UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

PITMAN, United States Magistrate Judge:

TO THE HONORABLE KIMBA M. WOOD, United States District Judge,

I. Introduction

Defendants, Royal Dutch Petroleum Company and Shell Transport and Trading Company, two European oil companies, along with Brian Anderson, the former managing director of the oil companies' Nigerian subsidiary, move for an Order pursuant to

Rule 12(b)(6) of the Federal Rules of Civil Procedure dismissing the Second Amended Complaint in Docket Number 01 Civ. 1909 ("Second Amended Complaint 01 Civ. 1909") and the Third Amended Complaint in Docket Number 96 Civ. 8386 ("Third Amended Complaint 96 Civ. 8386") on the grounds that: (1) plaintiffs' claims are barred by the "act of state" doctrine; (2) plaintiff Kiobel's wrongful death claim fails for want of standing, and (3) plaintiffs' claims are barred by the applicable statute of limitations. Defendants also seek an Order pursuant to Fed.R.Civ.P. 12(f) striking the allegation in paragraph 45 of the Third Amended Complaint 96 Civ. 8386 on the ground that it contains inaccurate information.

For the reasons set forth below, I respectfully recommend that defendants' motion be granted in part and denied in part.

II. Facts

A. The Allegations of the Second Amended Complaint 01 Civ. 1909 and Third Amended Complaint 96 Civ. 8386

This action arises out of alleged human rights violations in Nigeria during the period from 1990 through 1995.

As set forth in the pending complaints, plaintiffs and their decedents were active in protesting oil exploration and development activity by defendants in the Ogoni region of Nige-

ria; according to plaintiffs, these activities have had profoundly damaging ecological effects in the region (Second Amended Complaint 01 Civ. 1909 at ¶¶ 2, 4, 21, 22, 25; Third Amended Complaint 96 Civ. 8386 at ¶¶ 2, 4, 33, 34, 37). Plaintiffs allege that their lawful protests were suppressed by a host of human rights violations committed by agents of the Nigerian government either in conspiracy with defendants and their affiliates or at the defendants' request (Second Amended Complaint 01 Civ. 1909 at ¶¶ 2, 4, 16, 17, 26; Third Amended Complaint 96 Civ. 8386 at ¶¶ 2, 4, 25, 27, 38).

Specifically, plaintiffs allege that (1) plaintiff Karalolo Kogbara was beaten and shot in April, 1993 while protesting the destruction of her property (Third Amended Complaint 96 Civ. 8386 at ¶¶ 3, 48), (2) Late N-nah Uebari was shot and killed by the Nigerian military police on October 24, 1993 while defendants' staff members were present (Third Amended Complaint 96 Civ. 8386 at ¶ 64), (3) Ken Saro-Wiwa was arrested and detained in April and June, 1993 (Third Amended Complaint 96 Civ. 8386 at ¶¶ 54), (4) Saro-Wiwa, Dr. Barinem Kiobel, John Kpuinen, Saturday Doobee, Felix Nuate, Daniel Gbokoo and plaintiff Michael Tema Vizor were arrested because of their opposition to defendants' activities (Second Amended Complaint 01 Civ. 1909 at ¶¶ 43-44; Third Amended Complaint 96 Civ. 8386 at ¶¶ 79, 87), and (5) Saro-Wiwa, Kiobel, Kpuinen, Doobee, Nuate, and Gbokoo were

subsequently tried by an illegally-constituted military tribunal, falsely convicted of murdering four Ogoni tribal leaders and executed while Vizor was partially acquitted (Second Amended Complaint 01 Civ. 1909 at ¶¶ 60-63; Third Amended Complaint 96 Civ. 8386 at ¶¶ 84, 88, 98, 100-01). Plaintiffs further allege that (1) Saro-Wiwa's elderly mother and other family members were beaten when they attended Saro-Wiwa's trial (Second Amended Complaint 01 Civ. 1909 at ¶ 51; Third Amended Complaint 96 Civ. 8386 at ¶ 89), (2) during periods of incarceration, plaintiff Owens Wiwa, along with plaintiff Vizor, Saro-Wiwa, Kpuinen, Doobee, Nuate, Gbokoo and Kiobel were beaten and subjected to torture and some were denied adequate food and medical care (Second Amended Complaint 01 Civ. 1909 at ¶¶ 2-3, 30, 35, 41-42, 52, 62; Third Amended Complaint 96 Civ. 8386 at ¶¶ 3, 49, 69, 81-82, 90, 100), and (3) the conviction of Saro-Wiwa, Kiobel was brought about through defendants' bribes to "key witnesses" (Second Amended Complaint 01 Civ. 1909 at ¶ 53; Third Amended Complaint 96 Civ. 8386 at ¶ 91). Plaintiffs also allege that (1) plaintiff Wiwa, who had previously been arrested and detained without charges, left his medical practice and fled Nigeria after his father's execution because he feared arbitrary arrest, torture and execution (Second Amended Complaint 01 Civ. 1909 at ¶¶ 64, 66; Third Amended Complaint 96 Civ. 8386 at ¶¶ 102, 106), (2) on January 5, 1996, soldiers came to the home of plaintiff

Vizor, and upon finding the home empty, they destroyed it (Second Amended Complaint 01 Civ. 1909 at ¶ 65; Third Amended Complaint 96 Civ. 8386 at ¶ 103), (3) plaintiff Vizor was forced to flee Nigeria because of the incident on January 5, 1996 and escape to Benin and then Canada (Third Amended Complaint 96 Civ. 8386 at ¶¶ 104-05), and (4) beginning in mid-1994, an additional twenty Ogonis were detained and charged with murder in the same manner as Saro-Wiwa, Kiobel, Kpuinen, Doobee, Nuate, Gbokoo and plaintiff Vizor but were released by the end of 1997 (Second Amended Complaint 01 Civ. 1909 at ¶¶ 68-69; Third Amended Complaint 96 Civ. 8386 at ¶¶ 108-09).

As a result of the foregoing, plaintiffs seek damages in both the Second Amended Complaint 01 Civ. 1909 and Third Amended Complaint 96 Civ. 8386 for: (1) summary execution, (2) crimes against humanity, (3) torture, (4) cruel, inhuman or degrading treatment, (5) arbitrary arrest and detention, (6) violations of the rights to life, liberty, security of the person and peaceful assembly and association, (7) wrongful death, (8) assault and battery, (9) intentional infliction of emotional distress, (10) negligent infliction of emotional distress and (11) negligence. In the Third Amended Complaint 96 Civ. 8386, plaintiffs seek additional damages for a violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO").

