

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

KEN WIWA, et al.

Plaintiffs,

96 Civ. 8386
(KMW) (HBP)

- against -

ROYAL DUTCH PETROLEUM COMPANY;
SHELL TRANSPORT AND TRADING COMPANY, p.l.c.,

Defendants.

KEN WIWA, et al.,

Plaintiffs,

01 Civ. 1909
(KMW) (HBP)

- against -

BRIAN ANDERSON,

Defendant.

ESTHER KIOBEL, et al.,

Plaintiffs,

02 Civ. 7618
(KMW) (HBP)

- against -

ROYAL DUTCH PETROLEUM COMPANY;
SHELL TRANSPORT AND TRADING COMPANY, p.l.c.,

Defendants.

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION ON THE
PERJURIOUS BENIN TESTIMONY (TO OBTAIN LIMITED EXTENSION OF THE
DISCOVERY CUTOFF AND TO COMPEL PRODUCTION OF NUOS DOCUMENTS AND
UNREDACTED DOCUMENTS ON PAYMENTS TO WITNESSES)**

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June 28, 2004

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Preliminary Statement

The Benin witnesses perjured themselves. Early and often. Seven witnesses in the Benin Republic, whom plaintiffs admit are being paid by plaintiffs and their counsel, lied under oath at their depositions in a way that plaintiffs' counsel knew was false.¹ See Part I.A, infra.

Not only is the Benin testimony plainly and objectively false, but the circumstances of that testimony strongly indicate a conspiracy to procure false testimony. The Kiobel plaintiffs made payments to the Benin witnesses and provided them with all food and lodging expenses for several months and "entertainment" items such as a DVD player. The money for these payments and purchases came from plaintiffs themselves and from their law firm, Berger & Montague.² In addition, two of the witnesses owe their very presence in Benin to Kiobel plaintiff Dornubari Anslem John-Miller, who plaintiffs admit is serving as a paid "investigator" for plaintiffs' counsel in this case. Mr.

¹ Plaintiffs' counsel has threatened us with Rule 11 for making this statement elsewhere. We note that all attorneys in New York are required, under the Disciplinary Rules, to report conduct "that raises a substantial question as to another lawyer's honesty, trustworthiness or fitness". (N.Y. Disciplinary Rule 1-103(A).)

² Other funds were provided by the National Union of Ogoni Students ("NUOS"), which some plaintiffs control. See Part II, infra.

John-Miller acknowledges that he surreptitiously transported the witnesses across Benin's border with Nigeria without proper documentation. Mr. John-Miller also met with the Benin witnesses in Nigeria and Benin to discuss their testimony, but counsel has instructed him not to answer any questions about these conversations.

In light of the perjurious testimony, we are now pursuing discovery into the payments to those witnesses (and to other potential witnesses) and into who caused them to give false testimony. Plaintiffs are resisting that discovery with all their might. Their objection--that the discovery cutoff precludes any inquiry into such misconduct--is disingenuous, to say the least. Having been subjected for years to unsubstantiated accusations of murder, and now to perjurious testimony, defendants are entitled to discovery into the fraud on the Court. Enforcing a discovery cutoff against defendants would be highly prejudicial--especially given that discovery has previously been extended at plaintiffs' request.

Promptly after we discovered the facts about the Benin witnesses, defendants served discovery requests relating to the payments to the witnesses and the procurement of their testimony. That discovery--and further discovery relating to specific pieces of perjurious

testimony--should be permitted to proceed. The discovery cutoff should not insulate plaintiffs from inquiry into their misconduct. See Part I, infra.

Plaintiffs have also used the National Union of Ogoni Students ("NUOS") as a conduit for payments to the Benin witnesses, as well as to create and conceal documents related to this litigation. Plaintiffs acknowledge that NUOS has relevant documents. These documents are within plaintiffs' possession, custody or control, and plaintiffs should be compelled to produce them. See Part II, infra.

Defendants also seek the production of unredacted documents regarding plaintiffs' payments to witnesses. In response to the Court's order, plaintiffs produced documents reflecting payments that had been made to the Benin witnesses. These documents were heavily redacted, based solely on implausible claims of non-responsiveness. Plaintiffs (and their counsel) should not be permitted to hide the full scope of their misconduct through these unjustified redactions. See Part III, infra.

