

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

KEN WIWA, <i>et al.</i> ,	Plaintiffs,	
– against –		96 Civ. 8386 (KMW)(HBP)
ROYAL DUTCH PETROLEUM COMPANY, <i>et al.</i> ,	Defendants.	
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KEN WIWA, <i>et al.</i> ,	Plaintiffs,	
– against –		01 Civ. 1909 (KMW)(HBP)
BRIAN ANDERSON,	Defendant.	
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ESTHER KIOBEL, <i>et al.</i> ,	Plaintiffs,	
– against –		02 Civ. 7618 (KMW)(HBP)
ROYAL DUTCH PETROLEUM COMPANY, <i>et al.</i> ,	Defendants.	

**REPLY MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS’
LOCAL RULE 6.3 MOTION FOR RECONSIDERATION
OF THE COURT’S MARCH 2, 2009 ORDER**

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Date: March 25, 2009

Plaintiffs' opposition to our motion is without merit for three reasons.

First, plaintiffs expressly represented in 2004 that all redactions were "of non-responsive materials". (6/28/04 Reynolds Decl. Ex. TT (5/14/04 Letter from S. Whinston to R. Millson).) Given this representation, it is not surprising that plaintiffs failed to follow Local Rule 26.2, which requires a privilege log at the time of disclosure.

On May 13, 2004, the Magistrate Judge ordered "plaintiffs and their counsel . . . to produce to counsel for defendants all documents in their possession, custody or control concerning any payments" of the Benin witnesses. (5/13/04 Order at 2.) Magistrate Judge Pitman rejected plaintiffs' work product assertion at the May 12, 2004 hearing. Indeed, plaintiffs agreed with Magistrate Judge Pitman's statement that "I am hard pressed to see how a payment to a witness is work product". (Reynolds Decl. Ex. U (5/12/2004 Hr'g Tr. 29).)

On May 14, 2004, plaintiffs produced payments documents in response to the Magistrate Judge's Order. In their cover letter to defendants, plaintiffs specifically represented that "[a]ll the redactions from these documents are of non-responsive materials". (6/28/04 Reynolds Decl. Ex. TT (5/14/04 Letter from S. Whinston to R. Millson).) Plaintiffs made no mention whatsoever of any redaction or withholding of documents on work product grounds.¹

¹ This representation and the failure to provide a privilege log disposes of plaintiffs' assertion that defendants knew all along that plaintiffs asserted work product over the redactions in the payments documents and that as a result, it is not the proper subject of a reconsideration motion (Pls.' Opp'n 6-7).

Plaintiffs should have provided a privilege log. *See* Local Rule 26.2.² Not only have plaintiffs never provided the log as required by the Local Rules, but plaintiffs in several places redacted the very information that is required to be included in the log. (*See, e.g.*, KIOBEL 002990, KIOBEL 002999, KIOBEL 3013 (several examples of many documents redacting the addressee or other recipient(s)).) Plaintiffs' failure to provide a log constitutes a waiver. *See, e.g., Pkfinans Int'l Corp. v. IBJ Schroder Leasing Corp.*, Nos. 93 Civ. 5375 (SAS)(HBP), 96 Civ. 1816 (SAS)(HBP), 1996 WL 525862, at *3 (S.D.N.Y. Sept. 17, 1996) (Pitman, M.J.) ("A party's failure to produce [a] log results in a waiver of any privilege that might otherwise be asserted"), *aff'd*, 1996 WL 675772 (S.D.N.Y. Nov. 21, 1996); *see also Goodyear Tire & Rubber Co. v. Kirk's Tire & Auto Servicer of Haverstraw, Inc.*, Nos. 02 Civ. 0504 (RCC), 2003 WL 22110281, at *3 (S.D.N.Y. Sept. 10, 2003) (same).

Thus, the Court did "overlook[] . . . factual matters" and there is "a need to correct a clear error" and to "prevent manifest injustice". (Pls.' Opp'n 3 (quoting *Kingsway Fin. Servs., Inc. v. Price-Waterhouse-Coopers LLP*, No. 03 Civ. 5560 (RMB)(HBP), 2008 U.S. Dist. LEXIS 69117, at *7 (S.D.N.Y. Sept. 12, 2008)).) The Court stated that it "ascertain[ed] whether, *as plaintiffs contend*, [the documents were] protected work product". (Pls.' Opp'n 6-7.) Plaintiffs' reliance on this statement as proof that work product has been "consistently raised by plaintiffs" (*id.* at 7) is wholly

² That log must be "furnished in writing at the time of the response to such discovery or disclosure". Local Rule 26.2. It must contain "the general subject matter of the document"; "the date" and "such other information as is sufficient to identify the document . . . including, where appropriate, the author of the document, the addressees of the document, and any other recipients shown in the document, and, where not apparent, the relationship of the author, addressees, and recipients to each other". *Id.*

misplaced. There was no assertion of work product until plaintiffs' *ex parte* submission. The Court overlooked the fact that plaintiffs' work product assertion was not reflected in a privilege log, not briefed in the motion papers and defendants never had the opportunity to address plaintiffs' *ex parte* submission.