B. Procedural History

Defendants filed Docket No. 96 Civ. 8386 against the corporate defendants on November 6, 1996 and Docket No. 01 Civ. 1909 against defendant Brian Anderson on March 5, 2001. Both actions have been the subject of numerous discovery and dispositive motions. On February 28, 2002, Your Honor rendered a decision addressing defendants' first Rule 12(b)(6) motion to dismiss both of these actions. Your Honor granted the motion with respect to plaintiff Owens Wiwa's Alien Tort Claim Act claims but denied the motion in all other respects and gave plaintiffs thirty days to re-plead the dismissed claims. Plaintiffs filed amended complaints in these actions on June 16, 2003,[1] naming five new plaintiffs in the Second Amended Complaint 01 Civ. 1909 and seven new plaintiffs in the Third Amended Complaint 96 Civ. 8386.[2] On December 2, 2003, defendants filed

[1]Both the Second Amended Complaint 01 Civ. 1909 and Third Amended Complaint 96 Civ. 8386 are dated June 16, 2003. It appears that they were not filed in this Court, however, until September 15, 2003. There is no need to determine which of these dates is the actual filing date because, as explained in the text, plaintiffs clearly filed both amended complaints after certain applicable statutes of limitation expired by whichever date is used.

[2]The new plaintiffs in the Second Amended Complaint 01 Civ. 1909 include: (1) Michael Tema Vizor; (2) Lucky Doobee, individually and as the Administrator of the Estate of his late Brother, Saturday Doobee; (3) Friday Nuate, individually and as the Administratrix of the Estate of her late husband Felix Nuate; (4) Monday Gbokoo, brother of the late Daniel Gbokoo and (5)

(continued...)

the instant motion to dismiss the claims asserted by the new plaintiffs in the Second Amended Complaint 01 Civ. 1909 and the Third Amended Complaint 96 Civ. 8386 pursuant to Rule 12(b)(6) and to strike paragraph 45 of the Third Amended Complaint in 96 Civ. 8386.

III. Analysis

A. The Standard Applicable to a Motion to Dismiss

The standards applicable to a motion to dismiss pursuant to Rule 12(b)(6) are well-settled and require only brief review.

> When deciding a motion to dismiss under Rule 12(b)(6), I must accept as true all well-pleaded factual allegations of the complaint and draw all inferences in favor of the pleader. See City of Los Angeles v. Preferred Communications, Inc., 476 U.S. 488, 493, 106 S.Ct. 2034, 90 L.Ed.2d 480 (1986); Miree v. DeKalb County, 433 U.S. 25, 27 n.2, 97 S.Ct. 2490, 53 L.Ed.2d 557 (1977) (referring to "well-pleaded allegations"); Mills v. Polar Molecular Corp., 12 F.3d 1170, 1174 (2d Cir. 1993). "'[T]he complaint is deemed to include any written instrument attached to it as an exhibit or any statements or documents incorporated in it by reference.'" Int'l Audiotext Network, Inc. v. Am. Tel. &

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[2](...continued)
David Kiobel, individually and on behalf of his siblings Stella Kiobel, Leesi Kiobel and Baridi Kiobel and on behalf of his minor siblings, Angela Kiobel and Godwill Kiobel for harm suffered for the wrongful death of their father Dr. Barinem Kiobel. In the Third Amended Complaint 96 Civ. 8386, all five of these new plaintiffs are also named, in addition to (1) Karalolo Kogbara and (2) James B. N-Nah, individually and as Administrator for his late brother N-Nah Uebari.

> Tel. Co., 62 F.3d 69, 72 (2d Cir. 1995) (quoting Cortec Indus., Inc. v. Sum Holding L.P., 949 F.2d 42, 47 (2d Cir. 1991)). The Court also may consider "matters of which judicial notice may be taken." Leonard T. v. Israel Discount Bank of New York, 199 F.3d 99, 107 (2d Cir. 1999) (citing Allen v. WestPoint-Pepperill, Inc., 945 F.2d 40, 44 (2d Cir. 1991)). In order to avoid dismissal, a plaintiff must do more than plead mere "[c]onclusory allegations or legal conclusions masquerading as factual conclusions." Gebhardt v. Allspect, Inc., 96 F. Supp.2d 331, 333 (S.D.N.Y. 2000) (quoting 2 James Wm. Moore, Moore's Federal Practice ¶ 12.34[a][b] (3d ed. 1997)). Dismissal is proper only when "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957); accord Cohen v. Koenig, 25 F.3d 1168, 1172 (2d Cir. 1994).

Hoffenberg v. Bodell, 01 Civ. 9729 (LAP), 2002 WL 31163871 at *3 (S.D.N.Y. Sept. 30, 2002); see also McKenna v. Wright, 386 F.3d 432, 436 (2d Cir. 2004); Phillip v. Univ. of Rochester, 316 F.3d 291, 293-94 (2d Cir. 2003); Bruce v. United States Dep't of Justice, 314 F.3d 71, 73-74 (2d Cir. 2002); Cole v. Miraflor, 02 Civ. 9981 (RWS), 2006 WL 457817 at *2 (S.D.N.Y. Feb. 23, 2006); George v. N.Y. City Health & Hosp. Corp., 02 Civ. 1818 (AGS), 2003 WL 289617 at *2 (S.D.N.Y. Feb. 11, 2003); Woodrich v. Greiner, 01 Civ. 7892 (NRB), 2002 WL 1402002 at *1 (S.D.N.Y. June 28, 2002); Curry v. Kerik, 163 F. Supp.2d 232, 235 (S.D.N.Y. 2001); Boomer v. Lanigan, 00 Civ. 5540 (DLC), 2001 WL 1646725 at *2 (S.D.N.Y. Dec. 17, 2001). A court's inability to examine matters outside the pleadings when deciding a motion to dismiss extends to both the movant and non-movant and includes materials discussed in the parties' moving papers. City of New York v.