Argument

I. THE DISCOVERY CUTOFF SHOULD BE EXTENDED TO ALLOW
DISCOVERY WITH RESPECT TO PERJURY BY PLAINTIFFS'
WITNESSES

Because the complaints are false, defendants spent more than a year trying to get plaintiffs to identify witnesses with personal knowledge of their allegations. Plaintiffs frustrated these efforts through a variety of ruses with which the Court is familiar, such as the identification of "John Doe" witnesses and willful misunderstanding of the term "personal knowledge".³ Plaintiffs even promised the Court that they would schedule depositions of witnesses with personal knowledge in Africa in the fall of 2003, but they never did so. As a result, defendants have had to endure over a year of delay and concealment, only to be faced with purchased, perjured testimony during the final days of discovery. Defendants now seek a reasonable extension of the discovery period to uncover the facts relating to payments made by plaintiffs

³ For a more detailed history, see defendants' Memorandum of Law in Support of Defendants' Motion to Compel Interrogatory Answers and Preclude Testimony, dated Dec. 19, 2003, at 5-14; defendants' Memorandum of Law in Support of Defendants' Motion to Strike the Wiwa Plaintiffs' Interrogatory Answers and Preclude Testimony, dated April 2, 2004, at 1-11; and defendants' Memorandum of Law in Support of Defendants' Motion to Strike the Kiobel Plaintiffs' Interrogatory Answers and Preclude Testimony, dated April 2, 2004, at 1-18.

and their counsel to the Benin witnesses and the subsequent perjury these witnesses committed.⁴

A. Plaintiffs' Misconduct, Which Was Not Revealed Until May 2004, Makes Additional Discovery Requests Necessary.

With the close of discovery fast approaching, the Kiobel plaintiffs noticed the depositions of seven individuals in Benin: Prince Osaror, Boniface Ejioogu, Eebu Jackson Nwiyon, Raphael Kponee, Vincent Nwidoh, Lete Gbarale, and Blessing Israel ("the Benin witnesses"). Plaintiffs had promised to take depositions in Benin much earlier. In September 2003, plaintiffs' counsel told the Court that they would notice depositions of witnesses in Benin within a few weeks and that they planned to take those depositions in connection with the parties' trip to Nigeria in October 2003. (Ex. A⁵ (Sept. 4, 2003 hearing Tr. 105:17-106:17-24).) But none of the Benin witnesses were

⁴ Defendants have served plaintiffs with interrogatories and document requests regarding payments to witnesses and potential witnesses. Defendants have also noticed the deposition of Keith Mabray (the Kiobel plaintiffs' "investigator" in Africa) and his company in the United States, served a document subpoena to NUOS, and filed a request for letters rogatory aimed at securing documents from the Nigerian Government pertaining to several of the Benin witnesses. Defendants will also soon be serving further discovery targeted to specific pieces of perjurious testimony now that we have had an opportunity to review the transcripts from Benin.

⁵ References to "Ex. " are to the Exhibits to the Declaration of Michael T. Reynolds, dated June 28, 2004.

even in Benin yet.⁶ And plaintiffs' counsel does not appear to have spoken to the Benin witnesses at the time these representations were made to the court. (See, e.g., Ex. F (Gbarale Tr. 144:5-146:8); Ex. E (Israel Tr. 129:21-138:4); Ex. G (Kponee Tr. 226:8-229:12).) Thus, although the parties took two trips to London and two trips to Nigeria in the ensuing months, plaintiffs did not notice, propose, or even mention any depositions in Benin prior to any of these trips. Instead, even after having spoken with these witnesses and organizing their living arrangements in Benin, they waited until the last possible moment. Their motive for doing so soon became clear.

On May 11, 2004, little more than a week before the first Benin deposition was scheduled to take place, defendants deposed Kiobel plaintiff Dornubari Anslem John-Miller. This examination uncovered that Mr. John-Miller, who plaintiffs admit is a paid "investigator/paralegal" for

⁶ Two of the witnesses, Prince Osaror and Boniface Ejioogu, came to Benin later in September 2003. (Ex. B (Osaror 5/20 Tr. 143); Ex. C (Ejioogu 5/23 Tr. 40-41, 151).) Four others stated that they did not arrive in Benin until December 2003. (See Ex. D (Nwidoh Tr. 36, 115-116); Ex. E (Kponee Tr. 204); Ex. F (Gbarale Tr. 58-59); Ex. G (Israel Tr. 153).) The seventh witness, Eebu Jackson Nwiyon, did not move to Benin until 2004. (Ex. H (D. John-Miller Tr. 313-15, 328).)

