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I. PRELIMINARY INSTRUCTIONS

A. Opening Instructions

Members of the jury, we are about to begin the trial of this case, some details of which you heard about during the jury selection. Before the trial begins, certain instructions are essential for a clear understanding of what will be presented to you and how you should conduct yourselves during the trial.

During the trial, you will hear me use a few terms that you may not have heard before. Let me briefly explain some of the most common to you as well as the nature of this case.

B. Plaintiffs' Proposed Jury Instruction No. I.2 - Opening Instructions (Parties)

The parties who brought this lawsuit are called the plaintiffs. The ten plaintiffs in this case are: (1) Ken Wiwa, Jr., who also brings claims for injuries to his late father, Ken Saro-Wiwa; (2) Owens Wiwa; (3) Blessing Kpuinen, who also brings claims for injuries to her late husband John Kpuinen; (4) Karalolo Kogbara; (5) Michael Tema Vizor; (6) Lucky Doobee, who also brings claims for injuries to his late brother Saturday Doobee; (7) Friday Nuate, who also brings claims for injuries to her late husband Felix Nuate; (8) Monday Gbokoo, who also brings claims for injuries to his late brother Daniel Gbokoo; (9) James N-nah, who also brings claims for injuries to his late brother Uebari N-nah; and (10) David Kiobel.

The parties being sued are called the defendants. In this action, the defendants are (1) the Royal Dutch Petroleum Company; (2) The "Shell" Transport and Trading Company, p.l.c.; and (3) Brian Anderson.

SOURCE: Kevin F. O'Malley, Jay E. Grenig & Hon. William C. Lee, Federal Jury Practice and Instructions, Vol. 3, § 101.01 (5th ed. 2000).

DEFENDANTS' OBJECTIONS:
The "individually and on behalf of" formulation is more appropriate given that it tracks the complaint and does not characterize the facts not yet in evidence (e.g., "injuries") It is undisputed that Royal Dutch is a Dutch corporation and that Shell Transport is an English corporation. It is also undisputed that Mr. Anderson was the MD of SPDC. These are all facts that have been proposed by or agreed to by plaintiffs.

C. Defendants' Proposed Instruction: Opening Instructions – Parties

The parties who brought this lawsuit are called the plaintiffs. The ten plaintiffs in this case are: (1) Ken Wiwa, Jr., individually and on behalf of his late father, Ken Saro-Wiwa; (2) Owens Wiwa; (3) Blessing Kpuinen, individually and on behalf of her late husband John Kpuinen; (4) Karalolo Kogbara; (5) Michael Tema Vizor; (6) Lucky Doobee, individually and on behalf of his late brother Saturday Doobee; (7) Friday Nuate, individually and on behalf of her late husband Felix Nuate; (8) Monday Gbokoo, individually and on behalf of his late brother Daniel Gbokoo; (9) James N-nah, individually and on behalf of his late brother Uebari N-nah; and (10) David Kiobel.

The parties being sued are called the defendants. In this action, the defendants are (1) the Royal Dutch Petroleum Company, a Dutch corporation; (2) The "Shell" Transport and Trading Company, p.l.c., an English corporation; and (3) Brian Anderson, formerly the managing director of a separate corporation called the Shell Petroleum Development Company of Nigeria, otherwise known as SPDC, which is not a party to this lawsuit.

SOURCE: Kevin F. O'Malley, Jay E. Grenig & Hon. William C. Lee, Federal Jury Practice and Instructions, Vol. 3, § 101.01 (5th ed. 2000).

PLAINTIFFS' OBJECTIONS: The "individually and on behalf of" formulation is potentially confusing to the layperson. Plaintiffs' version is more straightforward and understandable regarding what the claims are about. Defendants' objection that this introduces "injuries" improperly is misplaced, because it is undisputed that each of the decedents was killed.

With respect to the description of the defendants, plaintiffs do not believe any more information should be given than is given about plaintiffs (i.e., their names). The nationality of the corporate defendants is irrelevant and the jury should not be instructed on this. As for Brian Anderson, if this amount of information is given, plaintiffs could easily include similar undisputed descriptors such as "Ken Saro-Wiwa, formerly the

President of the Movement for the Survival of the Ogoni People," but prefer to keep it minimal at this point.

D. Opening Instructions (Continued)

You will sometimes hear me refer to "counsel". "Counsel" is another way of saying "lawyer" or "attorney". I will sometimes refer to myself as the "Court".

You will occasionally hear counsel for both sides challenging tactics used or questions posed by opposing counsel. From time to time during trial, I may make rulings on objections or motions made by the lawyers. It is the duty of the lawyer on each side of a case to object when the other side offers testimony or other evidence that the lawyer believes is not admissible. You should not be prejudiced against a lawyer or the lawyer's client because the lawyer has made objections. When I "sustain" on objection, I am agreeing with the objecting attorney and excluding that evidence for this trial for a good reason. When I "overrule" an objection, I am disagreeing with objecting counsel and permitting that evidence to be admitted. If I "sustain" an objection to a question that goes unanswered by the witness, you should not draw any inference or conclusion from the question. You should not infer or conclude from any ruling or other comment I may make that I have any opinion on the merits of the case favoring one side or the other. I do not favor one side or the other.

When I say something has been "admitted into evidence" or "received into evidence", I mean that you may consider the particular statement or exhibit in question in making the decisions you must make at the end of the case.

By your verdict, you will decide disputed issues of fact. I will decide all questions of law that arise during the trial. Before you begin your deliberation at the close of the case, I will instruct you in more detail on the law that you must follow and apply in rendering your verdict.

