCH PETROLEUM CO., et al.,

Defendants.  
-----X

02 Civ. 7618 (KMW) (HBP)

ORDER

KIMBA M. WOOD, U.S.D.J.:

The Court held a conference in the three above-captioned actions on October 7, 2008 ("October 2008 Conference").<sup>1</sup> The Court hereby clarifies, alters, and augments a number of the

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<sup>1</sup> The Court originally called a hearing for October 7, 2008. (August 8, 2008 Order, 96-D.E. 235.) However, because no new evidence was presented that day, it shall be referred to henceforth as a conference.

orders it made at the October 2008 Conference. The following orders supercede, to the extent that they conflict with, the Court's directions contained in the transcript of the October 2008 Conference. All orders that the Court made at the October 2008 Conference which are not addressed herein remain in place.

**I. ECF Filing**

The Court orders the Clerk of Court to designate Wiwa v. Royal Dutch Shell Petroleum Co., 96 Civ. 8386, and Wiwa v. Anderson, 01 Civ. 1909 (collectively "Wiwa"); as well as Kiobel v. Royal Dutch Shell Petroleum Co., 02 Civ. 7618 ("Kiobel"), for Electronic Case Filing ("ECF"). Counsel for all Parties must register to use ECF. Henceforth, all Parties' filings in these cases shall comply with ECF Rules and Instructions, as described on the Court's website.

**II. Kiobel Plaintiffs' Motion for a Stay of Proceedings**

The Second Circuit Court of Appeals is currently considering Kiobel Plaintiffs' appeal and Defendants' cross-appeal of the Court's September 29, 2006 Order in Kiobel, which the Court certified for interlocutory appeal pursuant to 28 U.S.C. 1292(b). (02-D.E. 156.) Kiobel Plaintiffs have moved the Court for a stay of all proceedings in their case pending resolution of these appeals. For the following reasons, the Court GRANTS in part and DENIES in part Kiobel Plaintiffs' request.

Under 28 U.S.C. § 1292(b) ("1292(b)"), whether to stay proceedings pending interlocutory appeal is left to the discretion of the District and Appellate Courts. Generally, once courts determine that certifying a decision for interlocutory appeal will fulfill the purposes of 1292(b), they grant a stay, if appropriate, without further comment. See, e.g., In re World Trade Ctr. Disaster Site Litig., 270 F. Supp. 2d 357, 381 (S.D.N.Y. 2003); cf. A.B.N. Amro Verzekeringen BV v. Geologistics Americas, Inc., Nos. 01 Civ. 5661, 02 Civ. 1238, 2003 WL 21543429, \*3 (S.D.N.Y. July 9, 2003) (placing cases summarily on suspension docket after certifying a decision for appeal under 1292(b)). However, because it has been over two years since the Court certified its order for interlocutory appeal, the time has passed for it to summarily grant a stay.

Where the Appellate Court's decision may dispose of the entire action, a stay pending interlocutory appeal may be especially appropriate. See O'Brien v. Avco Corp., 309 F. Supp. 703, 705 (D.C.N.Y. 1969) (collecting cases). However, even where the interlocutory appeal could dispose of the entire action, courts may deny a stay if proceeding with the action will benefit the parties or avoid substantial prejudice. See In re Worldcom, Inc. Sec. Litig., No. 02 Civ. 3288, 2004 WL 77694, \*2 (S.D.N.Y. Jan. 20, 2004) (denying stay pending interlocutory appeal of jurisdictional question where, regardless of the outcome on

appeal, the case would continue in some forum and thus the parties would benefit from a clarification of the law governing plaintiffs' claims); 16 Charles Alan Wright et al., Fed. Prac. and Proc. § 3929 (noting that even where the certified order may dispose of the whole case, a stay may be inappropriate if discovery would be threatened by delay). Furthermore, if only part of a case will be decided by a certified order, it is "ordinarily . . . better to proceed with the rest of the case unless [doing so will] threaten extensive duplication later." Wright, supra, § 3929.