Berger & Montague⁷ (Ex. J (Letter from Stephen Whinston to Magistrate Judge Pitman, dated May 13, 2004); Ex. K (Letter from Stephen Whinston to Michael Reynolds, dated June 11, 2004)), had: (a) made payments to the Benin witnesses using his own money, the money of other plaintiffs, and money from Berger & Montague (Ex. H (D. John-Miller Tr. 212-13, 218-19); (b) arranged for these witnesses' food, accommodations, and other expenses for several months (id. at 138-139); and (c) illegally transported some of the witnesses into Benin (id. at 173, 178-80). Mr. John-Miller acknowledged that these witnesses were brought into Benin in order to secure their agreement to testify. (Id. at 180-81, 205.)

The Court recognized defendants' need to have further discovery on the payments prior to the taking of the Benin depositions and ordered plaintiffs to produce all documents in their possession, custody, or control concerning any payments, reimbursement of expenses or

⁷ Plaintiffs attempted to withdraw Mr. John-Miller as both a plaintiff and a witness in an attempt to shield him from discovery, stating that the reason for his withdrawal was "protected by the attorney-client privilege". Ex. I (Letter from Stephen Whinston to Michael Reynolds, dated Nov. 5, 2003). Plaintiffs have subsequently made a motion to withdraw him as a plaintiff (see Motion of Dornubari Anslem John-Miller to Withdraw as Plaintiff and Class Representative), and also purported to file an amended complaint dropping him from the lawsuit.

prepayment of expenses to or for the benefit of the witnesses to be deposed. (Ex. L (Order of May 13, 2003).) Plaintiffs subsequently produced documents that, while heavily and unjustifiably redacted (see Part III, infra), confirmed the payments outlined in Mr. John-Miller's deposition testimony.

The Benin depositions proceeded, and the witnesses gave objectively false testimony. These lies are not, as plaintiffs' counsel maintains, mere conflicts in testimony whose resolution is "up to the trier of fact." (See Ex. M (Letter from Stephen Whinston to Rory Millson, dated June 9, 2004). Rather, the testimony of the Benin witnesses was objectively false. For example:

- Two Benin witnesses invented an utterly false story that an SPDC employee gave a Nigerian military officer seven "Ghana Must Go" bags containing fifty-six million Naira in twenty-naira notes. (Ex. B (Osaror May 20, 2004 Tr. 86:2-94:12, 212:12-214:17; May 21, 2004 Tr. 117:18-119:7); Ex. C (Ejiogu May 22 Tr. 102:22-105:9).) This fraud is inconsistent with the laws of physics-- fifty-six million Naira in N20 notes simply cannot fit in seven large shopping bags. 2.8 million bills would form a stack over 1000 feet tall (nearly 150 feet per bag).
- A Benin witness falsely testified that SPDC bribed an army leader by giving him an interest in a pipeline project for an SPDC refinery in Nigeria. (Ex. B (Osaror May 20, 2004 Tr. 111:8-114:23; May 21 Tr. 75:6-75:25, 80:21-83:9, 90:22-92:16).) Plaintiffs' counsel elicited this

information from the witness despite knowing that it could not be true. SPDC has no refinery in Nigeria. Our witnesses have told them that. (Ex. N (Herkstroter Tr. 153:17-18); Ex. O (Detheridge Feb. 3, 2003 Tr. 81:9-11).) They have asked us to admit that all of SPDC's crude oil was sold to Shell International Trading Co. (SITCO), so therefore was not refined in Nigeria. (Ex. P (Requests for Admission, dated April 29, 2004, at 4).) In fact, another Benin witness heatedly testified that the refinery at issue is not owned by SPDC. (Ex. Q (Nwiyon May 24, 2004 Tr. 163-66).)