Second, plaintiffs' concession that they failed to comply with the Magistrate Judge's May 13, 2004 Order and this Court's March 2, 2009 Order cannot become a reason to deny this motion.

The Magistrate Judge ordered "plaintiffs and their counsel . . . to produce to counsel for defendants all documents in their possession, custody or control concerning any payments" of the Benin witnesses. (5/13/04 Order at 2.) Plaintiffs state that they "produced responsive documents" in response thereto (Pls.' Opp'n 1), but they do not claim to have produced *all* responsive documents. Indeed, it is clear they did not. Plaintiffs failed to comply in at least two ways. The Court has already addressed one of those, ordering plaintiffs to produce NUOS documents.³ (*See* 2/15/09 Order.) We believe that our motion for reconsideration appropriately addresses plaintiffs' other failure to comply with the May 13, 2004 Order.

MPTC is covered by the Magistrate Judge's Order. Indeed, plaintiffs conceded that MPTC, and Keith Mabray of MPTC, were plaintiffs' agents and that Mr. Mabray's documents were responsive to the Magistrate Judge's May 13, 2004 Order. (11/7/08 Millson Certification ¶ 12 & Exs. F, G.) Plaintiffs failed to produce the documents of MPTC, its paying agent. As discussed in defendants' opening brief—and

³ Plaintiffs still have not produced any of the NUOS documents the Court ordered to be produced in the February 15, 2009 Order.

not disputed by plaintiffs—this Court’s March 2, 2009 Order should not have been confined to the specific redacted documents that were in the physical possession of plaintiffs’ counsel and should have extended, for example, to MPTC pursuant to this Court’s definition of possession, custody or control. Accordingly, reconsideration of the March 2, 2009 Order is appropriate.⁴

Third, plaintiffs’ arguments regarding the timeliness and form of this motion are without merit. Plaintiffs’ argument that the March 2, 2009 Order was not a determination of a motion (Pls.’ Opp’n 7-8) is incorrect. The chronology is as follows:

- At the October 7, 2008 hearing, the Court ordered plaintiffs to review their redactions to determine whether they should be unredacted. (10/7/08 Hr’g Tr. 17.)
- On October 24, 2008, the Court reiterated that order and further ordered that “[t]o the extent *Kiobel* Plaintiffs still maintain that some or all of these documents warrant redaction, they shall provide the Court with an unredacted version of those documents for *in camera* review” by October 28, 2008. (10/24/08 Order at 18.) Thus, the Court denied the motion as moot. (*Id.*)
- On November 7, 2008, defendants requested to file two motions as ordered by the Court: (1) Defendants’ Motion on the Perjurious Benin Testimony (to Obtain Limited Extension of the Discovery Cutoff and to Compel Production of NUOS Documents and Unredacted Documents on Payments to Witnesses), dated June 28, 2004, and (2) Defendant The “Shell” Transport and Trading Co., p.l.c.’s Motion to Preclude the Taking of Depositions and to Compel Responses to Interrogatories, dated May 12, 2004. The Court’s memo endorsement of the same date granted leave to file

⁴ Although this Court quashed the MPTC subpoena as untimely in its October 24, 2008 Order (10/24/08 Order at 12-14), that did not absolve plaintiffs of their prior discovery obligations. That subpoena simply represented more specific examples of documents that plaintiffs should have produced in response to the Magistrate Judge’s May 13, 2004 Order. Moreover, these documents are called for in response to Shell Transport and Trading’s Second Set of Interrogatories regarding payments, which plaintiffs have refused to answer. Defendants’ motion to compel is fully submitted and pending before the Court. (*Wiwa* Docket Nos. 229, 230, 231, 242.)

both of those motions, the latter of which is still pending, but struck out portions of the motion that were being addressed separately—such as the unredacted payments documents portion.

- On March 2, 2009, the Court issued the substantive decision on the motion regarding unredacted payments documents.

Plaintiffs' argument that defendants' motion is untimely because it had to be made within ten days of the October 24, 2008 Order denying the motion as moot (Pls.' Opp'n 8-9) makes no sense. Defendants waited for the Court to dispose of the motion substantively, as opposed to merely procedurally. It was not until March 2, 2009 that the Court did so. Defendants timely moved for reconsideration within ten days after the issuance of that Order.

March 25, 2009

Respectfully submitted,

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