Because you will be asked to decide the facts of this case, it is crucial that you give careful attention to the testimony and evidence presented. I will instruct you at about determining the credibility or "believability" of each witness and the weight that should be accorded such testimony. During the trial you should keep an open mind and should not form or express any opinion about the case until you have heard all of the testimony and evidence, the lawyers' closing arguments, and my instructions to you on the law.

While the trial is in progress, you must not discuss the case in any manner among yourselves or with anyone else. In addition, you should not permit anyone to discuss the case in your presence and you should excuse yourself from conversations in your presence relating to the trial. You should avoid reading any news articles that might be published about the case. You should also avoid watching or listening to any television or radio comments about the trial.

The trial lawyers are not allowed to speak with you during this case. When you see them at a recess or pass them in the halls and they do not speak to you, they are not being rude or unfriendly; they are simply following the law.

During the trial, it may be necessary for me to speak with the lawyers out of your presence regarding questions of law or procedure that require consideration by the Court alone. Sometimes, you may be excused from the courtroom, which is common in trials and should not affect your deliberation process.

SOURCE: Kevin F. O'Malley, Jay E. Grenig & Hon. William C. Lee, Federal Jury Practice and Instructions, Vol. 3, § 101.01 (5th ed. 2000).

E. Order of Trial

The case will proceed as follows:

First, the lawyers for each side may make opening statements. What is said in opening statements is not evidence, but is simply an outline to help you understand what each party expects the evidence to show. A party is not required to make an opening statement.

Second, after the opening statements, the plaintiffs will present evidence in support of their claims, and the defendants' lawyers may cross-examine the plaintiffs' witnesses. At the conclusion of the plaintiffs' case, the defendants' may introduce evidence, and the plaintiffs' lawyers may cross-examine the defendants' witnesses. The defendants, however, are not required to introduce any evidence or to call any witnesses. If the defendant does introduce evidence, the plaintiff may then present rebuttal evidence.

Third, after the evidence is presented, the lawyers from each side may present closing arguments explaining what they believe the evidence has shown and what inferences you should draw from that evidence. What is said in the closing arguments is not evidence.

Finally, I will instruct you on the law that you are to apply in reaching your verdict. You will then decide the case.

SOURCE: O'Malley et al., Federal Jury Practice and Instructions, Vol. 3, § 101.02.

F. Conduct of Jurors

You are to conduct your duty as jurors in an atmosphere of complete fairness and impartiality, without bias, prejudice or sympathy for or against plaintiffs or defendants. All parties stand as equals before the bar of justice. You are to approach your duties coolly and calmly, without emotion and without being influenced by sympathy or prejudice for or against any party.

SOURCE: *Deravin v. Kerik*, 00 Civ. 7487 (KMW) (KNF), 2007 Jury Instr. LEXIS 212, 2000 U.S. Dist. Ct. Jury Instr. 7487B, at *2-3 (S.D.N.Y. May 11, 2007).

G. Nature of the Evidence

The evidence in this case is the sworn testimony of the witnesses, the exhibits received in evidence, stipulations, and judicially noticed facts.

Depositions may also be received in evidence. Depositions contain sworn testimony, with the lawyers for each party being entitled to ask questions. In some cases, a deposition may be played for you on videotape. Deposition testimony may be accepted by you, subject to the same instructions that apply to witnesses testifying in open court.

The law recognizes two types of evidence, direct and circumstantial evidence. Direct evidence is where a person testifies as to what she herself saw or heard or that which she has knowledge of by virtue of her own senses. Circumstantial evidence consists of proof of facts and circumstances from which, in terms of common experience, one may reasonably infer the ultimate fact sought to be established. Such evidence, if believed, is of no less value than direct evidence.

A claim must be established by the party bearing the burden of proof for that particular claim, and either circumstantial or direct evidence may be used.

To constitute evidence, exhibits must be received in evidence. Exhibits marked for identification but not admitted are not evidence, nor are materials brought forth only to refresh a witness' recollection.

A "stipulation" is an agreement between both sides that certain facts are true. When the lawyers on both sides stipulate or agree to the existence of a fact, you must, unless otherwise instructed, accept the stipulation and regard that fact as proved.

I may take judicial notice of certain facts or events. When I declare that I will take judicial notice of some fact or event, you must accept that fact as true.

The question of a lawyer is not to be considered by you as evidence. It is the witnesses' answers that are evidence, not the questions. At times, a lawyer on cross-examination may have incorporated into a question a statement which assumed certain facts to be true, and asked the witness if the statement was true. If the witness denied the truth of a statement, and if there is no evidence in the record proving that assumed fact to be true, then you may not consider it to be true simply because it was contained in the lawyer's question. On the other hand, if the witness acknowledged the truth of the statement, you may, of course, consider the witness' answer as evidence that the statement is, in fact, true.

Testimony that has been stricken or excluded is not evidence and may not be considered by you in rendering your verdict. If I sustain an objection to any evidence or if I order evidence stricken, that evidence must be entirely ignored. Also, if certain testimony was received for a limited purpose—such as for the purpose of assessing a witness' credibility—you must follow the limiting instructions I have given.

Arguments by lawyers are not evidence, because the lawyers are not witnesses. What they have said to you in their opening statements and in their summations is intended to help you understand the evidence to reach your verdict. However, if your recollection of the facts differs from the lawyers' statements, it is your recollection which controls.

Finally, statements which I may have made concerning the quality of the evidence do not constitute evidence.

You are to consider only the evidence in this case, but in your consideration of the evidence you are not limited to the statements of the witnesses. In

other words, you are not limited solely to what you see and hear as the witnesses testified. You may draw from the facts that you find have been proved such reasonable inferences or conclusions as you feel are justified in the light of your experience.

