

EXHIBIT F
RACKETEER INFLUENCED AND CORRUPT
ORGANIZATIONS ACT (RICO)¹

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¹ Defendants object to all RICO instructions because the Court lacks subject matter jurisdiction. (See Defs.’ R&O Stmt. Part III.)

I. RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT (RICO)

A. Generally

Plaintiffs Karalolo Kogbara and Owens Wiwa also bring a claim against the corporate defendants based on a federal statute known as the Racketeer Influenced and Corrupt Organization Act, otherwise called RICO. Plaintiffs Karalolo Kogbara and Owens Wiwa claim that defendants Shell Petroleum, N.V., Shell Transport and Trading Company, Ltd. violated RICO. Plaintiffs do *not* bring any claim under RICO against Mr. Anderson.

Plaintiffs must prove each element of a RICO violation as those elements will be explained to you. You should consider each and every element of a RICO cause of action only in the precise way that I will define them in these instructions.

SOURCES: O'Malley et al., Federal Jury Practice and Instructions, Vol. 3B, § 161.01.

B. Plaintiffs' Proposed Instruction No. 2.2: Plaintiffs' Allegations

Specifically, Plaintiffs Kogbara and Wiwa contend that the corporate defendants formed an enterprise with, or conspired with an enterprise composed of, Shell Nigeria, the Nigerian military authorities, and Willbros West Africa, Inc. that sought to suppress Ogoni opposition and ensure the low-cost production of oil in Nigeria. They claim that the corporate defendants agreed to commit or aid in the commission of at least two of the acts of murder, arson, and extortion alleged in this case. They claim that as a direct result of these activities, they suffered harms that are compensable under RICO.

Note: Plaintiffs believe it would be helpful to explain to the jury what the allegations at issue in the RICO claims are.

DEFENDANTS' COMMENTS AND OBJECTIONS: Defendants object to this instruction in its entirety as an improper narrative of plaintiffs' allegations, irrelevant insofar as it is unrelated to any elements of a RICO claim on which the jury will be instructed, and prejudicial.

C. Defendants' Proposed Instruction: Use of Words

During the course of these instructions, you will hear me use the words "racketeer", "racketeering" and "corrupt organization". Those words have certain implications in our society. You should not assume that defendants or defendants' employees are "racketeers" because defendants have been sued under RICO. Use of those terms in RICO and during this trial should not be thought of as having anything to do with your determination of whether plaintiffs have established the elements of their RICO claim. These terms are only terms used by Congress to describe the RICO statute.

SOURCES: O'Malley et al., Federal Jury Practice and Instructions, Vol. 3B, § 161.02.

DEFENDANTS' COMMENTS AND OBJECTIONS: This language is taken directly from the Federal Jury Practice and Instructions, Vol. 3B, §§ 161.02. A general instruction about "racketeering" language would not serve any purpose as the jury would not relate that cautionary general instruction to the RICO instructions. The use of the term "racketeering" is prejudicial toward defendants. Therefore, this language should be included in the opening RICO instruction, just like the model federal instructions.

PLAINTIFFS' OBJECTIONS: Plaintiffs object that this instruction, while not objectionable in itself, is inappropriately one-sided in that similar instructions do not appear for other terms and concepts throughout these instructions. Plaintiffs that the concerns reflected in this instruction are more appropriately addressed by a general instruction, such as No. III.3, which would apply more generally to the entire set of instructions rather than being narrowly focused on RICO.

D. Plaintiffs' Proposed Instruction No. 2.4: Conduct of SPDC

If you find that the corporate defendants are liable for the conduct of SPDC under any of the theories of liability set forth above, you may attribute SPDC's conduct to the corporate defendants for the purposes of RICO.

Note: This instruction is necessary because the RICO instructions are placed after all of the other claims and liability instructions.

DEFENDANTS' COMMENTS AND OBJECTIONS:

Defendants object to plaintiffs' proposed instruction. Plaintiffs' RICO claim alleges that defendants themselves formed an "enterprise" or conspired with an enterprise composed of SPDC, the Nigerian Government, and Willbros West Africa, Inc. (*See supra* Plaintiffs' Proposed Instruction No. 2.2: Plaintiffs' Allegations.) Thus, plaintiffs' theory of indirect liability must find its source of law within the RICO statute itself, *i.e.*, 18 U.S.C. 1962(d), not from other sources such as international law or New York law. Similar to plaintiffs' erroneous theories of indirect liability for their ATS claims, plaintiffs cannot simply graft liability onto defendants through theories that do not have any basis in law. Furthermore, plaintiffs' cannot make out a civil claim for aiding and abetting a civil RICO violation because the text of RICO says nothing about secondary liability. *Id.* 475-77; *Dep't of Economic Dev. v. Arthur Andersen & Co. (U.S.A.)*, 924 F. Supp. 449, 475-77 (S.D.N.Y. 1996); *Hayden v. Paul, Weiss, Rifkind, Wharton & Garrison*, 955 F. Supp. 248, 255-56 (S.D.N.Y. 1997); *Pa. Ass'n of Edwards Heirs v. Righenour*, 235 F.3d 839, 843-44 (3d Cir. 2000); *Ling v. Deutsche Bank, AG*, No. 04 Civ. 4566, 2005 WL 1244689, at *3 (S.D.N.Y. May 26, 2005).