Nexicon, Inc., 03 Civ. 383 (DAB), 2006 WL 647716 at *3 (S.D.N.Y. Mar. 15, 2006); Adams v. Crystal City Marriott Hotel, 02 Civ. 10258 (PKL), 2004 WL 744489 at *3 (S.D.N.Y. Apr. 6, 2004).

"When a motion to dismiss is granted, the usual practice is to grant leave to amend the complaint." Hayden v. County of Nassau, 180 F.3d 42, 53 (2d Cir. 1999).

B. Defendants' Arguments

Defendants argue that the complaints, or portions thereof, should be dismissed or stricken for four reasons. First, defendants claim that the complaints should be dismissed pursuant to the "act of state" doctrine, or at the very least, the Court should seek the Executive Branch's guidance on whether this litigation should continue in a New York federal court. Second, defendants claim that plaintiff Kiobel has no standing to assert a wrongful death claim because he is not suing as the administrator of the decedent's estate as required by state law in New York. Third, defendants claim that the complaints should be dismissed because plaintiffs' civil RICO and supplemental state law tort claims are time-barred by the applicable state statutes of limitations. Fourth, defendants claim that paragraph

45 of the Third Amended Complaint 96 Civ. 8386 should be stricken pursuant to Fed.R.Civ.P. 12(f) because it is false.[3]

1. The Act of State Doctrine

This is defendants' third attempt to invoke the act of state doctrine. Your Honor has previously addressed and rejected the application of the act of state doctrine to the Original Complaint in Docket Number 01 Civ. 1909 and the Amended Complaint in Docket Number 96 Civ. 8386 in Wiwa v. Royal Dutch Petroleum Co., 96 Civ. 8386 (KMW), 2002 WL 319887 (S.D.N.Y. Feb. 28, 2002). Subsequent to Your Honor's decision in Wiwa, defendants filed a Rule 12(b)(6) motion to dismiss in Kiobel v. Royal Dutch Petroleum Co., Docket Number 02 Civ. 7618 ("Kiobel"), a factually and

[3]In their reply brief, defendants also raise the argument that the wrongful death claims asserted by plaintiffs Kiobel, Wiwa, Gbokoo, N-Nah, and Nuate should be dismissed on the ground that the claims were not asserted on behalf of all of the distributees of the respective decedent's estate (Defendants' Reply Memorandum of Law in Support of Defendants' Motion to Dismiss, dated December 2, 2003 ("Def. Reply Br."), at 10). Defendants also raise for the first time in their reply brief, the argument that paragraphs 3, 48, 144, 147-48, 92, 197(d), and 198-200 should also be stricken from the Third Amended Complaint 96 Civ. 8386 (Def. Reply Br. at 2). Defendants' assertion of new arguments for the first time in their reply is procedurally deficient, and, therefore, I do not consider them. Riverkeeper, Inc. v. Collins, 359 F.3d 156, 166 n.11 (2d Cir. 2004); Evangelista v. Ashcroft, 359 F.3d 145, 155 n.4 (2d Cir. 2004); Knipe v. Skinner, 999 F.2d 708, 710-11 (2d Cir. 1993); A & E Prods. Group, L.P. v. Mainetti USA, Inc., 01 Civ. 10820 (RPP), 2004 WL 169741 at *6 (S.D.N.Y. Jan. 27, 2004); Morris v. Dapolito, 297 F. Supp.2d 680, 689 n.7 (S.D.N.Y. 2004).

legally related matter, asserting that dismissal was appropriate pursuant to the act of state doctrine and other arguments.

On March 11, 2004, I issued a report and recommendation in Kiobel in which I limited the analysis of defendants' act of state doctrine argument to newly submitted factual material, including the December, 2002 letter from the Honorable Kanu G. Agabi, S.A.N., Attorney-General of Nigeria and Minister of Justice ("Agabi Letter") that defendants have also submitted here (Exhibit A to the Declaration of Rory O. Millson, Esq., submitted in support of Defendant's Motion to Dismiss in Docket Number 02 Civ. 7618, dated March 17, 2003). The Agabi Letter was sent directly to the United States Department of Justice ("DOJ") and concerned the effect this litigation would have on Nigerian-American relationships. After considering the import of the Agabi Letter, I rejected defendants' act of state doctrine argument for the following reasons:

> Weighing the human rights issues raised in the complaint against the arguments made in the Agabi Letter, and recognizing that the conduct of foreign affairs is the prerogative of the Executive Branch, I conclude, as a matter of discretion,[4] the act of state

[4]The act of state doctrine is not jurisdictional; rather, it is a principle of abstention. Bigio v. Coca-Cola Co., supra, 239 F.3d at 451-52. Its application appears to be discretionary. See Lyondell-Citgo Refining, LP, v. Petroleos De Venezuela, S.A., supra, 2003 WL 21878798 at 9 n.5; Dow Jones & Co. v. Harrods, Ltd., 237 F. Supp.2d 394, 444 (S.D.N.Y. 2002); Sirico v. British Airways PLC, 98-CV-4938 (FB), 2002 WL 113877 at *2 (E.D.N.Y. Jan. 22, 2002).

doctrine should not be applied here to dismiss the complaint.

Although the Agabi Letter asserts that adjudication of this action will damage relations between the United States and Nigeria, it does not explain how the damage will occur nor does it address the fact that, to the extent governmental actions are in issue in this action, they are not the actions of the incumbent Nigerian government. The fact that the actions of the current Nigerian government are not in issue is an important factor weighing against the application of the act of state doctrine. See Bigio v. Coca-Cola Co., supra, 239 F.3d at 453; Republic of the Philippines v. Marcos, 806 F.2d 344, 359 (2d Cir. 1986); Wiwa, supra, 2002 WL 319887 at *28.

In addition, the contention in the Agabi Letter that adjudication of this action will compromise the Nigerian government's efforts to reconcile with the Ogoni people is not persuasive. The Oxford English Dictionary defines "to reconcile" as "to bring (a person) again into friendly relations to or with (oneself or another) after an estrangement." Oxford English Dictionary 1528 at sub-page 352 (2d ed. 1998). It is difficult to understand how providing plaintiffs with a neutral forum to resolve their claims against the defendants here will frustrate reconciliation. To the contrary, logic would suggest that denying a party who claims to be aggrieved a neutral forum to litigate claims would only frustrate reconciliation. In most situations, reconciliation is promoted by permitting the airing and resolution of grievances.