During the trial, I will permit you to take notes. Of course, you are not obliged to take notes. If you do not take notes, you should not be influenced by the notes of another juror, but should rely upon your own recollection of the evidence. Because many courts do not permit notetaking by jurors, a word of caution is in order. You must not allow your notetaking to distract you from the proceedings. Your notes are only a tool to aid your own individual memory and you should not compare your notes with other jurors in determining the content of any testimony or in evaluating the importance of any evidence. Your notes are not evidence, and are by no means a complete outline of the proceedings or a list of the highlights of the trial. Your memory should be your greatest asset when it comes time to decide this case.

At the end of the trial, you will have to make your decision based on what you recall of the evidence. You will not have a written transcript to consult, and it is difficult and time-consuming for the court reporter to read back lengthy testimony. Therefore, I urge you to pay close attention to the testimony as it is given.

It is for you alone to decide the weight, if any, to be given to the testimony you have heard and the exhibits you have seen.

SOURCES: Sand et al., Modern Federal Jury Instructions, Vol. 4, ch. 74, Instr. 74-1, 74-2, 74-3, 74-4; *see also* O'Malley et al., Federal Jury Practice and Instructions, Vol. 3, §§ 101.13, 101.40; *Deravin v. Kerik*, 00 Civ. 7487 (KMW) (KNF), 2007 Jury Instr. LEXIS 212, 2000 U.S. Dist. Ct. Jury Instr. 7487B, at *4-6 (S.D.N.Y. May 11, 2007).

H. Defendants' Proposed Instruction: Evidence of Environmental Matters

To the extent that I permit any witnesses to speak about environmental matters in Nigeria, or obligations of oil companies operating in Nigeria, it is purely background information for you to place the events in context. Plaintiffs are not making any claim based on harm to the environment or damage to their communities. Plaintiffs are not seeking any damages of any kind to compensate for alleged environmental damages.

DEFENDANTS' COMMENTS:

Plaintiffs' objection on the ground that the court has not yet ruled is not appropriate. Plaintiffs have already stated their intention to offer such evidence. Defendants have stated their objection and intention to make a motion *in limine*. As plaintiffs have done with the proposed instruction on prior inconsistent statements, we could simply agree to a comment stating that it should be included only to the extent the Court deems evidence on environmental matters admissible. This instruction was used in *Bowoto*.

PLAINTIFFS' OBJECTIONS: Plaintiffs object that this instruction is one-sided and prejudicial, and also misstates the relevance of environmental evidence in this case. While environmental evidence was only admissible as "background information" in *Bowoto v. Chevron*, from which this instruction is drawn, in this case it may be admissible for other purposes as well; for example, to show defendants' motive for taking action against MOSOP and plaintiffs. Plaintiffs do not object to an instruction making clear that there are no environmental claims at the close of the case, and Plaintiffs' Proposed Jury Instruction No. 5.1 states much of the same substance. But to put this instruction at the beginning of the case improperly injects a particular viewpoint of the case at the outset.

If this instruction is given, the Court should also instruct the jury on the use of other categories of evidence, such as defendants' "good works," violence by third parties against Shell Nigeria, etc. Plaintiffs would prefer to use limiting instructions where appropriate and instruct the jury on the applicable claims at the close of the evidence.

I. Transnational Litigation

The Court has determined that this case may be decided in this United States Court, because the defendants have sufficient business in New York City. The Court has also determined that the case could not have been brought in Nigeria. You are not called on to determine whether this case is appropriately heard in this court, and you should not consider the fact that many of these events occurred in Nigeria in determining the liability of the defendants in this case.

SOURCES: *Wiwa v. Royal Dutch Petroleum*, 226 F.3d 88, 99 (2d Cir. 2000) ("the continuous presence of the Investor Relations program in New York City is sufficient to confer jurisdiction")

Wiwa v. Royal Dutch Petroleum, Co., 2002 U.S. Dist. LEXIS 3293 *56-57 (". . . plaintiffs have provided sufficient evidence of the inadequacy of that [Nigerian] forum. Although political conditions in Nigeria have improved since 1995, Nigerian courts remain an uncertain forum for justice. . . . Anderson has failed to demonstrate that plaintiffs have adequate, alternative remedies available in Nigeria.")
McKenna v. Fisk, 42 U.S. 241, 248 (1843) ("But it is an established rule, that in transitory actions a venue is only necessary to be laid to give a place for trial. . . . Lord Mansfield said: But as to transitory actions, there is not a colour of doubt but that any action which is transitory may be laid in any county in England, though the matter arises beyond the seas. *Mostyn v. Fabrigas*, 1 Cowp. 161.")

DEFENDANTS' OBJECTIONS: Defendants object to this instruction in its entirety as unnecessary, improper and prejudicial.

To the extent the Court permits an instruction on this subject matter, defendants propose that material in strikethrough be stricken:

The Court has determined that this case may be decided in this United States Court~~,~~ ~~because the defendants have sufficient business in New York City. The Court has also determined that the case could not have been brought in Nigeria~~. You are not called on to determine whether this case is appropriately heard in this court~~, and you should not consider the fact that many of these events occurred in Nigeria in determining the liability of the defendants in this case~~.

PLAINTIFFS' OBJECTIONS: It is natural for jurors to wonder 1) why this case is in New York City, and 2) why this case was not brought in Nigeria. Plaintiffs' version of this instruction answers those questions, while defendants' version essentially tells jurors to put it out of their minds but does not satisfy their curiosity. Defendants have not explained what is prejudicial about plaintiffs' instruction.

