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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

Plaintiffs,

-against-

ROYAL DUTCH PETROLEUM CO., et al.,

Defendants.
-----X

96 Civ. 8386 (KMW) (HBP)

KEN WIWA, et al.,

Plaintiffs,

-against-

BRIAN ANDERSON,

Defendant.
-----X

01 Civ. 1909 (KMW) (HBP)

ESTHER KIOBEL, et al.,

Plaintiffs,

-against-

ROYAL DUTCH PETROLEUM CO., et al.,

Defendants.
-----X

02 Civ. 7618 (KMW) (HBP)

OPINION & ORDER

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

Defendants in Kiobel v. Royal Dutch Shell Petroleum Co., 02 Civ. 7618 ("Kiobel"), ("Defendants"), move to compel the Kiobel plaintiffs ("Plaintiffs") to produce documents related to the activities of the National Union of Ogoni Students ("NUOS"). (02

Civ. 7618 D.E. ("02-D.E.") 211.) Plaintiffs contend that because NUOS is a third-party to this action, their ability and obligation to produce documents belonging to NUOS is limited; they further contend that they have produced all such documents within their possession, custody, or control.

For the reasons below, Defendants' motion to compel is GRANTED.

I. BACKGROUND

A general description of the facts underlying this case can be found in the Court's previous orders, familiarity with which is presumed. See, e.g., Kiobel v. Royal Dutch Petroleum Co., 456 F. Supp. 2d 457 (S.D.N.Y. 2006). Facts relevant to deciding Defendants' motion to compel, including Plaintiffs' relationship to NUOS and the scope of their production thus far, are described below.

A. Discovery Requests and Production

Defendants contend that there are two sources of as yet unproduced documents: (1) Defendants' First Request for Production of Documents ("First Document Request"), served on January 22, 2003, which requests a range of NUOS-related documents, (Certification of Rory O. Millson Ex. A at ¶ 21, Nov. 7, 2008, 02-D.E. 218); and (2) Magistrate Judge Pitman's order of May 13, 2004, which requires Plaintiffs and their counsel to produce to Defendants "all documents in their possession, custody

or control concerning any payments, reimbursements of expenses or prepayment of expenses to or for the benefit of the witnesses to be deposed in Benin" ("Pitman Order"). (Order, May 13, 2004, 96 Civ. 8386 D.E. ("96-D.E.") 124.)

In 2003, Plaintiffs objected to Defendants' First Document Request, but nonetheless produced approximately thirty-five pages of NUOS-related documents.¹ (Pls.' Resp. 2.) In 2004, however, Plaintiffs indicated that they did not believe that they were "required to produce documents from NUOS." (Reynolds' Decl. Ex M at 2.) Plaintiffs produced eighty pages of redacted documents in response to the Pitman Order. (Pls.' Resp. 4-5.)

After holding a discovery conference at which Defendants argued that Plaintiffs had not yet produced all NUOS-related documents responsive to Defendants' First Document Request and the Pitman Order, the Court ordered Plaintiffs to produce any such documents in their possession, custody, or control. (Order, Oct. 24, 2008, 96-D.E. 253.)

In response to the Court's order, Plaintiffs produced approximately twenty more pages of NUOS-related documents. (Pls.' Resp. 4.) They also learned that potentially responsive NUOS-related documents may have been destroyed by a fire at the

¹ Defendants contend that some of these NUOS-related documents were not produced until August 2004. (Defs.' Reply Mem. L. Supp. Mot. Compel ("Defs.' Reply") 7 n.5.)

NUOS headquarters in November 2006.² (Id. Ex. E.)

B. Plaintiffs' Relationship to NUOS

At least two Plaintiffs served in NUOS's leadership during the time NUOS was incorporated by the State of Illinois in September 2002. NUOS's articles of incorporation list Plaintiff Dornubari Anslem John-Miller as the organization's registered agent and his home as the organization's address. (Decl. Michael T. Reynolds Supp. Defs.' Mot. Compel ("Reynolds' Decl.") Ex RR, June 28, 2004.). Mr. John-Miller was the president of NUOS for part or all of 2003 and 2004, (id. Ex. H at 27, Ex. SS).³ Around June 2003, Plaintiffs' counsel hired Mr. John-Miller to serve as an investigator in the Kiobel litigation. (Id. Ex. J at 3.) Mr. John-Miller moved to withdraw himself as a plaintiff and class representative in Kiobel on May 11, 2004, the same day Defendants deposed Mr. John-Miller. (02-D.E. 67.) The Court granted his motion on February 10, 2006. (02-D.E. 154.)

Another Plaintiff, Charles Wiwa, is one of NUOS's original

² Kiobel Plaintiffs also produced approximately ten pages of non-NUOS-related documents that were responsive to the Pitman Order. (Pls.' Resp. 5.) Because Defendants' motion seeks to compel only NUOS-related documents, the Court does not address the sufficiency of this production. To the extent that Defendants, in their reply, request that the Court order Kiobel Plaintiffs to respond in full to the Pitman Order, including non-NUOS-related documents, (Defs.' Reply 6-8), the Court does not address this request as it is beyond the scope of Defendants' motion. Cf. Patterson v. Balsamico 440 F.3d 104, 114 n.5 (2d Cir. 2006) (noting that courts "generally will not consider arguments raised for the first time in a reply brief").