Finally, the suggestion in the Agabi Letter that the Nigerian courts provide an adequate alternative forum is also unpersuasive. The United States Department of State's 2003 Report on Human Rights Practices in Nigeria indicates that there is little recognition of basic human rights in Nigeria and that the judiciary's ability to resolve such disputes is in a developmental state and is limited at best:

> Although the judicial branch [of the incumbent Nigerian government] remained susceptible to executive and legislative branch pressures, the performance of the Supreme Court and decisions at the federal appellate level were indicative of

growing independence. State and local judiciary were significantly influenced by political leaders and suffered from corruption and inefficiency more than the federal court system.

* * *

The Government's human rights record remained poor, and the Government continued to commit serious abuses. Elections held during the year were not generally judged free and fair and therefore abridged citizens' right to change the government. Security forces committed extrajudicial killings and used excessive force to apprehend criminal suspects, and to quell some protests. There were several politically-motivated killings by unknown persons during the year. Security forces regularly beat protesters, criminal suspects, detainees, and convicted prisoners; however, there were fewer reported incidents of torture by security forces than in previous years. . . . Security forces continued to arbitrarily arrest and detain persons, including for political reasons. . . . The Government at times limited freedom of speech and press. The Government continued placing limits on freedom of assembly and association, citing security concerns. Some state governments placed limits on some religious rights, and some government programs discrimination between religious groups.

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Understaffing, underfunding, inefficiency, and corruption continued to prevent the judiciary from functioning adequately. Citizens encountered long delays and frequent requests from judicial officials for small bribes to expedite cases.

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[T]here was a widespread perception that judges were easily bribed or "settled," and that litigants could not rely on the courts to render impartial judgments. Many courts were understaffed, and personnel were paid poorly. Judges frequently failed to appear for trials, often because they

> **were pursuing other means of income. In addition, court officials often lacked the proper equipment, training, and motivation to perform their duties, again primarily due to inadequate compensation.**
>
> Country Reports on Human Rights Practices -- 2003 (Nigeria), available at http://www.state.gov/g/drl/rls/hrrpt/2003/27743.htm (last visited Mar. 10, 2004) (emphasis added). The foregoing comments on continuing human rights abuses in Nigeria and the inadequacy of the Nigerian judicial system give rise to grave concerns regarding the adequacy of the Nigerian courts to provide a remedy to plaintiffs.
>
> Given the special interest of the United States in providing a forum for the adjudication of crimes against humanity and given the lack of any reasonable probability (1) that this action will have an incrementally harmful effect on the prerogative of the Executive Branch to conduct relations with the incumbent Nigerian government, or (2) that plaintiffs would have an adequate forum in Nigeria if this action were dismissed, the Court should not abstain from adjudicating this action pursuant to the act of state doctrine.

(Report and Recommendation in Docket Number 02 Civ. 7618, dated March 11, 2004, at 20-23)(footnote omitted).[5]

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[5]The most recent report from the Department of State indicates that there has been no substantial improvement in conditions in Nigeria over the last two years, noting that

> The [Nigerian] government's human rights record remained poor, and governmental officials at all levels continued to commit serious abuses. . . . The following human rights problems were reported: . . . executive interference with the judiciary and judicial corruption . . . .
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> * * *
>
> Although [Nigerian] law provides for an independent judiciary, the judicial branch remained susceptible to executive and legislative branch pressure. Political leaders influenced the judiciary, particularly at the

(continued...)

Since defendants do not argue that this case is distinguishable, I adhere to my analysis in Kiobel and respectfully recommend that the Court should not abstain from adjudicating this action pursuant to the act of state doctrine and that defendants' motion to dismiss on this claim should be denied.

Defendants argue in the alternative that even if the Court declines to apply the act of state doctrine, that it should seek the Executive Branch's comment as to whether the continuation of these actions in a federal court in New York may damage American-Nigerian relations.[6] However, where, as here, an official of the Nigerian government has sent correspondence referencing this litigation directly to the Attorney General, a request from the Court for comment is unnecessary.

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[5](...continued)

> state and local levels. Understaffing, underfunding, inefficiency, and corruption continues to prevent the judiciary from functioning adequately.

Country Reports on Human Rights Practices -- 2005 (Nigeria), available at http://www.state.gov/g/drl/rls/hrrpt/2005/61586.htm (last visited Mar. 14, 2006).

[6]In support of their argument, defendants submit additional material outside the pleadings. As "[t]he Court looks only to matters included in the pleadings when considering a motion to dismiss," Calcutti v. SBU, Inc., 273 F. Supp.2d 488, 492 (S.D.N.Y. 2003), I do not rely upon these additional submissions in addressing defendants' argument. See also Friedl v. City of New York, 210 F.3d 79, 83-84 (2d Cir. 2000); Arnold v. Goetz, 245 F. Supp.2d 527, 540 (S.D.N.Y. 2003); Well-Made Toy Mfg. Corp. v. Lotus Onda Indus. Co., 02 Civ. 1151 (CBM), 2003 WL 42001 at *4 (S.D.N.Y. Jan. 6, 2003).

2. Viability of Kiobel's Wrongful Death Claim

Defendants next argue that David Kiobel's wrongful death claim arising out of the death of his father, Dr. Barinem Kiobel, should be dismissed because he does not allege that he is the administrator of his father's estate.

Defendants are correct that a wrongful death claim may only be brought by the personal representative of a decedent who has received letters of administration. As stated by the New York Court of Appeals:

> It is well established that the existence of a qualified administrator is essential to the maintenance of the action and that the statutory right to recover for wrongful death does not even arise until an administrator has been named through the issuance of letters of administration (e.g., Boffe v Consolidated Tel. & Elec. Subway Co., 171 App Div 392, affd without opn 226 NY 654). Indeed, our recent reaffirmation of this principle in George v Mt. Sinai Hosp. (47 NY2d 170, 176-177, supra) would seem to foreclose the possibility of reducing the statutory requirement of an appointed administrator to a mere question of capacity to sue . . . .