Most problematic is defendants' deletion of the instruction not to consider the fact that these events occurred in Nigeria. The jury should know that it should apply the law fairly no matter where the case arose.

J. Credibility of Witnesses

Now for the important subject of evaluating testimony. You, as jurors, are the sole judges of the credibility of the witnesses and the weight their testimony deserves.

How do you evaluate the credibility or believability of the witnesses? The answer is that you use your plain common sense. Common sense is your greatest asset in the fulfillment of your obligation as a juror. You should ask yourselves, did the witness impress you as honest, open and candid? Or did the witness appear evasive or as though he or she was trying to hide something? How responsive was the witness to the questions asked on direct examination and on cross-examination?

There are three ways in which you may decide a witness' testimony is not credible. First, the way a witness testifies may persuade you that the witness is being inaccurate or untruthful. Second, you may conclude that the testimony of a witness fails to conform to the facts as indicated by the other evidence you have seen—including the testimony of other witnesses. Third, you may be persuaded by the evidence that you have heard regarding discrepancies between the trial testimony of a witness and something done or said at some earlier time by that witness. You may reach any of these conclusions for any number of reasons, for example, because a witness' recollection is wrong, because a witness did not accurately see or hear what he or she testified about, because a witness was nervous or confused or because he or she didn't express him or herself clearly. Or, a witness may be intentionally testifying falsely. If you find that a witness is intentionally telling a falsehood, that is always a matter of importance that you should weigh carefully.

However, few people recall every detail of every event precisely the same way. A witness may be inaccurate, contradictory or even untruthful in some respects and

yet entirely believable and truthful in other respects. It is for you to determine whether such inconsistencies are significant or inconsequential, and whether to accept or reject all or to accept some and reject the balance of the testimony of any witness. You are not required to accept testimony even though the testimony is uncontradicted and the witness' testimony is not challenged. You may decide because of the witness' bearing or demeanor, or because of the inherent improbability of the testimony, or for other reasons sufficient to yourselves that the testimony is not worthy of belief. On the other hand, you may find, because of a witness' bearing and demeanor and based upon your consideration of all the other evidence in the case, that the witness is truthful.

Thus, there is no magic formula by which you can evaluate testimony. You bring to this courtroom all your experience and all your background that you have in your everyday life. You determine for yourself in many circumstances the reliability of statements that are made by others to you and upon which you are asked to rely and act. You may use the same tests that you use in your everyday life. You may consider the interest of any witness in the outcome of this case and any bias or prejudice of any such witness, and this is true regardless of who called or questioned the witness.

Now, this is certainly not to suggest that any witness with an interest in a case will necessarily testify falsely. It is simply a matter for you to consider as you review the credibility of witnesses.

You must not be biased in favor of or against any witness because of his or her disability, gender, race, religion, ethnicity, sexual orientation, age, national origin or nationality, or socioeconomic status.

SOURCES: *Deravin v. Kerik*, 00 Civ. 7487 (KMW) (KNF), 2007 Jury Instr. LEXIS 212, 2000 U.S. Dist. Ct. Jury Instr. 7487B, at *6-9 (S.D.N.Y. May 11, 2007).

K. Prior Inconsistent Statements

A witness may be discredited or "impeached" by contradictory evidence, that is, by a showing that he or she testified falsely concerning a material matter, or by evidence that at some other time the witness has said or done something, or has failed to say or do something, which is inconsistent with the witness' present testimony.

It is for you to determine whether a prior statement was inconsistent and whether any such inconsistency is significant or inconsequential. Furthermore, if you believe that any witness has been so impeached, then it is your exclusive province to give the testimony of that witness such credibility or weight, if any, as you may think it deserves. It is for you to determine how much, if any, weight to give to an inconsistent statement or a discrepancy in testimony in determining whether to believe all or part of a witness' testimony.

You may consider such evidence of a witness' prior inconsistent statements only insofar it relates to that witness' credibility. Evidence of a prior inconsistent statement must not be considered by you as affirmative evidence in determining liability, except for statements that have been received in evidence. Otherwise, evidence of a prior inconsistent statement was placed before you for the limited purpose of helping you decide whether, and how much to believe the trial testimony of the witness who contradicted himself or herself.

SOURCES: *Deravin v. Kerik*, 00 Civ. 7487 (KMW) (KNF), 2007 Jury Instr. LEXIS 212, 2000 U.S. Dist. Ct. Jury Instr. 7487B, at *9-10 (S.D.N.Y. May 11, 2007).

II. JURY INSTRUCTIONS DURING TRIAL

A. Plaintiffs' Proposed Instruction No. II.1 - Deposition in Lieu of Live Testimony

[*To be read at the first presentation of a deposition*]

Testimony will now be presented through a deposition. A deposition contains the sworn, recorded answers to questions asked a witness in advance of the trial. A witness' testimony may sometimes be presented in the form of a deposition if the witness is not present or if the testimony in court contradicts the witness' deposition testimony. Some time before this trial, attorneys representing the parties in this case questioned this witness under oath. A court reporter was present and recorded the testimony. The questions and answers will be read/shown to you today.

You must give this deposition testimony the same consideration as if the witness had been present and had testified from the witness stand in court.

SOURCES: O'Malley et al., Federal Jury Practice and Instructions, Vol. 3, §102.23

DEFENDANTS' COMMENTS AND OBJECTIONS: Defendants object to this instruction as duplicative of preliminary instructions I.D (Nature of the Evidence). Defendants further object to having this as a separate section and believe each of the instructions in this section II.A-D are more appropriately covered as part of the preliminary instructions in section I and the instruction in section II.E. is more appropriately covered as part of the instructions at the close of evidence.