E. Section 1962(c) – Conducting a Racketeering Enterprise

Plaintiffs Karalolo Kogbara and Owens Wiwa contend that the corporate defendants violated Section 1962(c) of RICO. Section 1962(c) of RICO prohibits the conduct of an enterprise through a pattern of racketeering activity. To show that the corporate defendants have violated section 1962(c), plaintiffs Karalolo Kogbara and Owens Wiwa must prove each of the following elements by a preponderance of the evidence:

1. The existence of an enterprise affecting interstate or foreign commerce;
2. That defendants were employed by or associated with the enterprise;
3. That defendants conducted or participated in the conduct of the enterprise's affairs;
4. That defendants' participation was through a pattern of racketeering activity; and
5. That plaintiff Karalolo Kogbara's or Owens Wiwa's business or property was injured by reason of defendant's conducting or participating in the conduct of the enterprise's affairs.

The term "enterprise" includes any individual, partnership, corporation, association or other legal entity. An enterprise may also be any group of individuals associated in fact although not a legal entity. Although the enterprise must engage in illegal activity, the enterprise may be formed for a legitimate or lawful purpose.

The term "pattern of racketeering activity" means at least two acts of racketeering activity occurring within a ten year period. Acts of racketeering may

include, as plaintiff alleges in this case, murder, arson, bribery, and extortion. While the two acts of racketeering activity need not be of the same kind, you must find by a preponderance of the evidence that the two acts of racketeering activity occurred within the time specified.

The term “pattern of racketeering activity” requires that you find the alleged acts of bribery, extortion, murder or arson were related to each other. Such acts are related if they have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events.

SOURCES: U.S.C. § 1962(c), (d); O’Malley et al., Federal Jury Practice and Instructions, Vol. 3B, §§ 161.22, 161.23; 161.41, 161.47; Sand et al., Modern Federal Jury Instructions, Vol. 3, Instr. 52-12; *Smithfield Foods Inc. v. United Food & Commercial Workers Int’l Union*, No. 3:07-cv-6412008, Jury Instr. LEXIS 760, 2007 U.S. Dist. Ct. Jury Instr. 267009, at *31-33 (E.D. Va. Oct. 14, 2008); *North S. Fin. Corp. v. Al-Turki*, 100 F.3d 1046, 1051 (2d Cir. 1996); *In re Terrorist Attacks on Sept. 11, 2001*, 349 F. Supp. 2d 765, 826-27 (S.D.N.Y. 2005); *Aldana v. Fresh Del Monte Produce, Inc.*, 305 F. Supp. 2d 1285 (S.D. Fla. 2003); *Wiwa v. Royal Dutch Petroleum Co.*, No. 96 Civ. 8386 (KMW), 2002 WL 319887, at *20-27 (S.D.N.Y. Feb. 28, 2002); *North S. Fin. Corp. v. Al-Turki*, 100 F.3d 1046, 1051 (2d Cir. 1996).

DEFENDANTS’ COMMENTS: Although defendants do not object to the deletion of the instruction under § 1962(b), defendants note that plaintiffs’ Complaint ¶ 183 does in fact alleged a § 1962(b) violation. We assume by removing this instruction that plaintiffs intend to abandon this claim. We reserve the right to propose an instruction in the event plaintiffs are permitted to proceed under this theory.

F. Plaintiffs' Proposed Instruction No. 2.7: Enterprise Affecting Commerce

An enterprise “affects interstate or foreign commerce” if the enterprise either engages in or pursues activities affecting or having a potential effect on commerce between the United States and a foreign country.

SOURCE: O'Malley et al., Federal Jury Practice and Instructions, Vol. 3B, §§ 161.42 (“An enterprise ‘affects interstate or foreign commerce’ if the enterprise either engages in or pursues activities affecting [*or having a potential effect on*] commerce between the states or between the states and foreign countries.”) (bracketed text in original)

DEFENDANTS' COMMENTS AND OBJECTIONS:

Defendants object that the proposed instruction does not reflect the law. In order to establish a RICO claim here where the personal harms were suffered overseas, plaintiffs must show that defendants' alleged illegal activities *substantially affected* commerce. Plaintiffs must establish that the alleged activities of defendants which were part of a RICO enterprise had a substantial effect on the United States. If the activities had only a remote or indirect effect on the United States, then defendants cannot be held liable under this claim. (*See* Defs.' Motion to Dismiss Pls.' RICO Claim, Wiwa Docket Nos. 309, 328.) Defendants further object to this instruction insofar as it should be included within the instruction Section 1962(c) – Conducting a Racketeering Enterprise”, where the term “enterprise” first appears.