Many factors militate in favor of granting a stay in Kiobel. Because every remaining claim in Kiobel is currently on appeal, there is no question that the Second Circuit's decision could dispose of the entire case. In addition, Kiobel is a putative class action. Certifying a class is a lengthy process and will vary depending on the claims the Kiobel Plaintiffs ultimately bring.<sup>2</sup> (See Ct. Order, Feb. 8, 2006, D.E. 154 ("A motion to certify requires the Court's careful attention to the details of the claims involved and the individual plaintiffs and defendants".)) If the Court does not stay Kiobel, it might

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<sup>2</sup> Although the Kiobel cutoff date for filing pretrial motions was June 28, 2004 (96-D.E. 56, 66, 71, & 118), by Order dated February 8, 2006, the Court dismissed Kiobel Plaintiffs' Motion to Certify the Class without prejudice to refile it. (02-D.E. 154.) Thus the June 28, 2004 cutoff date for pretrial motions does not govern the timeliness of any future class certification motion by Kiobel Plaintiffs.

decide one class certification motion and possibly try Kiobel as a class action, only to repeat that process should the Second Circuit's disposition of the pending appeals so require. This potential waste of judicial and party resources weighs heavily in favor of granting Kiobel Plaintiffs' motion. If these were the sole considerations, staying all proceedings in Kiobel pending the Second Circuit's decision would be straightforward.

But these are not the only considerations; instead, the Court must weigh a number of countervailing factors. First, the Kiobel appeals have been pending for over two years, without resolution of the potentially dispositive certified questions. Second, discovery has been stayed or stalled on the brink of completion in the Kiobel and Wiwa cases for over four years. The earliest allegations in this case concern events that took place more than fifteen years ago. Further passage of time and erosion of memories counsel prompt completion of discovery and favor moving quickly toward trial. (See Wiwa Pls.' Resp. Mot. Stay 4 (Oct. 3, 2008).)

Third, although Kiobel is not consolidated with the Wiwa cases and the Wiwa Plaintiffs have no claims on appeal, the three actions share discovery, 96-D.E. 66, as well as the interests of one decedent's estate, two defendants, several claims, and some common facts. As a result, a stay of all further proceedings in Kiobel might hinder, if not preclude, bringing the Wiwa cases to

trial. But the Wiwa Plaintiffs are understandably eager to move their cases forward, the oldest of which has now been pending for over twelve years. They oppose a stay in Kiobel to the extent that it will impede this outcome. (See Wiwa Pls.' Resp. Mot. Stay 2.) Defendants, for their part, urge a speedy resolution of these cases, out of concern for their aging witnesses and because they believe Defendant Anderson has been tainted by Plaintiffs' accusations and is entitled to a final resolution of the claims against him.<sup>3</sup> (Hr'g Tr. 59: 4-11 (Oct. 7, 2008).)

The Court finds that requiring all Parties to complete fact discovery, but thereafter staying only the remaining proceedings in Kiobel, best balances the Parties' competing interests without overly burdening the Court.<sup>4</sup>

### III. Discovery Issues

#### 1. Discovery Stays: Magistrate Judge ("MJ") Pitman stayed

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<sup>3</sup> Defendants also argue that staying Kiobel but not Wiwa will unduly burden them and the Court. (Hr'g Tr. 58-59.) If Wiwa goes to trial and the Second Circuit subsequently allows some of the Kiobel claims to proceed, Defendants may have to try some duplicative facts and claims. (Id.) However, because they also assert that trial is unlikely to be lengthy in either Kiobel or the Wiwa cases, id. at 58, the Court grants this argument limited weight.

<sup>4</sup> The Second Circuit has proposed January 5, 2009 for oral arguments in the Kiobel appeal. (2d Cir. No. 06 Civ. 4800 Dkt.) Even if the Second Circuit hears oral arguments in the Kiobel appeals in early 2009, the Court cannot predict when the Second Circuit will issue its decision. In addition, if the Second Circuit's decision does not dispose of Kiobel in its entirety, the Court will likely face the delays associated with deciding a motion for class certification and, possibly, noticing class members before taking Kiobel to trial. Accordingly, while the Second Circuit's proposed oral argument date is promising, it does not justify staying the Wiwa cases.