B. Plaintiffs' Proposed Instruction No. II.2 - Transcript of Tape Recording

[*To be read only if such evidence is introduced*]

You are about to listen to a tape recording that has been received in evidence. Please listen to it very carefully. You have also been given a written transcript of the recording to help you identify speakers and to help you listen to the tape.

The transcript is not evidence. The tape recording itself is the primary evidence of its own contents. Where there is a difference between the transcript and the tape recording, you must rely on what you hear rather than what you read.

Transcripts of recorded conversations can be very difficult to make. Whether the typewritten transcript correctly or incorrectly reflects the conversation or the identity of the speakers is entirely for you to decide based upon what you hear on the tape recording, what you hear about the preparation of the transcript, and your own examination of the transcript. If you decide that the transcript is incorrect or unreliable, you should disregard it to that extent.

SOURCES: O'Malley et al., Federal Jury Practice and Instructions, Vol. 3, §102.21

DEFENDANTS' COMMENTS AND OBJECTIONS: Defendants object to this instruction in its entirety. Defendants have objected and will object to use of any and all video or other recording. Defendants have not received any "transcripts of recorded conversations" referenced in this instruction, and plaintiffs have not given defendants any notice of what they intend to play to the jury. Defendants object to this instruction and any such evidence as irrelevant and prejudicial. Defendants further object on the basis that this instruction is more appropriately covered as part of the preliminary instructions in section I.

PLAINTIFFS' COMMENT: Defendants' concerns are overblown. This instruction is only to be read if a tape recording is introduced. Plaintiffs have no particular reason to believe that this will happen; this is simply a standard instruction to have ready should this type of evidence be introduced.

C. Plaintiffs' Proposed Jury Instruction No. II.3 - Use of Interrogatories and Admissions of a Party

[*To be read at the first presentation of interrogatories and RFAs*]

Evidence will now be presented to you in the form of written answers of one of the parties to written interrogatories or requests for admission submitted by the other side. These answers were given in writing and under oath before this trial in response to written questions or requests.

You must give the answers the same consideration as if the answers were made from the witness stand.

SOURCES: O'Malley et al., Federal Jury Practice and Instructions, Vol. 3, §102.24

DEFENDANTS' COMMENTS AND OBJECTIONS:

Defendants believe this instruction is more appropriately covered as part of the preliminary instructions in section I .

D. Plaintiffs' Proposed Jury Instruction No. II.4 – Expert Opinion

[*To be read prior to the first expert's testimony*]

You are about to hear testimony from an expert witness. The rules of evidence ordinarily do not permit witnesses to testify as to opinions or conclusions. An exception to this rule exists for "expert witnesses." An expert witness is a person who, by education and experience has become expert in some art, science, profession, or calling. Expert witnesses may state their opinions as to matters in which they profess to be expert, and may also state their reasons for their opinions.

You should consider each expert opinion received in evidence in this case, and give it such weight as you think it deserves. If you should decide that the opinion of an expert witness is not based upon sufficient education and experience, or if you should conclude that the reasons given in support of the opinion are not sound, or if you feel that it is outweighed by other evidence, you may disregard the opinion entirely.

SOURCES: O'Malley et al., Federal Jury Practice and Instructions §104.40.

DEFENDANTS' COMMENTS AND OBJECTIONS:

Defendants believe this instruction is more appropriately covered as part of the instructions at the close of evidence. Defendants further object insofar as does not provide factors for the jury to consider in weighing the testimony. Defendants suggest the language in defendants' proposed instruction.

E. Defendants' Proposed Instruction: Expert Opinion

[To be read at the close of evidence]

You **have heard** testimony from **plaintiffs'** expert witness. The rules of evidence ordinarily do not permit witnesses to testify as to opinions or conclusions. An exception to this rule exists for "expert witnesses." An expert witness is a person who, by education and experience has become expert in some art, science, profession, or calling. Expert witnesses may state their opinions as to matters in which they profess to be expert, and may also state their reasons for their opinions.

You should consider each expert opinion received in evidence in this case, and give it such weight as you think it deserves. If you should decide that the opinion of an expert witness is not based upon sufficient education and experience, or if you should conclude that the reasons given in support of the opinion are not sound, or if you feel that it is outweighed by other evidence, you may disregard the opinion entirely.

In weighing an expert's testimony, you may consider the expert's qualifications, his opinions, his reasons for testifying, as well as all of the other considerations that ordinarily apply when you are deciding whether or not to believe a witness' testimony. You may give the expert testimony whatever weight, if any, you find it deserves in light of all the evidence in this case. You should not, however, accept the witness' testimony merely because he is an expert. You may reject the testimony of the expert in whole or in part, if you conclude the reasons given in support of an opinion are unsound, if the testimony is outweighed by other evidence, or, if you, for other reasons, do not believe the expert witness. But most importantly, you should not substitute an expert's testimony for your own reason, judgment and common sense. The determination of the facts in this case rests solely with you.

SOURCES: *Deravin v. Kerik*, 00 Civ. 7487 (KMW) (KNF), 2007 Jury Instr. LEXIS 212, 2000 U.S. Dist. Ct. Jury Instr. 7487B, at *11-13 (S.D.N.Y. May 11, 2007); O'Malley et al., Federal Jury Practice and Instructions §104.40.