³ Mr. John-Miller is no longer president of NUOS. (Pls.' Resp. Defs.' Mot. Compel ("Pls.' Resp.") 2, Ex. E.)

incorporators, (Reynolds' Decl. Ex. RR at 3), and served as the organization's secretary for at least part or all of 2003. (Id. Ex. PP at 369:14-15, Ex. SS.)

II. DISCUSSION

A. Summary of Arguments

Defendants argue that there are unproduced but responsive NUOS-related documents that fall within the scope of their First Document Request and the Pitman Order.⁴ (Defs.' Mem. L. Supp. Mot. Compel ("Defs.' Mot. Compel") 18-20.) In particular, Defendants contend that there are unproduced but responsive documents regarding (1) NUOS payments to witnesses, (2) NUOS meetings at which the Kiobel case was discussed, and (3) statements NUOS has made about Defendants and the allegations against Defendants that are at issue in Kiobel. (Id. at 17-18.)

Plaintiffs argue that the documents Defendants seek either do not exist or are not within Plaintiffs' possession, custody, and control. In particular, they claim that NUOS is a third party to the Kiobel litigation such that Plaintiffs' "ability to

⁴ In their Reply, Defendants ask the Court to compel Kiobel Plaintiffs to produce "MPTC documents" as well as documents regarding NUOS. (Defs.' Reply 5-7.) However, Defendants' motion seeks to compel production of only NUOS documents. Accordingly, the Court does not address Defendants' request regarding MPTC documents because this request is beyond the scope of Defendants' motion. Cf. Patterson 440 F.3d at 114 n.5 (2d Cir. 2006). For similar reasons, the Court does not address Defendants' request, raised in their reply, that the Court sanction Kiobel Plaintiffs by ordering them to respond to Defendants' contention interrogatories, which the Court has already stricken as untimely. (Defs.' Reply 9.)

produce NUOS documents is limited," (id. at 2-3); and that they have "made diligent efforts to obtain documents from NUOS but have been told that the documents do not exist."⁵ (Id. at 4.)

B. Motion to Compel

1. Legal Standard

Federal Rule of Civil Procedure 34(a) requires a party to produce responsive documents that it has in its "possession, custody, or control." Fed. R. Civ. P. 34(a)(1). "In the face of a denial by a party that it has possession, custody or control of documents, the discovering party must make an adequate showing to overcome this assertion." Golden Trade S.r.L. v. Lee Apparel Co., 143 F.R.D. 514, 525 n.7 (S.D.N.Y. 1992).

For Rule 34(a) purposes, a party has control over documents held by a third party ("third-party documents") if the party (1) is legally entitled, or (2) has the practical ability, to acquire the documents from the third party. See U.S. v. Stein, 488 F.

⁵ Kiobel Plaintiffs also argue that the fact that Mr. John-Miller testified during his deposition that he was involved in making witness payments does not prove Defendants' contention that NUOS, as an organization, was sending money to witnesses. (Pls.' Resp. 3-4.) The Court notes that whether or not Mr. John-Miller's testimony proves NUOS made payments to witnesses, Plaintiffs' own exhibit demonstrates that NUOS at least had documents related to these payments and may have been directly involved with them. Exhibit E to Plaintiffs' Response is a letter from the current president of NUOS in which the president states that the organization did have documents "relating to the feeding of witnesses in the Ogoni Class Action Lawsuit," but that they were destroyed in the 2006 fire. (Pls.' Resp. Ex. E.) The letter also states that Plaintiffs Pius Nwinee and Benson Magnus Ikari "were appointed to handle the welfare (including feeding) of the aforesaid witnesses." (Id.)

Supp. 2d 350, 360-61 (S.D.N.Y. 2007) (collecting cases); S.E.C. v. Credit Bancorp, Ltd., 194 F.R.D. 469, 471 (S.D.N.Y. 2000) (“‘Control’ has been construed broadly by the courts as the legal right, authority, or practical ability to obtain the materials sought upon demand”); In re NASDAQ Market-Makers Antitrust Litig., 169 F.R.D. 493, 530 (S.D.N.Y. 1996).

A party’s control over third-party documents extends to the records of a corporation for which the party serves as an officer. In re Flag Telecom Holdings, Ltd. Sec. Litg., 236 F.R.D. 177, 181 (S.D.N.Y. 2006) (finding that a party has control for Rule 34(a) purposes over records of a corporation for which he was a senior officer); Scott v. Arex, 124 F.R.D. 39, 41 (S.D.N.Y. 1989) (a party controls records of any third-party corporate entities that he “has the right, authority, or ability to obtain upon demand”). Cf. Shcherbakovsky v. Da Capo Al Fine, Ltd., 490 F.3d 130, 139 (2d Cir. 2007) (reversing a discovery sanction of dismissal and stating that where a defendant is an officer of a third-party corporation, the plaintiff is entitled to the production of the corporation’s records if the defendant “has access to them and can produce them”).