Parties' obligations to respond to specified discovery requests by Orders dated June 2, 2004, 96-D.E. 136, and July 15, 2004, 96-D.E. 162. Those stays are hereby lifted.<sup>5</sup>

**2. Requests to File Motions:** The Court grants Defendants' request to file a Motion (1) to Strike Kiobel Plaintiffs' Interrogatory Answers, 02-D.E. 71, and (2) for Discovery Sanction of Dismissal against Wiwa and Kiobel Plaintiffs.

**3. Docketing and Courtesy Copies:** All Parties shall review the docket sheets in the Wiwa and Kiobel cases and ensure that (1) all their motion papers are properly docketed, and (2) the Court has courtesy copies of any documents a party wishes it to consider regarding the matters addressed at the October 2008 Conference. In particular, (1) Defendants shall docket their request to file a Motion for Discovery Sanction of Dismissal and the motion itself; and (2) Parties shall provide the Court with courtesy copies of (a) their papers regarding Defendants' Motion to Strike Kiobel Plaintiffs' Interrogatories, 02-D.E. 68, 71, 74-77; and (b) Wiwa Plaintiffs' July 9, 2004 Declaration of Blessing Kpuinen, 96-D.E. 156. The Parties shall complete this review, docketing, and provision of courtesy copies by 5:00 PM on October 28, 2008.

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<sup>5</sup> To the extent MJ Pitman's May 24, 2004 Order, 96-D.E. 137, adjourning sine die Plaintiffs' obligation to respond to Defendants' Requests for Admission swept more broadly than the June 2, 2008 stay, 96-D.E. 136, that adjournment is ended.

**4. Plaintiffs' Joint Request to Redepose Four of Defendants'**

**Witnesses:** Plaintiffs' request to redepose Emeka Achebe, Brian Anderson, Alan Detheridge, and Egbert Imomoh is GRANTED with the following conditions: Plaintiffs may redepose these four witnesses shortly before or during trial, solely with respect to documents that Defendants produced subsequent to Plaintiffs' prior depositions of these witnesses (the "redemption documents").

Plaintiffs shall submit a list of redemption documents to the Court and Defendants by 5:00 PM on December 5, 2008.

Defendants shall notify the Court and Plaintiffs of any documents Defendants believe that the Court should not deem redemption documents and their evidence therefore by 5:00 PM on December 12, 2008.

**5. Kiobel Plaintiffs' Motion to Compel Defendants' Payment of**

**Deposition Expenses:** Kiobel Plaintiffs' have requested, in an October 10, 2008 Letter to the Court, that the Court decide their Motion to Compel Defendants' Payment of Deposition Expenses, 02-D.E. 120. The Court DENIES the Motion as untimely.

Kiobel Plaintiffs' Motion to Compel was filed long after the cutoff date for pretrial motions. According to the scheduling order governing this case, the cutoff date for filing pretrial motions was June 28, 2004. (96-D.E. 56, 66, 71, 118.) Kiobel Plaintiffs filed their Motion on October 5, 2004. Thus, it was clearly untimely. Furthermore, even if the Court construes

Kiobel Plaintiffs' October 10, 2008 Letter as a request for a modification of the cutoff date, no such modification is warranted.

A pretrial scheduling order "may be modified only for good cause." Fed. R. Civ. P. 16(b)(4). "A finding of 'good cause' depends on the diligence of the moving party." Parker v. Columbia Pictures Indus., 204 F.3d 326, 340 (2d Cir. 2000); see also, Fed. R. Civ. P. 16, Advisory Comm. Notes, 1983 Amendments at Subdivision (b) ("the court may modify the schedule . . . if it cannot reasonably be met despite the diligence of the party seeking the extension").