- A Benin witness testified that he interviewed Ken Saro-Wiwa in detention on June 15, 1995 and that Mr. Saro-Wiwa had been in chains for 65 days. (Ex. B (Osaror May 20, 2004 Tr. 29-30, 34.) But Mr. Saro-Wiwa sent his son typewritten letters in April, May and June 1995. Indeed, in a June 8, 1995 letter, Mr. Saro-Wiwa thanked his son for sending him a computer (Ex. S (K 13688-89)) and on June 19, 1995 wrote that now that he had the computer, he was beginning to write again (Ex. R (K 13714-15)).
- A Benin witness testified extensively about being taken to a Shell police station at Oron beach. (Ex. G (Israel Tr. 13:8-25:13, 125:15-24, 153:14-156:20, 157:18-25).) There is no SPDC facility at the place in question, or anywhere nearby.
- Two witnesses testified that they did not know the other Benin witnesses (Ex. E (Kponee Tr. 209:10-211:7); Ex. G (Israel Tr. 141:10-142:23)), despite the undisputed fact that all seven live together in a single compound, in which the witnesses share a kitchen. (Ex. E (Kponee Tr. 231:22-234:3); Ex. F (Gbarale Tr. 148-53).) It was only after the witnesses consulted with counsel that they admitted the truth. (Ex. G (Israel

Tr. 152:12-153:19); Ex. E (Kponee Tr. 218:22-219:14; 223:1-226:7).)

- Plaintiffs submitted interrogatory responses stating that the Benin witnesses had personal knowledge that the Internal Security Task Force used "Shell's warehouse in Afam" to detain and torture prisoners. (Ex. T (Plaintiffs' Amended Responses to Defendants' Second Set of Interrogatories to the Kiobel Plaintiffs, dated October 10, 2003, at 5-6).) Defendants made it very clear before the trip to Benin that SPDC has no warehouse in Afam. (See Ex. U (May 12, 2004 Hearing Tr. 13:11-17, 23:10-11).) Yet the first witness in Benin testified that "Shell located [the Afam warehouse] for the Nigerian Army for secret detention". (Ex. B (Osaror May 20, 2004 Tr. 44-47).) Plaintiffs' next witness contradicted this, testifying correctly that the Afam warehouse is part of the Nigerian Government's power station. (Ex. C (Ejiogu May 22, 2004 Tr. 24-25).) Another Benin witness testified that he was detained at Afam in a warehouse owned by the National Electric Power Authority. (Ex. F (Gbarale Tr. 34).)
- Two of plaintiffs' witnesses have concocted a story that SPDC provided food to soldiers in Ogoni after 1993, and that this food was delivered in Hilux trucks with the "Shell BP" logo by a woman with a "Shell BP" logo on her blouse. (Ex. B (Osaror May 20, 2004 Tr. 100-03, 197); Ex. C (Ejiogu May 23 Tr. 217-23).) In addition to this tale's patent implausibility, plaintiffs are aware that all logos were removed from SPDC vehicles in 1993. (Ex. V (DEF 23103-09, 23106).)

These witnesses testified less than two months after meeting with Mr. John-Miller to discuss their prospective testimony. (Ex. H (D. John-Miller Tr. 26:7-27:20; 30:14-32:20).) In addition, at least two of the witnesses

admitted discussing their testimony with one another. (Ex. E (Kponee Tr. 210:1-211:12); Ex. F (Gbarale Tr. 152:11-154:20).)

Defendants will seek appropriate relief for this perjurious testimony in due course. For now, we seek only the opportunity to take discovery on the payments to the witnesses and other facts regarding how that testimony was procured.

B. Defendants' Discovery Requests Are Targeted to Plaintiffs' Recently Uncovered Misconduct

We have pursued this discovery as promptly as possible. We did not learn of the payments to the Benin witnesses until May 11, 2004, at which point it was too late to serve discovery requests that would have been due before the discovery cutoff. Moreover, the Benin depositions did not end until May 28, 2004, and we served most of the discovery at issue either that very day or within a week thereafter. Plaintiffs' attempt to evade this discovery by hiding behind the discovery cutoff should not be countenanced by this Court. It would be inequitable to permit plaintiffs' misdeeds to escape scrutiny simply because they were not revealed until discovery was almost concluded.