A party cannot evade her obligation to produce third-party documents by resigning her office. See Flag Telecom, 236 F.R.D. at 181-82 (finding that a party was obligated to produce corporate documents despite the fact that he had resigned from

his senior officer position since being served with the document request).

2. Analysis

From the beginning, Kiobel Plaintiffs too narrowly construed their responsibility to produce NUOS-related documents. Defendants have established that Mr. Wiwa and Mr. John-Miller founded, ran, and housed NUOS during part or all of 2003 and 2004. In addition to their responsibility to produce all responsive NUOS-related documents in their physical possession,⁶ Plaintiffs John-Miller and Wiwa, as officers of NUOS, had control over NUOS's organizational records. Any NUOS records that were responsive to Defendants' First Document Request or the Pitman Order should have been promptly produced to Defendants regardless of their physical location.

This obligation persisted even if Plaintiffs Wiwa and John-Miller ceased to hold leadership positions in NUOS and despite the fact that Mr. John-Miller was terminated as a plaintiff in

⁶ The Court notes that Kiobel Plaintiffs do not seem to have done an adequate job preserving and producing even NUOS-related documents in their possession. Magistrate Judge Pitman ordered Kiobel Plaintiffs to complete their production of documents responsive to Defendants' First Document Request by November 24, 2003. (Conf. Tr. 119:11-13, 120:10-13, Sept. 23, 2003.) Plaintiff John-Miller states in his May, 2004 deposition testimony that he kept notes, some of which may have been responsive, on his computer. (Reynolds' Decl. Ex. H at 64-65.) It is unclear whether hard copies of these electronic files were among the approximately 35 pages of NUOS-related documents Kiobel Plaintiffs produced to Defendants in 2003 and 2004. Defendants will never know because Mr. John-Miller also states in his deposition that he acquired a new computer in 2004, whereupon he discarded his old computer, including its hard drive. (Id.)

2006. Even if Plaintiff Wiwa ceased serving as NUOS's secretary in or after 2003 and even if Plaintiff John-Miller ceased serving as the organization's president in or after 2004, this did not necessarily end their control over NUOS documents and thus their obligation to produce those that were responsive. See Flag Telecom, 236 F.R.D. at 181-82. Furthermore, even assuming Mr. John-Miller's termination as a plaintiff in 2006 extinguished his obligation to respond, Mr. Wiwa's obligation persisted.⁷

Plaintiffs do not provide any basis to deny Defendants' motion. Plaintiffs rely on the fact that the organization is a third party to the litigation and they state that they have diligently sought, and made every reasonable effort to obtain, responsive NUOS-related documents.

The cases Plaintiffs rely on regarding a party's control over third-party documents are inapposite. They involve third parties with a contractual relationship to the recipient of a discovery request; none addresses the scope of a party's control over a third-party corporation for which the party is an officer.⁸

⁷ Plaintiffs Nwinee and Ikari, who NUOS's current president states were "appointed to handle" the payments addressed in the Pitman Order, see supra note 5, may also have sufficient control over NUOS documents to have an obligation to produce organizational documents beyond those in their personal possession or custody.

⁸ In Chevariati v. Williams Pipe Line Co., 11 F.3d 1420 (7th Cir. 1993) the third party was a sub-contractor of a sub-contractor of a contractor for the plaintiffs. In M'Baye v. New Jersey Sports Production, Inc., 06 Civ. 3439, 2008 WL 1849777 (S.D.N.Y. April 21,

Furthermore, given that Plaintiffs misunderstood the scope of their responsibility to produce responsive NUOS-related documents, the Court cannot be sure that Plaintiffs have actually made "every reasonable effort to search for and produce responsive NUOS related documents." (Pls.' Resp. 5.) Plaintiffs' assessment of what efforts are reasonable may be different now that the scope of their responsibility has been clarified.

Accordingly, the Court GRANTS Defendants' motion to compel. Due to the fire at NUOS's headquarters in 2006, Plaintiffs may not be able to produce any further responsive NUOS documents. However, in light of the Court's clarification of the scope of Kiobel Plaintiffs' control over, and thus responsibility to produce, NUOS documents, Kiobel Plaintiffs shall make another effort to search for and produce any responsive documents. In addition, they shall provide the Court with an affidavit describing what searches they and their counsel have made for NUOS-related documents responsive to Defendants' First Document Request and the Pitman Order. They shall do so by 5:00 PM on March 6, 2009.

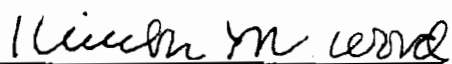
2008) the third party was a promoter and business manager for the plaintiff. Finally, In re Luzano, 392 B.R. 48 (Bankr. S.D.N.Y. 2008) involved the control a mortgagee and loan servicer had over a loan originator's records.

III. CONCLUSION

For the above reasons, Defendants' motion to compel, 02-D.E. 211, is GRANTED.

SO ORDERED.

Dated: New York, New York
February 15, 2009



Kimba M. Wood
United States District Judge