Kiobel Plaintiffs have not established good cause for allowing their tardy Motion to Compel. Defendants expressed their unwillingness to pay these deposition fees by June 22, 2004. (Defs.' Mem. L. Opp'n Kiobel Pls.' Mot. Compel Ex. F (October 20, 2004), 02-D.E. 122.) Kiobel Plaintiffs filed their Motion over three months later, without having asked the Court for a discovery conference, pursuant to Local Rule 37.2, or having requested a modification to the scheduling order. They also provided no justification for its tardy filing at the October 2008 Conference or in their October 10, 2008 letter to the Court. Accordingly, the Court DENIES Kiobel Plaintiffs' Motion to Compel as untimely.

**6. Defendants' RICO Interrogatories to Wiwa Plaintiffs: Wiwa**

Plaintiffs shall respond to only paragraphs 1, 4, 10, and 13 of Defendants' RICO Interrogatories; the remaining paragraphs are stricken. They shall do so by 5:00 PM on December 5, 2008.

**7. Defendant Shell Transport and Trading Co., p.l.c.'s Motion to Compel Kiobel Plaintiffs' Response to Defendant's Second Set of Interrogatories:**

Defendant has a request to file a Motion to Compel Kiobel Plaintiffs' responses to these interrogatories pending before the Court. The Court DENIES that request without prejudice to renew it according to the following conditions:

(1) Kiobel Plaintiffs shall respond to these timely interrogatories by 5:00 PM on October 31, 2008.

(2) If Defendant finds Kiobel Plaintiffs' responses inadequate, it shall make a good faith effort to confer with Kiobel Plaintiffs and resolve their differences.

(3) If Parties reach a true impasse, Defendant shall so certify to the Court and renew its request to file its Motion to Compel by 5:00 PM on November 7, 2008.

**8. Defendants' Motion to Obtain Limited Extension of the Discovery Cutoff and to Compel Production of Documents:**

The following supercedes the Court's orders at the October 2008 Conference and constitutes its only orders addressing

Defendants' following discovery requests:<sup>6</sup>

On June 28, 2004, Defendants requested leave to file, and filed, a Motion to Obtain Limited Extension of the Discovery Cutoff and to Compel Production of National Union of Ogoni Students ("NUOS") Documents and Unredacted Documents on Payments to Witnesses ("Defendants' 2004 Motion").<sup>7</sup> Defendants' motion seeks to (1) extend the discovery cutoff so as to permit their otherwise untimely discovery requests regarding Kiobel Plaintiffs' alleged payments, or offers of payment, to witnesses and/or potential witnesses ("witness payments").<sup>8</sup> Defendants also moved to compel (2) further production of Kiobel Plaintiffs' NUOS-related documents and (3) Kiobel Plaintiffs' production of

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<sup>6</sup> The Court so revises its orders because Parties argued these disputes to the Court at the October 2008 Conference without briefing the Court as to the substance of their disagreement and without having placed the requests in question before the Court for its review.

<sup>7</sup> Plaintiffs contend that MJ Pitman's September 29, 2006 Opinion and Order, 02-D.E. 155, granting in part and denying in part Kiobel Plaintiffs' Motion for Sanctions under Federal Rule of Civil Procedure 11(b)(3) ("Sanctions Order") struck these requests. It did not.

The Sanctions Order found only that the following statements made by Defendants lacked evidentiary support at the time Defendants made them: (1) "[t]here can be no doubt that the witnesses are giving testimony that counsel know to be false," and (2) "we know that between February 29, 2004 and April 2, 2004, Berger & Montague wired \$15,195 to the Benin republic [sic] for the benefit of the witnesses." Sanctions Order 28 (alteration of capitalization in original).

The Sanctions Order did not decide whether it would be appropriate for Defendants to seek evidence that could support these statements. It also did not decide whether the Court should grant Defendants a limited extension of the discovery cutoff in order to do so.

<sup>8</sup> In order to be timely, all discovery requests in the above-captioned actions had to be filed and served in time to be completed by May 28, 2004. (See 96-D.E. 56, 66, 71, 118.)

unredacted versions of previously produced documents.

**A. Motion for a Limited Extension of the Discovery Cutoff**

For the reasons provided below, the Court DENIES Defendants' request for a limited extension of the discovery cutoff.