Carrick v. Cent. Gen. Hospital, 51 N.Y.2d 242, 249 n.2, 414 N.E.2d 632, 636 n.2, 434 N.Y.S.2d 130, 134 n.2 (1980); see also N.Y. Est. Powers & Trusts L. § 5-4.1; DiGiacomo v. Lentz, 03 Civ. 6724 (MGC), 2004 WL 66690 at *1 (S.D.N.Y. Jan. 14, 2004); Mingone v. State, 100 A.D.2d 897, 899, 474 N.Y.S.2d 557, 560-61 (2d Dep't 1984).

Since Kiobel has not alleged that he is the administrator of his father's estate, his wrongful death claim must be dismissed.[7]

3. Statute of Limitations

a. Civil RICO Claim in Second Amended Complaint 01 Civ. 1909

Defendants next argue that the RICO claim asserted by one of the newly added plaintiffs in the Second Amended Complaint 01 Civ. 1909 -- Michael Tema Vizor -- is time-barred. Plaintiffs rely on a number of equitable tolls to support the timeliness of this claim. As explained below, the equitable tolls proffered by plaintiffs fail in every instance.

The statute of limitations is an affirmative defense; the defendant asserting the defense bears the burden of proving all elements of the defense. Bano v. Union Carbide Corp., 361 F.3d 696, 710 (2d Cir. 2004). Notwithstanding the fact that it is an affirmative defense, the statute of limitations may be raised by way of a motion to dismiss where its applicability is apparent from the face of the complaint. Baker v. Cuomo, 58 F.3d 814, 819 (2d Cir. 1995), vacated in part on rehearing on other grounds sub nom., Baker v. Pataki, 85 F.3d 919 (2d Cir. 1996)

[7]Since I need no do so, I express no opinion concerning the timeliness of Kiobel's wrongful death claim.

(per curiam); Pino v. Ryan, 49 F.3d 51, 54 (2d Cir. 1995). The Court of Appeals for the Second Circuit has noted that "[w]hile a statute of limitations defense may be raised in a motion to dismiss . . . such a motion should not be granted unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Ortiz v. Cornetta, 867 F.2d 146, 148 (2d Cir. 1989), quoting Abdul-Alim Amin v. Universal Life Ins. Co., 706 F.2d 638, 640 (5th Cir. 1983); see also Weizmann Inst. of Science v. Neschis, 229 F. Supp.2d 234, 252 (S.D.N.Y. 2002).

The statute of limitations for a civil RICO claim is four years. Rotella v. Wood, 528 U.S. 549, 552 (2000); Agency Holding Corp. v. Malley-Duff & Assocs., Inc., 483 U.S. 143, 156 (1987); Tho Dinh Tran v. Alphonse Hotel Corp., 281 F.3d 23, 35 (2d Cir. 2002); Bingham v. Zolt, 66 F.3d 553, 559 (2d Cir. 1995); Meadowbrook-Richman, Inc. v. Associated Fin. Corp., 325 F. Supp.2d 341, 361 (S.D.N.Y. 2004). The four-year limitations period begins to run upon discovery of the RICO injury underlying the plaintiff's claim. Tho Dinh Tran v. Alphonse Hotel Corp., supra, 281 F.3d at 36; Bankers Trust Co. v. Rhoades, 859 F.2d 1096, 1102-03 (2d Cir. 1988); Pharr v. Evergreen Gardens, Inc., 03 Civ. 5520 (HB), 2004 WL 42262 at *2 (S.D.N.Y. Jan. 7, 2004), aff'd mem., 123 Fed. Appx. 420 (2d Cir. 2005); 131 Maine St. Assocs. v. Manko, 179 F. Supp.2d 339, 346 (S.D.N.Y.), aff'd mem.,

54 Fed. Appx. 507 (2d Cir. 2002). When the statute of limitations is raised by way of a motion to dismiss, "[t]he question of constructive knowledge and inquiry notice may be one for the trier of fact and therefore ill-suited for determination on a motion to dismiss . . . . Nonetheless, the test is an objective one and dismissal is appropriate when the facts from which knowledge may be imputed are clear from pleadings and the public disclosures themselves." In re Sumitomo Copper Litig., 104 F. Supp.2d 314, 324 (S.D.N.Y. 2000), quoting Salinger v. Projectavision, Inc., 934 F. Supp. 1402, 1408 (S.D.N.Y. 1996) and In re Merrill Lynch Ltd. P'ships Litig., 154 F.3d 56, 60 (2d Cir. 1998).

Here, plaintiff Vizor's alleged RICO injury -- property damage to his house in Nigeria -- occurred on January 5, 1996 (Third Amended Complaint 96 Civ. 8386 at ¶ 103). The face of the complaint establishes that Vizor knew of the injury at that time. As stated in paragraph 104 of the Third Amended Complaint 96 Civ. 8386, "[b]ecause of [the property damage on January 5, 1996,] Plaintiff Vizor along with one of his children was forced to flee and fall out of touch with his family in [Nigeria]. He did not see them again for seven years" (Third Amended Complaint 96 Civ. 8386 at ¶ 104). If the property damage, i.e., the alleged RICO injury, caused Vizor to flee Nigeria, then he must have been aware of the damage at that time. While the complaint does not

state exactly when Vizor fled Nigeria, the complaint was filed on June 16, 2003 and, as noted above, alleges that Vizor had not seen his family in Nigeria for seven years. Accordingly, Vizor's flight and his absence from his family must have occurred no later than 1996, substantially more than four years before the Third Amended Complaint 96 Civ. 8386 was filed.[8] Thus, based on the face of the complaint, therefore, Vizor's civil RICO claim is time-barred unless the statute of limitations has been tolled.

Plaintiffs argue that Vizor should receive an equitable toll (1) for the period during which the Nigerian dictatorship was in control and (2) as a result of unspecified mental and physical injuries he allegedly suffered as a result of torture by Nigerian officials.

"Equitable tolling allows courts to extend the statute of limitations beyond the time of expiration as necessary to avoid inequitable circumstances." Johnson v. Nyack Hosp., 86 F.3d 8, 12 (2d Cir. 1996). Tolling "applies as a matter of fairness where a [party] has been prevented in some extraordinary way from exercising his rights." Iavorski v. I.N.S., 232 F.3d 124, 129 (2d Cir. 2000) (internal quotation marks omitted).