Under the Federal Rules, the Court's scheduling order setting the discovery cutoff can be modified "upon a showing of good cause". (Fed. R. Civ. P. 16(b) (2004).) The Advisory Committee Notes to Rule 16 state that the Court should modify the schedule when a deadline "cannot reasonably be met despite the diligence of the party seeking the extension". (Fed. R. Civ. P. 16, Advisory Committee Notes to 1983 Amendment.) In the case of extension of a discovery deadline, the objective factors a court should consider include "the past conduct and diligence of the parties, the prior knowledge of the parties, the stage of litigation reached, and the nature of the relief sought." Bernstein v. Bernstein, 1993 WL 466402, at *1 (E.D.N.Y Aug. 13, 1993) (granting parties' cross motions to extend discovery deadline to enable taking of further depositions). Though plaintiffs portray the discovery cutoff as an absolute bar to further discovery, courts have found that "the main purpose of a scheduling order is to enable the Court to manage the conduct and disposition of the cases, not to deprive litigants of information they seek . . . ". Id. at *1-*2. Given that the payments to and perjury by the Benin witnesses were only revealed immediately prior to the discovery cutoff, as well as defendants' diligence in promptly pursuing related

discovery, the Court should extend the discovery cutoff for the limited purpose of permitting discovery on the issues of payments to witnesses and perjured testimony.

We have served the following discovery regarding plaintiffs' payments to the Benin witnesses and the witnesses' perjurious testimony:

- Document requests on May 28, 2004 seeking the production of all documents pertaining to communications that plaintiffs, plaintiffs' counsel, and their representatives had with the seven Benin witnesses.
- Interrogatories on May 28, 2004 seeking information regarding plaintiffs' contacts with and payments to the Benin witnesses, as well as any other attempts made by plaintiffs to secure favorable testimony by offering incentives to potential witnesses.
- Defendants noticed the deposition of Keith Mabray, the Kiobel plaintiffs' "investigator" in Africa on May 28, 2004. Mr. Mabray, along with his company MPTC Security, has been responsible for facilitating payments to and acquiring accommodations for the Benin witnesses. (See Ex. W (KIOBEL 2992); Ex. X (KIOBEL 2995-98); Ex. Y (KIOBEL 3000-01); Ex. Z (KIOBEL 3005-07); Ex. AA (KIOBEL 3015-16); Ex. BB (KIOBEL 3024-25); Ex. CC (KIOBEL 3028); Ex. F (Gbarale Tr. 159:22-160:16).) Mr. Mabray's role was only revealed to defendants in the final month of discovery.
- Defendants served a document and 30(b)(6) deposition subpoena on Mr. Mabray's company in the United States, MPTC Security, on June 18, 2004 in order to obtain documents and other information relating to his payments

to and communications with the Benin witnesses on behalf of plaintiffs.

- Defendants served a Request for International Judicial Assistance (Letters Rogatory) on June 3, 2004 seeking documents from the Nigerian Government. The request seeks documents about the Benin witnesses' claimed affiliation with the Nigerian military and police force, as well as the authenticity of documents produced by plaintiffs.
- Defendants issued a document subpoena to NUOS on May 28, 2004 seeking documents related to that organization's contacts with and payments to the Benin witnesses. Testimony given in Benin revealed that NUOS has had contact with at least one of the Benin witnesses, passed a resolution supporting this lawsuit, and also participated in the payments made to the Benin witnesses. (See Ex. F (Gbarale Tr. 111:13-112:17, 140:11-141:3, 141:18-143:6, 145:14-21, 147:5-23, 155:1-156:5).) Defendants believe that plaintiffs have an obligation to produce these documents directly (see Part II, *infra*), but have served this subpoena due to their recalcitrance on this issue.
- Additional discovery to follow soon after this motion regarding specific pieces of perjured testimony.

Defendants should not be prevented from conducting this legitimate discovery due to the Kiobel plaintiffs' gamesmanship. After stating last September that depositions in Benin would be scheduled in October, plaintiffs instead waited to notice the Benin witnesses' depositions for over six months--scheduling them for the

end of discovery to try to shield any inquiry into the circumstances of the witnesses' testimony.