Defendants' otherwise untimely discovery requests are their (1) May 28, 2004 Document Request to Kiobel Plaintiffs; (2) May 28, 2004 Interrogatories to Kiobel Plaintiffs; (3) May 28, 2004 Deposition Notice to Keith G. Mabray;<sup>9</sup> (4) June 2, 2004 Document Subpoena to NUOS; and (5) June 18, 2004 Document Subpoena and Deposition Notice to MPTC Security.<sup>10</sup>

As explained above, the Court may modify a scheduling order only where the requesting party has shown good cause, which depends on that party's diligence.

Defendants have not provided good cause for their untimely June 2, 2004 discovery request of NUOS. Defendants learned of NUOS's existence at least as early as July 2003. (Decl. Michael T. Reynolds in Support of Defs.' Mot. on the Perjurious Benin Testimony ("Reynolds Decl.") Ex. PP (Dep. Tr. of Charles Wiwa, July 30, 2003, at 8:25-9:8).) According to Defendants, they

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<sup>9</sup> The Parties dispute the exact date of this Notice, but they agree that it was not served before May 28, 2004. (See Parties' responses to the Court's Oct. 3, 2008 Order, 96-D.E. 242.)

<sup>10</sup> Defendants' 2004 Motion also seeks an extension for their June 3, 2004 request for Letters Rogatory to the Nigerian Government. (Defs.' 2004 Mot. 14.) The Court does not address this request herein because Defendants withdrew it at the October 2008 Conference. (Oct. 2008 Conf. Tr. 16:23-17:3.)

acquired information indicating that NUOS was involved in making payments to Kiobel Plaintiffs' witnesses in Benin by May 14, 2008, if not sooner. (Defs.' Mem. L. in Support of 2004 Mot. 18 ("Defs.' Mem. L.") (citing the transcript of Dumle J. Kunenu's May 14, 2004 deposition, Reynolds Decl. Ex. QQ at 207-11, for the proposition that "NUOS held a meeting at which it decided to send money to the witnesses in Benin").)<sup>11</sup> Defendants had the opportunity to timely file their subpoena to NUOS.<sup>12</sup> Accordingly, Defendants' Notice of Document Subpoena to NUOS is hereby QUASHED.

Second, Defendants have not provided good cause for their untimely discovery requests to Keith Mabray, which they filed no earlier than May 28, 2004, and MPTC Security, which they filed June 18, 2004. Kiobel Plaintiffs produced documents to Defendants on May 14, 2004 that indicated that someone named Keith was distributing payments to witnesses residing in Benin. (Reynolds Decl. Exs. W-DD, TT, WW.) These documents also

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<sup>11</sup> The Court passes no judgment on whether the deposition transcript Defendants rely on supports the conclusion they draw from it.

<sup>12</sup> Defendants suggest that by May 11, 2004, it was already "too late to serve discovery requests that would have been due before the discovery cutoff." (Defs.' 2004 Mot. 11.) The Court disagrees. However, even assuming arguendo that the recipients of Defendants' discovery requests would not have been able to respond prior to the discovery cutoff date, this possibility did not justify Defendants waiting until the cutoff date to file their requests. Nor does it justify Defendants waiting until one month after the discovery cutoff date to seek a limited extension of discovery for their already filed untimely requests.

indicated that an entity called MPTC may have been involved with these payments. (Id. Ex. Z.) For the reasons stated above, Defendants had sufficient opportunity to file timely discovery requests to Keith Mabray and MPTC Security. If they did not yet know Mabray's last name or what, precisely, MPTC was, they could have filed their requests based on the information they had and served them via Kiobel Plaintiffs' counsel. Accordingly, the Court hereby QUASHES Defendants' Document and Deposition Subpoena to MPTC Security and STRIKES their Notice of Deposition to Keith Mabray.