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[8]Plaintiffs' memorandum of law in opposition to the pending motion confirms that this construction of the Third Amended Complaint is correct (see Wiwa Plaintiffs' Opposition to Defendants' Motions to Dismiss Complaints, dated November 19, 2003 ("Pl. Br."), at 12 ("As Alleged in the complaint, Mr. Vizor fled Nigeria in 1996 to a refugee camp and was granted refugee status in Canada.")).

Because the applicable statute of limitations derives from federal law, namely the Clayton Act, federal equitable tolling doctrines apply to civil RICO actions. Riverwoods Chappaqua Corp. v. Marine Midland Bank, N.A., 30 F.3d 339, 347 (2d Cir. 1994); Ctr. Cadillac, Inc. v. Bank Leumi Trust Co. of New York, 808 F. Supp. 213, 225 n.2 (S.D.N.Y. 1992) ("After Agency Holding, state tolling principles no longer govern civil RICO actions."), aff'd, 99 F.3d 401 (2d Cir. 1995); see G-I Holdings, Inc. v. Baron & Budd, 238 F. Supp.2d 521, 540 (S.D.N.Y. 2002); DLT Res., Inc. v. Credit Lyonnais Rouse, Ltd., 00 Civ. 3560 (HB), 2001 WL 25695 at *4 (S.D.N.Y. Jan. 10, 2001).

Vizor's equitable tolling arguments are not persuasive.

First, Vizor's argument that a toll should apply until the Nigerian dictatorship left power in May 1999 does not withstand analysis. As noted above, the Third Amended Complaint alleges that Vizor left Nigeria in 1996. Since he was continuously out of Nigeria after 1996, the composition or nature of the Nigerian government after that date was immaterial to his ability to assert his claim. Moreover, even if I assume that the dictatorship effectively prevented the filing of the complaint through a tacit threat of retaliation against Vizor's family, the argument still fails. The four year limitations period began to run in June 1996. Assuming the truth of plaintiffs' contention, that the military dictatorship was out of power as of May, 1999, Vizor

still had more than one year to file his RICO claim. Plaintiff's failure to explain the years of delay between the demise of the Nigerian military dictatorship and the filing of his RICO claim is fatal to any claim for an equitable toll. Pace v. DiGuglielmo, 544 U.S. 408, ___, 125 S.Ct. 1807, 1814 (2005) ("Generally, a litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way."); Smith v. McGinnis, 208 F.3d 13, 17 (2d Cir. 2000) ("[T]he party seeking equitable tolling must have acted with reasonable diligence throughout the period he seeks to toll.").

Vizor's second argument for equitable tolling, that he suffered from mental and physical injuries that prevented him from timely filing his claim, is also unpersuasive. While plaintiffs have included allegations of beatings, torture and unlawful detention in the complaint, (Third Amended Complaint 96 Civ. 8386 at ¶¶ 3, 49, 81-82), in neither the Third Amended Complaint 96 Civ. 8386 nor in their submissions in response to the pending motion do plaintiffs specify the nature of Vizor's alleged disabilities or explain how they prevented him from pursuing his rights. Although I appreciate that a plaintiff's invocation of the doctrine of equitable tolling based on physical or mental disability frequently necessitates a fact-specific inquiry, Brown

v. Parkchester S. Condos., 287 F.3d 58, 60 (2d Cir. 2002) ("The issue of whether a mental disability warrants equitable tolling of a filing deadline requires a 'highly case-specific' inquiry."); Tsai v. Rockefeller Univ. 137 F. Supp.2d 276, 281 (S.D.N.Y. 2001) ("The Second Circuit has recognized that the 'question of whether a person is sufficiently mentally disabled to justify tolling of a limitation period is . . . highly case-specific.'"), quoting Boos v. Runyon, 201 F.3d 178, 184 (2d Cir. 2000), no such inquiry is necessary here. The Court of Appeals has expressly cautioned that vague references to physical or mental disabilities are not an "open sesame" to an evidentiary hearing concerning a claimed equitable toll: "While mental illnesses are as varied as physical illnesses, [a plaintiff's] conclusory and vague claim, without a particularized description of how her condition adversely affected her capacity to function generally or in relation to the pursuit of her rights is manifestly insufficient to justify any further inquiry into tolling." Boos v. Runyon, supra, 201 F.3d at 185 (emphasis added); see also Bartow v. Comm'r of Soc. Sec., 04 Civ. 3200 (AJP), 2004 WL 2368004 at *2 (S.D.N.Y. Oct. 22, 2004) (excuse that plaintiff was "depressed" did not "constitute one of the 'rare cases' that warrant equitable tolling") (social security case); Columbo v. United States Postal Serv., 293 F. Supp.2d 219, 224 (E.D.N.Y. 2003) ("The plaintiff does not set forth a 'particularized de-

scription' of how her mental illness impeded her ability to pursue her rights or timely seek EEO counseling.") (employment discrimination case); Rhodes v. Senkowski, 82 F. Supp.2d 160, 168-69 (S.D.N.Y. 2000) (listing cases discussing mental incapacity) (habeas corpus petition); Guinyard v. Apfel, 99 Civ. 4242 (MBM), 2000 WL 297165 at *4 (S.D.N.Y. Mar. 22, 2000) ("[Plaintiff's] portrayal establishes no causal connection between her mental state and the lateness of her complaint. Whatever particularized allegations she has made go to the merits of her underlying disability claim; they do not explain why her complaint was delayed.") (social security case). Vizor's nebulous allegations of disability in this case clearly fall squarely within the proscription of Boos.

Accordingly, for the reasons set forth above, I respectfully recommend that defendants' motion to dismiss plaintiff Vizor's civil RICO claim be granted.[9]

[9]Vizor has also asserted a number of state-law tort claims. Since the longest statute of limitations applicable to these tort claims is three years (see pages 25-26, below), Vizor's conclusory disability claim is also insufficient to give rise to an equitable toll as to these claims, and, therefore, they are also time barred.

b. State Law Tort Claims in Second Amended Complaint 01 Civ. 1909 and Third Amended Complaint 96 Civ. 8386

Defendants next argue that all of the newly asserted supplemental tort claims in the Second Amended Complaint 01 Civ. 1909 and Third Amended Complaint 96 Civ. 8386 are time-barred. Specifically, defendants argue that while these new tort claims accrued no later than January 1996, the Second Amended Complaint 01 Civ. 1909 and Third Amended Complaint 96 Civ. 8386 were not filed until June 16, 2003, over seven years later. Again, plaintiffs rely upon a number of equitable tolls to argue that their claims were timely filed.