PLAINTIFFS' OBJECTIONS: Defendants' instruction is problematic for two reasons. First, because plaintiffs are the only parties using expert testimony, it is to defendants' benefit to add additional doubt to the value of expert testimony. This is simply overkill. Plaintiffs' instruction, which is the model federal instruction, is appropriate and sufficient. Second, the only source on which defendants rely for their additional language is the *defendant's proposed* instructions in *Deravin v. Kerik*, a case that settled before trial, not instructions approved by the Court. It is inappropriate to rely on another defendant's proposed instructions as a source, and even more inappropriate to fail to disclose this.

III. JURY INSTRUCTIONS AT CLOSE OF EVIDENCE

A. General Instructions

1. Continued Applicability of Preliminary Instructions

Members of the jury, the instructions I gave at the beginning of the trial and during the trial remain in effect. I now give you additional instructions.

You must, of course, continue to follow the instructions I gave you earlier, as well as those I give you now. You must not single out some instructions and ignore others, because all are important. This is true even though some of those I gave you at the beginning of and during trial are not repeated here.

The instructions I am about to give you now as well as those I gave you earlier are in writing and will be available to you in the jury room.

SOURCE: *Henke v. Sharon K. Gajewski*, No. 4:07CV1209 (HEA), 2008 Jury Instr. LEXIS 910, 2007 U.S. Dist. Ct. Jury Instr. 1209, at *7 (E.D. Mo. Dec. 2, 2008)

2. Duty of Jury

Now that you have heard the evidence and the argument, it is my duty to instruct you about the applicable law. It is your duty to follow the law as I will state it and to apply it to the facts as you find them from the evidence in the case. Do not single out one instruction as stating the law, but consider the instructions as a whole. You are not to be concerned about the wisdom of any rule of law stated by me. You must follow and apply the law.

The lawyers have properly referred to some of the governing rules of law in their arguments. If there is any difference between the law stated by the lawyers and as stated in these instructions, you are governed by my instructions.

Nothing I say in these instructions indicates that I have any opinion about the facts. You, not I, have the duty to determine the facts.

You must perform your duties as jurors without bias or prejudice as to any party. The law does not permit you to be controlled by sympathy, prejudice, or public opinion. All parties expect that you will carefully and impartially consider all the evidence, follow the law as it is now being given to you, and reach a just verdict, regardless of the consequences.

If at any time I instructed you to disregard anything that was said, you must follow that instruction. If at any time I instructed you that the parties stipulated that a fact was true, you must accept the fact as true. I also ask you to draw no inference from the fact that upon occasion I asked questions of certain witnesses. These questions were only intended for clarification or to expedite matters and certainly were not intended to suggest any opinions on my part as to the verdict you should render, or whether any of the witnesses may have been more credible than any other witnesses. You are expressly

to understand that the Court has no opinion as to the verdict you should render in this case.

SOURCES: O'Malley et al., Federal Jury Practice and Instructions, Vol. 3, §103.01; Sand et al., Modern Federal Jury Instructions, Vol. 4, ch. 71, Instr. 71-3; *see also Deravin v. Kerik*, 00 Civ. 7487 (KMW) (KNF), 2007 Jury Instr. LEXIS 212, 2000 U.S. Dist. Ct. Jury Instr. 7487B, at *3-4 (S.D.N.Y. May 11, 2007).

3. Plaintiffs' Proposed Jury Instruction No. III.3 – Meaning of Specialized Words

During the course of these instructions, you will hear me use certain words and phrases, such as "racketeering," "corrupt organization," "agency", "conspiracy," and "aiding and abetting". These words may have certain implications in our society, and you may have some understanding of what they mean. You may not consider your understanding of words and phrases such as these, or the law in general, that you may have learned from television, the media, prior experience with the law or any other source. Instead, you must follow the law as expressed in these instructions, and accept the definitions of these words and phrases that I will give to you. Nor should you assume that the use of any of these words has any implications for whether plaintiffs have proved their case against defendants.

DEFENDANTS' COMMENTS AND OBJECTIONS: Defendants object to removing this instruction from RICO. To the extent it is also used here, no RICO terms should be contained therein because such terms are prejudicial without being coupled with a RICO instruction. Thus, "racketeering" and "corrupt organization" should be stricken. This is a common RICO instruction.

PLAINTIFFS' COMMENTS: Plaintiffs object to separating out the instructions on RICO terms from the instructions on other specialized terms. The jury should be aware that this approach applies to all specialized terms used in the instructions, and that RICO is no different. Defendants' approach would signal to the jury that RICO terms are somehow different from other terms used in the instructions, and there is no basis for this.

4. Use of Notes

You may use the notes taken by you during the trial. However, the notes should not be substituted for your memory. Remember, notes are not evidence. If your memory should differ from your notes, then you should rely on your memory and not on your notes.

SOURCE: O'Malley et al., Federal Jury Practice and Instructions, Vol. 3, § 103.02.

5. Two or More Parties – Different Legal Rights

You should decide the case as to each plaintiff and each defendant separately. Different laws apply depending on the nature of particular claims. These instructions explain which law applies to which claims for which individuals. You should apply the law that these instructions direct you to apply and no other law. Unless otherwise indicated, the instructions apply to all parties.

Each defendant is entitled to a fair consideration as to each plaintiff and as to each other, just as each plaintiff is entitled to a fair consideration of each plaintiff's claim against each defendant.

SOURCES: Ninth Circuit Model Instruction No. 1.5 (modified), O'Malley et al., Federal Jury Practice and Instructions, Vol. 3, §§ 103.13, 103.14.

6. Do Not Consider Others

You are to determine the liability of the defendants in this case as to each claim asserted. You are not called upon to return a verdict as to the liability of any other person or persons. Nor are you to consider the liability that such other persons may or may not have, or whether such persons have been, will be or should be charged with liability in this or any other court. You must determine whether or not the evidence in the case convinces you of these defendants' liability without regard to any belief you may have about the liability of any other person or persons.