Plaintiffs' insistence on a rigid adherence to the discovery cutoff is particularly inappropriate in light of their other conduct. For one thing, plaintiffs previously requested a 120-day extension of discovery, which the Court granted. (Ex. DD (Jan. 21, 2004 hearing Tr. 69).) In addition, all plaintiffs continue to seek additional days of deposition of several of defendants' witnesses (Ex. EE (Letter from Judith Chomsky to Magistrate Judge Pitman, dated May 28, 2004)); the Kiobel plaintiffs have sought leave to depose a former SPDC employee if the Fifth Circuit reverses the quashing of their subpoena⁸ (Ex. FF (Letter from Keino Robinson to Magistrate Judge Pitman, dated May 24, 2004)); the Kiobel plaintiffs have purported to file an amended complaint adding a new defendant; and all plaintiffs have consistently flouted their discovery obligations through belated and deficient production of documents.⁹

⁸ Indeed, plaintiffs have represented to the Fifth Circuit that the proceeding there is not moot because "there are many discovery issues yet to be resolved by the District Court in New York". (Ex. FF (Reply Brief of Appellants at 5).)

⁹ For a more detailed explanation of plaintiffs' document-related discovery deficiencies, see defendants' Memorandum

II. PLAINTIFFS SHOULD BE COMPELLED TO PRODUCE NATIONAL UNION OF OGONI STUDENTS DOCUMENTS

Plaintiffs have used NUOS to conceal relevant documents about their allegations and about their (and their counsel's) payments to the witnesses in the Benin Republic who committed perjury.

NUOS has responsive documents. See Part II.A, infra. Plaintiffs do not dispute that. NUOS is devoted to the "Ogoni struggle" against defendants, NUOS meetings and correspondence have specifically addressed this litigation, and plaintiffs have used NUOS as a vehicle for paying the Benin witnesses.

Plaintiffs' sole justification for refusing to produce NUOS documents--that the documents are not within plaintiffs' possession, custody or control (Ex. GG (Letter from S. Whinston to R. Millson, dated June 9, 2004))--is a sham. See Part II.B, infra. NUOS was incorporated approximately two weeks before the complaint was filed, plaintiff Dornubari Anslem John-Miller is the President and registered agent of NUOS, and the registered office of NUOS is Mr. John-Miller's home. Mr. John-Miller has NUOS documents in his home and on his computer, and other

of Law in Support of Defendants' Motion for Discovery Sanction of Dismissal, dated May 21, 2004.

plaintiffs have NUOS documents as well. This sham should not be condoned. NUOS has been used to advance plaintiffs' witnesses' perjury. Plaintiffs should be compelled to produce all NUOS documents that are responsive to our Rule 34 requests, the subpoena we served on NUOS¹⁰, and this Court's May 13, 2004 Order. (Ex. L (Order dated May 13, 2004 (requiring plaintiffs and their counsel to produce "all documents in their possession, custody or control concerning any payments, reimbursement of expenses or prepayment of expenses to or for the benefit of the witnesses to be deposed in Benin"))).)

A. NUOS Has Responsive Documents.

NUOS has responsive documents regarding plaintiffs' allegations. NUOS is a subgroup of the Movement for the Survival of the Ogoni People ("MOSOP") (Ex. F (Gbarale Tr. 63:11-15); Ex. NN (F. Idamkue Tr. 85:6-10); Ex. OO Nwikpo Tr. 27:4-11) and is committed to the "persecution of Shell" (Ex. H (D. John-Miller Tr. 61:13-

¹⁰ Because plaintiffs have consistently rebuffed our requests for NUOS documents (see, e.g., Ex. II (Letter from A. Wheatley to S. Whinston, dated May 4, 2004); Ex. JJ (Letter from A. Wheatley to S. Whinston, dated May 7, 2004); Ex. KK (Letter from M. Reynolds to S. Whinston, dated May 18, 2004)), we have also served a subpoena on NUOS directly. (Ex. LL (Subpoena dated May 28, 2004).) Plaintiff and NUOS Secretary Charles Wiwa accepted service of the subpoena on NUOS's behalf. (Ex. MM (Affidavit of Service, dated June 1, 2004).)

14). NUOS is devoted to the Ogoni "campaign against Shell" (Ex. F (Gbarale Tr. 71:8-73:13) and to achieve its goals, it "takes pains" to argue that defendants are aligned with the Nigerian Government (Ex. PP (C. Wiwa Tr. 466:9-13). NUOS e-mails to its membership, including plaintiffs, "always" mention "Shell", which is NUOS's "big enemy". (Ex. QQ (Kunenu Tr. 48:9-21, 49:23-50:6); Ex. RR (Nwikpo Tr. 27:4-11).) Mr. John-Miller--the President of NUOS--has "sent several" communications on behalf of NUOS that specifically target defendants. (See, e.g., Ex. H (D. John-Miller Tr. 60:4-24.)