Third, Defendants have not established good cause for their late filing of their Interrogatories and Document Requests to Kiobel Plaintiffs. As indicated above, Defendants had sufficient information to formulate these requests at least as early as May 14, 2008.<sup>13</sup> Accordingly, for the reasons stated above, Defendants have not established good cause to extend the discovery cutoff to allow these otherwise untimely discovery requests to Kiobel Plaintiffs.

For the foregoing reasons, Defendants' request for a limited

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<sup>13</sup> In addition to the evidence discussed in relation to Defendants' discovery requests to NUOS, MPTC Security, and Keith Mabray, Defendants claim to have received key information regarding witness payments at their May 11, 2004 deposition of Dornubari Anslem John-Miller. (Defs.' 2004 Mot. 6-7 (citing Reynolds Decl. Ex H).) Indeed, Defendants appear to have had adequate information to formulate interrogatories on this subject as of April 28, 2004. (Oct. 2008 Conf. Tr. 33:25-34:5.)

extension of the discovery cutoff is DENIED in its entirety.<sup>14</sup>

**B. Motion to Compel Production of NUOS Documents**

Defendants' request to file its Motion to Compel is DENIED without prejudice to renew the request as indicated below.

Under Rule 37, a motion to compel "must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery." Fed. R. Civ. P. 37(a)(1). Defendants' motion makes no such certification. Unless the parties are at a true impasse, Defendants' motion to compel is unripe.

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<sup>14</sup> Defendants suggest that it would be unfair for the Court to deny their request for a limited extension of the discovery cutoff. (Defs.' 2004 Mot. 15.) Notwithstanding the fact that good cause, not fairness, determines whether an extension is merited, the Court does not find Defendants' analysis of the equities convincing.

First, Defendants state that Plaintiffs' were granted their request for an extension of discovery. (Defs.' 2004 Mot. 15.) However, that extension is not comparable to Defendants' pending request as it was requested and granted before discovery closed. (Order, Jan. 30, 2004, 96-D.E. 118 (extending Jan. 30, 2004 discovery cutoff 120 days based on request discussed at Jan. 21, 2004 hearing).)

Next, Defendants point to Plaintiffs' request to redepose four of Defendants' witnesses. (Defs.' 2004 Mot. 15.) Because Plaintiffs' request alleges that, and has been granted only insofar as, Defendants produced relevant documents subsequent to Plaintiffs' prior depositions of these witnesses, Plaintiffs have established good cause. Furthermore, the Court extends the opportunity to Defendants to make a similar request, with the same conditions, should the remaining discovery disclose documents that warrant redeposition of Plaintiffs or their witnesses.

Defendants also mention a deposition request by Kiobel Plaintiffs. (Id.) Because Kiobel Plaintiffs are no longer pursuing the deposition request, it is irrelevant. Finally, Defendants accuse Plaintiffs of "belated and deficient production of documents." (Id.) However, Plaintiffs make the same complaints about Defendants. Thus, this consideration does not cut in favor or against either side.

Accordingly, the Court perceives no injustice to the Defendants as a result of its denial of their request for a limited extension of the discovery cutoff.

Accordingly, the Court denies Defendants' request to file their Motion to Compel, without prejudice to renew their request once the following conditions have been met:

(1) To the extent that Kiobel Plaintiffs have any previously unproduced NUOS-related documents in their possession, custody, or control that are responsive to Defendants' timely discovery requests or Magistrate Judge Pitman's May 13, 2004 Order, 96-D.E. 124, they shall produce them to Defendants. To the extent that Kiobel Plaintiffs' counsel claims that Defendants' discovery requests have been fully responded to, they shall so state, in writing, to the Court. Kiobel Plaintiffs shall do the above by 5:00 PM Friday, October 31, 2008.

(2) If Defendants still find Kiobel Plaintiffs' responses inadequate, they shall make a good faith effort to confer with Kiobel Plaintiffs in an effort to resolve this dispute.

(3) If the parties cannot resolve this dispute on their own, Defendants may renew their request to file their Motion to Compel. If Defendants do so, they shall include a certification that they have made a good faith effort to resolve the dispute without the Court's further involvement. If Defendants wish to renew their request to file their Motion, they shall do so by 5:00 PM, November 7, 2008.