SOURCES: *Chavez v. Carranza,* No. 03-2932 (W.D. Tenn.), Civil Charge Book (Jury Instructions) 3(d) ("You are to determine the liability of this defendant as to each claim asserted from the evidence. You are not called upon to return a verdict as to the liability of any other person or persons. Nor are you to consider the liability that such other persons may or may not have, or whether such persons have been, will be or should be charged with liability in this or any other court. You must determine whether or not the evidence in the case convinces you of this defendant's liability without regard to any belief you may have about the liability of any other person or persons.")

7. Plaintiffs' Proposed Jury Instruction No. III.7 – Absent parties

For legal reasons, Shell Nigeria and the Government of Nigeria are not defendants in this case. In your deliberations, you should not consider the fact that they are not defendants.

Note: Plaintiffs believe that jurors will be curious as to why Shell Nigeria and the GoN are not before the Court, and this neutral instruction would be helpful.

DEFENDANTS' COMMENTS AND OBJECTIONS: Defendants object to the last paragraph of plaintiffs' proposed instruction in its entirety as unnecessary and prejudicial.

8. Plaintiffs' Proposed Jury Instruction No. III.8 –Party Having Power to Produce Better Evidence, Willful Suppression of Evidence, Failure to Explain or Deny Evidence

The law does not require any party to call as witnesses all persons who may have been present at any time or place involved in the case, or who may appear to have some knowledge of the matters in issue at this trial. Nor does the law require any party to produce as exhibits all papers and things mentioned in the evidence in the case. You may, however, draw certain inferences from the failure of a party to produce or explain evidence or witness testimony.

[*You may consider whether one party intentionally concealed or destroyed evidence in order to prevent its being presented in this trial.*] You may [*also*] consider whether a party has failed to produce evidence that is under the party's control and reasonably available to that party and not reasonably available to the adverse party. If you decide that a party did so, you may infer that the evidence would have been unfavorable to the party that could have produced it and did not.

If a party fails to call a person as a witness who has knowledge about the facts in issue, and who is reasonably available to the party, and who is not equally available to the other party, then you may infer that the testimony of that person is unfavorable to the party who could have called the witness and did not.

Note: The bracketed language should only be included if some evidence of concealment or spoliation is introduced at trial.

SOURCES: O'Malley et al., 3 Federal Jury Practice and Instructions § 105.11 ("The law does not require any party to call as witnesses all persons who may have been present at any time or place involved in the case, or who may appear to have some knowledge of the matters in issue at this trial. Nor does the law require any party to produce as exhibits all papers and things mentioned in the evidence in the case.")
O'Malley et al., 3 Federal Jury Practice and Instructions § 104.27 ("If you should find that a party willfully [suppressed] [hid] [destroyed] evidence in order to prevent its being presented in this trial, you may consider such [suppression] [hiding] [destruction] in determining what inferences to draw from the evidence or facts in the case.")
O'Malley et al., 3 Federal Jury Practice and Instructions § 104.26 ("If a party fails to produce evidence that is under that party's control and reasonably available to that party and not reasonably available to the adverse party, then you may infer that the evidence is unfavorable to the party who could have produced it and did not.")
O'Malley et al., 3 Federal Jury Practice and Instructions § 104.25 ("If a party fails to call a person as a witness who has knowledge about the facts in issue, and who is reasonably available to the party, and who is not equally available to the other party, then you may infer that the testimony of that person is unfavorable to the party who could have called the witness and did not.")

DEFENDANTS' COMMENTS AND OBJECTIONS: Defendants object to this instruction in its entirety as wholly inappropriate and unwarranted and highly prejudicial. Plaintiffs have not given any notice of or any basis for such an adverse instruction. There is no basis for one.

9. Charts and Summaries

Certain charts and summaries have been shown to you in order to help explain facts disclosed by books, records, and other documents that are in evidence in the case. These charts or summaries are not themselves evidence or proof of any facts. If the charts or summaries do not correctly reflect facts or figures shown by the evidence in the case, you should disregard them.

In other words, the charts or summaries are used only as a matter of convenience. To the extent that you find they are not truthful summaries of facts or figures shown by the evidence in the case, you are to disregard them entirely.

B. Specific Instructions

1. Burden of Proof – Preponderance of the Evidence

Members of the jury, now that I have given you general instructions, I am going to instruct you on the law to be applied to the specific issues in this case. But first I am going to explain the concept of "burden of proof". From television and books and the movies you may have heard of something called proof beyond a reasonable doubt. That is the standard of proof in a criminal trial, not a civil trial. Since this is a civil trial, that standard does not apply, and [*except to the extent that I instruct you otherwise,*] you should put it entirely out of your mind. [*Except where I instruct you otherwise,*] the burden of proof in this action, a civil case, is by a preponderance of the evidence.

What does "preponderance of the evidence" mean? To prove a fact by a preponderance of the evidence means to establish that the fact is more likely true than not true. A preponderance of the evidence means the greater weight of the evidence. It refers to the quality and persuasiveness of the evidence, not to the number of witnesses or documents.

If you find that the credible evidence on a given issue is evenly divided between the parties—that it is equally probable that one side is right as it is that the other side is right—then you must decide that issue against the party having this burden of proof. That is because the party bearing this burden must prove more than simple equality of evidence—he must prove the element at issue by a preponderance of the evidence. On the other hand, the party with this burden of proof need prove no more than a preponderance. So long as you find that the scales tip, however slightly, in favor of the party with this burden of proof - that what the party claims is more likely true than not - then that element will have been proved by a preponderance of the evidence.