The remaining newly asserted tort claims allege (1) assault and battery, (2) intentional infliction of mental distress, (3) wrongful death (asserted by the newly added plaintiffs other than Kiobel),[10] (4) negligence and (5) negligent infliction of emotional distress. Under New York law,[11] the statute of limitations applicable to the intentional torts alleged by plaintiffs is one year from the date of injury. N.Y. C.P.L.R. § 215(3); Holmes v. Lorch, 329 F. Supp.2d 516, 523 (S.D.N.Y. 2004).

[10]The aspect of defendants' motion addressed to Kiobel's wrongful death claim is resolved by the discussion in Section III(b)(2), above.

[11]Your Honor has already decided that "New York statutes of limitations apply to plaintiffs' supplemental state law tort claims. . . . including tolling rules." Wiwa v. Royal Dutch Petroleum Co., supra, 2002 WL 319887 at *20.

The statute of limitations applicable to plainitffs' wrongful death claims is two years from death. N.Y. Est. Powers & Trusts L. § 5-4.1; Freier v. Westinghouse Elec. Corp., 303 F.3d 176, 183 (2d Cir. 2002). The statute of limitations applicable to the negligence claims is three years from the date of the date of injury. N.Y. C.P.L.R. § 214(5); Freier v. Westinghouse Elec. Corp., supra, 303 F.3d at 184 (inter alia, negligence); Knoll v. Merrill Corp., 02 Civ. 566 (CSH), 2003 WL 22682271 at *4 (S.D.N.Y. Nov. 12, 2003) (negligent infliction of emotional distress); Tornheim v. Fed. Home Loan Mortgage Corp., 988 F. Supp. 279, 286 n.6 (S.D.N.Y. 1997) (same), aff'd, 198 F.3d 235 (2d Cir. 1999).

The most recent tortious acts and injuries alleged in plaintiffs' newly asserted supplemental tort claims occurred in December 1997 (see Second Amended Complaint 01 Civ. 1909 at ¶ 68; Third Amended Complaint 96 Civ. 8386 at ¶ 108). Therefore, in the absence of a toll, all claims with respect to this conduct, whether based in negligence, wrongful death or on an intentional-tort theory, fail because the Second Amended Complaint 01 Civ. 1909 and Third Amended Complaint 96 Civ. 8386 were not filed until June 16, 2003, at least, approximately, two and one-half years after the expiration of the longest applicable statute of limitations.

In response, plaintiffs argue that they are entitled to an equitable toll while the military dictatorship was in power and while they pursued remedies in Nigerian tribunals. The former argument fails for the same reason it fails with respect to Vizor's RICO claim. Even if I assume that plaintiffs were entitled to an equitable toll up to May 1999 when the military dictatorship ended, they are entitled to an equitable toll only if they diligently sought to enforce their claims after the impediment to doing so was eliminated. Pace v. DiGuglielmo, supra, 544 U.S. at ___, 125 S.Ct. at 1814; Doe v. Menefee, 391 F.3d 147, 159 (2d Cir. 2004); Smith v. McGinnis, supra, 208 F.3d at 17. The unexplained four year gap between the end of the military dictatorship and the assertion of the claims in this court is fatal to plaintiffs' attempt to invoke an equitable toll. Chapman v. ChoiceCare Long Island Term Disability Plan, 288 F.3d 506, 512 (2d Cir. 2002) ("Generally, to merit equitable relief, a plaintiff must have acted with reasonable diligence during the time period she seeks to have tolled.").

Plaintiffs' second argument -- that a toll should apply to the time the plaintiffs remaining in Nigeria spent "attempt[ing] to utilize the remedies of their new democracy" after the Nigerian dictatorship left power in May 1999 (Pl. Br. at 14) -- is not supported by precedent and, if adopted, would have wide-ranging consequences. Initially, plaintiffs cite no

authority, and my own research has disclosed none, that a plaintiff's dissatisfaction with the results of litigation in another forum -- even if that dissatisfaction is reasonable and based on good cause -- is a sufficiently extraordinary reason to give rise to an equitable toll. In addition, New York has enacted a statute, New York C.P.L.R. § 205(a), which provides a six-month grace period, under certain circumstances, for the commencement of a second action where a prior action is dismissed.[12] Since New York's Legislature has already addressed the effect of a prior action on the statute of limitations, a court must be particularly cautious when asked to create the broad and amorphous exception to the statute of limitations sought by plaintiffs. As the Supreme Court noted more than a century ago:

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[12]Section 205(a) provides:

> **New action by plaintiff.** If an action is timely commenced and is terminated in any other manner than by a voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits, the plaintiff, or, if the plaintiff dies, and the cause of action survives, his or her executor or administrator, may commence a new action upon the same transaction or occurrence or series of transactions or occurrences within six months after the termination provided that the new action would have been timely commenced at the time of commencement of the prior action and that service upon defendant is effected within such six-month period.

> Courts cannot supply omissions in legislation, nor afford relief because they are supposed to exist [sic]. 'We are bound,' said Justice Buller in an early case in the King's Bench, 'to take the act of Parliament as they have made it: a casus omissus can in no case be supplied by a court of law, for that would be to make laws . . . .' Jones v. Smart, 1 T. R. 44-52.

United States v. Union Pac. R.R. Co., 91 U.S. 72, 85 (1875); see also Bank of Alabama v. Dalton, 50 U.S. (9 How.) 522, 529 (1850); Murray v. City of Milford, 380 F.2d 468, 473 (2d Cir. 1967) ("The plaintiff contends that the notice provisions of § 13a-149 are tolled during her minority. However, that statute makes no exception for minors, and Connecticut courts do not imply such exceptions where the legislature has not specifically established them."); In re Conn. Mobilecom, Inc., 02-12725 REG, 02-02519 (WHP), 2003 WL 23021959 at *5 (S.D.N.Y. Dec. 23, 2003) ("'Courts should not create exemptions that the legislature has not enacted.'"), quoting Normand Josef Enters., Inc. v. Conn. Nat'l Bank, 230 Conn. 486, 512, 646 A.2d 1289, 1302 (1994).