(4) If the Court grants Defendants' request to file their Motion to Compel, the parties shall adhere to the following

briefing schedule:

(a) Kiobel Plaintiffs shall file their Response by 5:00 PM November 12, 2008.

(b) Defendants shall file their Reply by 5:00 PM November 14, 2008.

In seeking to resolve their dispute, the Court notes that Federal Rule of Civil Procedure 34(a) requires a party to produce responsive documents that it has in its "possession, custody, or control." Fed. R. Civ. P. 34(a)(1). For Rule 34(a) purposes, a party has control over documents held by a third party ("third-party documents") if the party (1) is legally entitled, or (2) has the practical ability, to acquire the documents from the third party. See U.S. v. Stein, 480 F. Supp. 2d 350, 360-61 (S.D.N.Y. 2007) (collecting cases); In re NASDAQ Market-Makers Antitrust Litig., 169 F.R.D. 493, 530 (S.D.N.Y. 1996); S.E.C. v. Credit Bancorp, Ltd., 194 F.R.D. 469, 471 (S.D.N.Y. 2000) ("Control" has been construed broadly by the courts as the legal right, authority, or practical ability to obtain the materials sought upon demand"); cf. Shcherbakovsky v. Da Capo Al Fine, Ltd., 490 F.3d 130, 138 (2d Cir. 2007) (noting that a party's practical and legal ability to compel production of documents directly from a third-party may sometimes limit an opposing party's obligation to acquire those documents in response to a discovery request even if they are otherwise in its control).

**C. Defendants Motion to Compel Production of Unredacted Documents**

The Court disposed of this dispute at the October 2008 Conference. Accordingly, this aspect of Defendants' Motion to Compel is DENIED as moot.

By October 21, 2008, Kiobel Plaintiffs were to have reviewed the relevant redacted documents to determine if they could provide Defendants with unredacted, or less redacted, versions. (Oct. 2008 Conf. Tr. 17:15-22.) To the extent that they are prepared to provide unredacted versions of these documents to Defendants, they shall do so by 5:00 PM on October 28, 2008.

To the extent Kiobel Plaintiffs still maintain that some or all of these documents warrant redaction, they shall provide the Court with an unredacted version of those documents for in camera review. In an accompanying document, they shall explain their reasons for any remaining redactions. Kiobel Plaintiffs shall do so by 5:00 PM on October 28, 2008.

**9. Defendants' Remaining Untimely Discovery Requests:** The Court strikes as untimely: (1) Defendants Royal Dutch Petroleum Co.'s and Shell Transport and Trading Co., p.l.c.'s Contention Interrogatories for Kiobel and Wiwa Plaintiffs, and (2) Defendant Brian Anderson's Contention Interrogatories for Wiwa Plaintiffs.

**Conclusion**

As explained in further detail above, the Court hereby (1)

designates the above-captioned cases for ECF; (2) grants in part Kiobel Plaintiffs' motion for a stay; (3) lifts the stays on discovery; (4) grants Defendants' request to file motions to strike and for discovery sanctions; (5) denies Defendants' request for a limited extension of the discovery cutoff (6) strikes or quashes Defendants' untimely discovery requests; (7) denies without prejudice to renew Defendant Shell Trading and Transport Co., p.l.c.'s and all Defendants' requests to file motions to compel Kiobel Plaintiffs' production of documents and responses to interrogatories; (8) denies as moot Defendants' motion to compel Kiobel Plaintiffs' production of unredacted documents and orders Kiobel Plaintiffs' to produce these documents for in camera review; (9) orders Wiwa Plaintiffs to respond to a sampling of Defendants' RICO interrogatories; (10) grants with conditions Plaintiffs' request to redepose four of Defendants' witnesses; and (11) denies Kiobel Plaintiffs' motion to compel Defendants' payment of deposition expenses as untimely.

SO ORDERED.

Dated: New York, New York  
October 24, 2008

Kimba M. Wood  
Kimba M. Wood  
United States District Judge