Each plaintiff in this case bears the burden of proving every essential element of his or her claims by a fair preponderance of the credible evidence. In determining whether any fact in issue has been proved by a preponderance of the evidence you may, unless otherwise instructed, consider the testimony of all witnesses, regardless of who may have called them, all exhibits received in evidence, regardless of who may have produced them, and all facts stipulated by the parties to be true.

Note: The bracketed language applies if the Court accepts defendants' beyond a reasonable doubt instructions.

SOURCES: *Deravin v. Kerik*, 00 Civ. 7487 (KMW) (KNF), 2007 Jury Instr. LEXIS 212, 2000 U.S. Dist. Ct. Jury Instr. 7487B, at *13-15 (S.D.N.Y. May 11, 2007).

2. Special Burden of Proof for Certain Claims Under Nigerian Law - Proof Beyond a Reasonable Doubt

Plaintiffs bring certain claims against defendants that are governed by Nigerian law. Under Nigerian law, the burden is on plaintiffs to establish every essential element of these claims with proof beyond a reasonable doubt. If plaintiffs should fail to establish any essential element of its claims for assault or battery beyond a reasonable doubt, you should find for defendants as to these claims.

What does "proof beyond a reasonable doubt" mean? "Proof beyond a reasonable doubt" is a stricter standard than "preponderance of the evidence". It is the highest burden of proof.

A reasonable doubt is a doubt based upon reason and common sense—the kind of doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt must, therefore, be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it in the most important of his or her own affairs.

SOURCES: *Smithfield Foods Inc. v. United Food & Commercial Workers Int'l Union*, - No. 3:07-cv-641, 2008 Jury Instr. LEXIS 761, 2007 U.S. Dist. Ct. Jury Instr. 267009 (E.D. Va. Oct. 14, 2008); *Okuarume v. Obabokor*, [1965] N.S.C.C. 286, 286-87; Nigerian Evidence Act (1990), Cap. 112, § 138(1).

PLAINTIFFS' OBJECTIONS: For the reasons discussed in the choice of law argument, plaintiffs disagree that any Nigerian burden of proof should apply here. Nigerian law does not apply to these claims in any fashion, and even if it did, New York's burden of proof would still apply.

Even if a beyond a reasonable doubt standard applies, this instruction is objectionable. First, the instruction does not specify that only *some* of plaintiffs' claims under Nigerian law are governed by this standard; according to the Nigerian sources cited this only applies to assault and battery. *See Okuarume v. Obabokor*, [1965] N.S.C.C. 286, 286-87; Nigerian Evidence Act (1990), Cap. 112, § 138(1). Assault and battery should either be

mentioned by name here or it should be made clear that this only applies to *certain* claims, not all or even the majority of claims, under Nigerian law.

Second, the instruction goes beyond even the reasonable doubt standard, by specifying that this is "the highest burden of proof." The final paragraph of this instruction mirrors the model federal instruction, *see* O'Malley et al., 1A Federal Jury Practice and Instructions § 12.10, but the instruction critically omits the key preceding phrase from that instruction: "It is not required that the government prove guilt beyond all possible doubt. The test is one of reasonable doubt." Thus, if the Court does instruct on this issue, plaintiffs propose that the sentence "It is the highest burden of proof" be replaced with: "It is not required that plaintiffs prove guilt beyond all possible doubt. The test is one of reasonable doubt."

3. Plaintiffs' Proposed Jury Instruction No. III.12 – Summary of Claims and Defenses

The parties to this case are:
The plaintiffs, (1) Ken Wiwa, Jr., who also brings claims for injuries to his late father, Ken Saro-Wiwa; (2) Owens Wiwa; (3) Blessing Kpuinen, who also brings claims for injuries to her late husband John Kpuinen; (4) Karalolo Kogbara; (5) Michael Tema Vizor; (6) Lucky Doobee, who also brings claims for injuries to his late brother Saturday Doobee; (7) Friday Nuate, who also brings claims for injuries to her late husband Felix Nuate; (8) Monday Gbokoo, who also brings claims for injuries to his late brother Daniel Gbokoo; (9) James N-nah, who also brings claims for injuries to his late brother Uebari N-nah; and (10) David Kiobel.

The defendants, Royal Dutch Petroleum Co., Shell Transport and Trading Co. and Brian Anderson. Royal Dutch Petroleum Co. and Shell Transport and Trading Co. are sometimes referred to in these instructions as "the corporate defendants".

The positions of the parties can be summarized as follows:
Plaintiffs have claims against defendants for extrajudicial execution, torture, cruel, inhuman and degrading treatment, crimes against humanity, arbitrary arrest and detention, violations of the right to life, liberty and security of person and peaceful assembly and expression, assault, battery, negligence, intentional infliction of emotional distress, negligent infliction of emotional distress, wrongful death, and violations of the Racketeer Influenced and Corrupt Organizations Act. Not all plaintiffs bring all of the above claims against all defendants. I will give you detailed instructions that describe each claim and a verdict form that lists which claims each plaintiff holds against each defendant.

Defendants deny that they are legally liable for any and all of plaintiffs' claims.

SOURCES: O'Malley et al., Federal Jury Practice and Instructions, Vol. 3, § 101.03 ("The positions of the parties can be summarized as follows: Plaintiff claims that [describe]. Defendant denies those claims [and also contends that [describe]].")

DEFENDANTS' COMMENTS AND OBJECTIONS: Defendants object to this instruction in its entirety. The first portion is covered in the opening instructions. The second half is controversial and in dispute. Defendants would seek to add a lengthier description of its position. That would be avoided by omitting this instruction.