Finally, plaintiffs argue that their negligence claims in the Second Amended Complaint 01 Civ. 1909 against defendant Anderson should be tolled during the period that Anderson was absent from the Southern District of New York. Your Honor has already decided this issue in Wiwa v. Royal Dutch Petroleum Co., supra, 2002 WL 319887 at *20, and found that New York law tolled plaintiffs' claims against Anderson while he was absent from this jurisdiction. See N.Y. C.P.L.R. § 207. Accordingly, the same

result applies here and the limitations periods applicable to plaintiffs' newly added claims against Anderson are tolled until Anderson first visited New York in March 2001. See Wiwa v. Royal Dutch Petroleum Co., supra, 2002 WL 319887 at *20. Given the three-year statute of limitations applicable to negligence and negligent infliction of emotional distress claims, these claims were timely filed in June 2003.

Accordingly, for the reasons set forth above, I respectfully recommend that defendants' motion to dismiss be granted with respect to plaintiffs' newly added claims for wrongful death brought on behalf of plaintiffs other than Kiobel, assault and battery and intentional infliction of emotional distress. With respect to plaintiffs' negligence and negligent infliction of emotional distress claims against all defendants other than Anderson, I also recommend that defendants' motion to dismiss be granted. With respect to plaintiffs' negligence and negligent infliction of emotional distress claims against defendant Anderson, I recommend that defendants' motion to dismiss be denied.

D. Motion to Strike Paragraph 45 of the Third Amended Complaint 96 Civ. 8386

Defendants' final argument is that the allegation in paragraph 45 of the Third Amended Complaint 96 Civ. 8386 should be stricken because it contains false information. Plaintiffs

respond that a Rule 12(b)(6) motion is an inappropriate vehicle for a motion to strike and, in any event, amendment of the complaint is the preferred remedy where both parties agree that allegations in the complaint contain factual inaccuracies.

Rule 15(a) of the Federal Rules of Civil Procedure allows for liberal amendment of pleadings. Fed.R.Civ.P. 15(a) ("[A] party may amend the party's pleading . . . by leave of court . . . and leave shall be freely given when justice so requires."); Bank of Am. Corp. v. Lemgruber, 385 F. Supp.2d 200, 238 (S.D.N.Y. 2005); Adams v. Crystal City Marriott Hotel, supra, 2004 WL 744489 at *4. The Supreme Court has stated:

> In the absence of any apparent or declared reason--such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.--the leave sought should, as the rules require, be "freely given."

Foman v. Davis, 371 U.S. 178, 182 (1962). Here, there is no evidence of bad faith on the part of plaintiffs, and while granting leave to amend would permit plaintiffs to change their complaint for the fourth time, the amendment would be a deletion and would not prejudice defendants in any way.

Accordingly, for the reasons stated above, I respectfully recommend that defendants' motion to dismiss be denied on this claim and that plaintiffs be given leave to amend the complaint in Docket Number 96 Civ. 8386 to delete paragraph 45.

IV. Conclusion

Accordingly, for all the foregoing reasons, I respectfully recommend that defendant's motions be disposed of as follows:

1. In Docket Number 96 Civ. 8386,

a. defendants' Rule 12(b)(6) motion to dismiss pursuant to the act of state doctrine should be denied;

b. defendants' Rule 12(b)(6) motion to dismiss plaintiffs' assault and battery, intentional infliction of emotional distress, negligence and negligent infliction of emotional distress claims and the newly added plaintiffs' wrongful death claims should be granted, and

c. defendants' Rule 12(b)(6) motion to dismiss the allegations in paragraph 45 should be denied.

2. In Docket Number 01 Civ. 1909,

a. defendants' Rule 12(b)(6) motion to dismiss pursuant to the act of state doctrine should be denied;

b. defendants' Rule 12(b)(6) motion to dismiss plaintiff Vizor's RICO claim should be granted;

c. defendants' Rule 12(b)(6) motion to dismiss plaintiffs' assault and battery and intentional infliction of emotional distress claims and the newly added

plaintiffs' wrongful death claims should be granted, and

d. defendants' Rule 12(b)(6) motion to dismiss plaintiffs' negligence and negligent infliction of emotional distress claims should be denied.

I further recommend that for each claim upon which defendants' motion to dismiss was granted, that plaintiffs be granted leave to amend the complaints to re-plead these claims.

V. Objections

Pursuant to 28 U.S.C. § 636(b)(1)(c) and Rule 72(b) of the Federal Rules of Civil Procedure, the parties shall have ten (10) days from the date of this Report and Recommendation to file written objections. See also Fed.R.Civ.P. 6(a) and 6(e). Such objections (and responses thereto) shall be filed with the Clerk of the Court, with courtesy copies delivered to the chambers of the Honorable Kimba M. Wood, United States District Judge, Room 1610, 500 Pearl Street, New York, New York 10007 and to the chambers of the undersigned, Room 750, 500 Pearl Street, New York, New York 10007. Any requests for an extension of time for filing objections must be directed to Judge Wood. **FAILURE TO OBJECT WITHIN TEN (10) DAYS WILL RESULT IN A WAIVER OF OBJECTIONS AND WILL PRECLUDE APPELLATE REVIEW.** Thomas v. Arn, 474 U.S. 140 (1985); United States v. Male Juvenile, 121 F.3d 34, 38 (2d Cir.

OBJECT WITHIN TEN (10) DAYS WILL RESULT IN A WAIVER OF OBJECTIONS AND WILL PRECLUDE APPELLATE REVIEW. Thomas v. Arn, 474 U.S. 140 (1985); United States v. Male Juvenile, 121 F.3d 34, 38 (2d Cir. 1997); IUE AFL-CIO Pension Fund v. Herrmann, 9 F.3d 1049, 1054 (2d Cir. 1993); Frank v. Johnson, 968 F.2d 298, 300 (2d Cir. 1992); Wesolek v. Canadair Ltd., 838 F.2d 55, 57-59 (2d Cir. 1988); McCarthy v. Manson, 714 F.2d 234, 237 & n.2 (2d Cir. 1983).

Dated: New York, New York
March 31, 2006

Respectfully submitted,

HENRY PITMAN
United States Magistrate Judge

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