NUOS has also held meetings at which this litigation was discussed. (See, e.g., Ex. QQ (Kunenu Tr. 44:9-45:17, 209:15-212:20); Ex. OO (C. Wiwa Tr. 8-10).) At one of those meetings, NUOS "passed a resolution" in support of the litigation. (Ex. F (Gbarale Tr. 145:17-21).) One of the Benin witnesses even testified that the "Ogoni Class Action" is the "National Union of Ogoni Students US Chapter". (Id. 145:14-16).

Moreover, there are responsive NUOS documents regarding payments to the Benin witnesses. NUOS held a meeting at which it decided to send money to the witnesses in Benin. (See, e.g., Ex. QQ (Kunenu Tr. 207-11).) And NUOS has in fact sent money to the Benin witnesses on

multiple occasions. (Ex. F (Gbarale Tr. 155-56).) The Benin witnesses testified that they have received payments from their "brothers" in "the Ogoni Class Action", who are the plaintiffs and the members of the "U.S. Chapter of NUOS in Chicago". (Ex. F (Gbarale Tr. 155-65); see also Ex. C (Ejiogu 5/23/04 Tr. 154 (received money from the "Ogoni Class Action"))); Ex. G (Israel Tr. 159 (received money from his "Ogoni brothers" in the United States)); Ex. E (Kponee Tr. 207 (same)); Ex. D (Nwidoh Tr. 119 (same)).)

Those payments were sent by Mr. John-Miller, NUOS's President, to Benin witness Lete Gbarale, who is a NUOS member. (See Ex. H (D. John-Miller Tr. 20, 215-16, 218, 220); Ex. F (Gbarale Tr. 157).)¹¹ Mr. John-Miller is the plaintiff that counsel hired and is paying as an "investigator", and who personally brought some of the Benin witnesses across the border out of Nigeria.

NUOS documents are relevant to the litigation and responsive to defendants' prior document requests and the Court's order. Defendants have made abundantly clear to plaintiffs which documents we are seeking. In fact, after

¹¹ Mr. John-Miller's testimony that the money was sent to Mr. Gbarale because the witnesses said Mr. Gbarale "has documentation to be able to pick up the money from Western Union" (Ex. H (D. John-Miller Tr. 20)) is plainly false. Mr. Gbarale acknowledged that the money was sent to him because he is a NUOS member. (Ex. F (Gbarale Tr. 157).)

plaintiffs consistently refused to produce the documents we served a subpoena on NUOS (Ex. LL), which identifies the documents we seek with specificity. But we should not be forced to litigate a subpoena in some other court. The production of these documents by plaintiffs is required by both defendants' Rule 34 request, the Court's May 13 Order, and the subpoena directed to NUOS.

B. Plaintiffs Have Possession, Custody and Control of NUOS Documents.

Plaintiffs' refusal to produce NUOS documents--on the ground that such documents are not in plaintiffs' possession, custody or control (Ex. M (Letter from S. Whinston to R. Millson, dated June 9, 2004))--is meritless. A "party controls documents that it has the right, authority or ability to obtain". In re NASDAQ Market-Makers Antitrust Litig., 169 F.R.D. 493, 530 (S.D.N.Y. 1996) (emphasis added) (internal quotations and citations omitted). Actual legal ownership of the documents is not determinative. See e.g., Bank of New York v. Meridien BIAO Bank Tanzania Ltd., 171 F.R.D. 135, 146-47 (S.D.N.Y. 1997). The "practical ability to obtain the documents" requested is sufficient. Golden Trade v. Lee Apparel Co., 143 F.R.D. 514, 525 (S.D.N.Y. 1992)

Plaintiffs--particularly Mr. John-Miller and Charles Wiwa--have "control" over NUOS documents. Mr. John-Miller is NUOS's President and Mr. Wiwa is its Secretary. (Ex. H (D. John-Miller Tr. 27:13-14); Ex. PP (C. Wiwa Tr. 369:12-16).) NUOS's registered office is Mr. John-Miller's home. (See Ex. RR (NUOS Articles of Incorporation); Ex. SS (NUOS 2003 Annual Report); Ex. H (D. John-Miller Tr. 5:21-24, 58:18-20).) Mr. John-Miller personally prepares and circulates NUOS e-mails and press releases. (Id. at 60:2-60:24.) He also delivers speeches and writes papers on behalf of NUOS that relate to "the Ogoni struggle" and "mention Shell". (Id. at 61:8-63:7, 64:2-67:3.) Similarly, Mr. Wiwa uses his personal e-mail account to publicize NUOS-related demonstrations against defendants. (Ex. PP (C. Wiwa Tr. 310:14-20, 481:16-482:9).) Many of these documents are created and stored on plaintiffs' personal computers (see, e.g., Ex. H (D. John-Miller Tr. 61:8-63:7, 64:2-67:3)), and others are maintained at Mr. John-Miller's home in numerous "bags", "portfolios" and "suitcases" (id. at 58:21-59:22). In addition, Mr. John-Miller is the person who transmitted NUOS's payments to the witnesses in Benin. (Id. 218:4-21).

The NUOS documents--including documents regarding NUOS's payment to the Benin witnesses--are within

plaintiffs' control, and plaintiffs should not be permitted to use the sham of incorporating NUOS two weeks before filing suit (See Ex. RR (NUOS Articles of Incorporation)) to shield the documents from production. NUOS has been a forum for plaintiffs to discuss their allegations, and it has been a vehicle for collecting and distributing payments to the Benin witnesses. The NUOS documents should be produced.

III. PLAINTIFFS SHOULD BE COMPELLED TO PRODUCE UNREDACTED DOCUMENTS REGARDING PAYMENTS TO WITNESSES

The Court ordered plaintiffs to produce "all documents in their possession, custody or control concerning any payments, reimbursement of expenses or prepayment of expenses to or for the benefit of the witnesses to be deposed in Benin". (Ex. L (Order dated May 13, 2004).) The documents plaintiffs produced in response to that order were heavily and unjustifiably redacted. Their explanation for the redaction was that "All the redactions from these documents are of non-responsive materials". (Ex. TT (Letter from Stephen Whinston to Rory Millson, dated May 14, 2004).) The documents make clear, however, that plaintiffs' claim of non-responsiveness is just one more effort to cover up their wrongdoing.

For example, the very first document in their production (Ex. UU (KIOBEL 002985)), is an e-mail from plaintiff Dornubari Anslem John-Miller to one of the Benin deponents, Lete Gbarale, with the subject "Western Union Money Transfer Details". Though it is hard to understand how any of that e-mail could be "non-responsive", several paragraphs are redacted. As another example, in an e-mail from Mr. John-Miller to counsel from Berger & Montague (Ex. VV (KIOBEL 003055)), the text of the message is redacted in its entirety except for the sentence, "To cut a long story short, I have been responsible for their feeding since my arrival yesterday". The rest of the "long story" is plainly responsive to the Court's order. Further, plaintiffs produced a spreadsheet (Ex. WW (KIOBEL 003059)) on which lines 28-41 were redacted. But an identical spreadsheet was produced (Ex. XX (KIOBEL 003008)) in unredacted form, with lines 28-41 including information on payment of "accrued hotel bills for witnesses' accomodation [sic] 45 days".

Plaintiffs have made no claim that any material was redacted as privileged. In fact, both the Court and plaintiffs' counsel have acknowledged that documents regarding payments made to witnesses are entitled to neither attorney-client nor work product privilege. (Ex. U

(May 12, 2004 Hearing Tr. 27-29).) Plaintiffs have also failed to produce a log of any documents that were withheld or redacted as privileged. Defendants are entitled to such a log if plaintiffs are claiming privilege with regard to these or any other responsive documents. That log will be necessary for any future motion to vacate privilege based on the crime fraud exception. (Id. at 29.) In the meantime, plaintiffs have improperly redacted as non-responsive substantial portions of documents that they were ordered to produce, and the Court should order plaintiffs to produce those documents in unredacted form.

Conclusion

For the foregoing reasons, defendants respectfully request that the Court issue an order (1) extending the discovery cutoff to August 6, 2004 to permit discovery on the issues of payments to witnesses and perjured testimony, (2) ordering the production of all NUOS documents responsive to our Rule 34 requests and the Court's May 13, 2004 order, and (3) ordering the production of unredacted copies of documents responsive to the May 13, 2004 Order.

June 28, 2004

Respectfully submitted,

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