G. Defendants' Proposed Instruction: Enterprise Affecting Commerce

An enterprise "affects interstate or foreign commerce" if the enterprise either engages in or pursues activities having a substantial effect on commerce between the United States and a foreign country.

DEFENDANTS' COMMENTS AND OBJECTIONS:

In order to establish a RICO claim here, plaintiffs must show that defendants' alleged illegal activities *substantially affected* commerce. Plaintiffs must establish that the alleged activities of defendants which were part of a RICO enterprise had a substantial effect on the United States. If the activities had only a remote or indirect effect on the United States, then defendants cannot be held liable under this claim. (*See* Defs.' Motion to Dismiss Pls.' RICO Claim, Wiwa Docket Nos. 309, 328.)

PLAINTIFFS' OBJECTIONS: Plaintiffs' instruction reflects the pattern instruction verbatim, including the optional language from the brackets. This bracketed language is based on *Jund v. Town of Hempstead*, 941 F.2d 1271, 1285 (2d Cir.1991) (any interference with or effect upon interstate commerce, whether slight, subtle or even potential is sufficient). Defendants' instruction alters the pattern instruction. Plaintiffs' argument regarding the effects test is set forth in the RICO briefing, but even if this is a jurisdictional requirement, there is no support for a jury instruction on this issue. Instead, the pattern instructions require that the enterprise have an affect or potential affect on interstate or foreign commerce.

H. Plaintiffs' Proposed Instruction No. 2.8: Allegations of Racketeering Activity

In this case, plaintiffs Karalolo Kogbara and Owens Wiwa contend that the activities of the corporate defendants involving the bribery of Naayone Nkpah and Charles Danwi by the military and defendants' lawyer; the extortion of Owens Wiwa by Brian Anderson and the Nigerian military, who threatened him, demanded concessions in return for the life of his brother, and forced him to abandon his medical practice; and numerous acts of murder and arson committed by the Nigerian military with the support of defendants, constituted a pattern of racketeering activity.

Note: Plaintiffs believe it would be helpful to explain to the jury what the alleged racketeering activity is.

DEFENDANTS' COMMENTS AND OBJECTIONS:

Defendants object to this instruction as an improper narrative of plaintiffs' allegations, irrelevant insofar as it is unrelated to any elements of a RICO claim on which the jury will be instructed, and prejudicial. Moreover, the phrase "and numerous acts of murder and arson committed by the Nigerian military" is vague and ambiguous and would confuse the jury. Defendants further object to this instruction insofar as it should be included within the instruction Section 1962(c) – Conducting a Racketeering Enterprise", where the term "enterprise" first appears.

I. Section 1962(d) – Conspiracy

Plaintiffs Karalolo Kogbara and Owens Wiwa claim that the corporate defendants violated Section 1962(c) of the RICO statute by conspiring to conduct an enterprise through a pattern of racketeering activity.

To recover on this claim against each defendant, each plaintiff must prove each of the following elements:

1. The enterprise was engaged in, or the activities of the enterprise affected, interstate or foreign commerce;
2. Defendants understood the nature or unlawful character of the conspiratorial plan;
3. Defendants agreed to join with others to achieve the objective of the conspiracy. To conspire to conduct the affairs of an enterprise, defendants must be aware of the existence and purpose of the enterprise;
4. Defendants agreed that the enterprise would be conducted through a pattern of racketeering activity. This means that the commission of at least two racketeering crimes by the conspiracy was contemplated; and
5. Plaintiff Karalolo Kogbara's or Owens Wiwa's business or property was injured by the conspiracy to conduct or participate in the affairs of the enterprise through a pattern of racketeering activity.

If you find that the corporate defendants agreed that the conspiracy would commit two or more of the racketeering acts alleged, you need not find that any of the racketeering acts were actually committed. It is enough that the defendants agreed that the conspiracy would commit two or more of the acts.

SOURCE: O'Malley et al., Federal Jury Practice and Instructions, Vol. 3B, §§ 161.23

J. Plaintiffs' Proposed Instruction No. 2.10: Conspiracy – Definition

Conspiracy is defined differently for RICO than the definition of conspiracy used above. In this context, conspiracy means that each corporate defendant joined with the Nigerian military and military government in an agreement to conduct or participate in the affairs of the enterprise through a pattern of racketeering activity.

SOURCE: O'Malley et al., Federal Jury Practice and Instructions, Vol. 3B, §§ 161.23 (“This means that plaintiff ___ must prove that defendant ___ joined with the other members of the alleged conspiracy in an agreement to conduct or participate in the affairs of the enterprise [through a pattern of racketeering activity] [collection of an unlawful debt].”) Plaintiffs added language to eliminate confusion over multiple definitions of conspiracy and to specify who the other conspirators are.

DEFENDANTS' COMMENTS AND OBJECTIONS: Defendants object to this instruction as duplicative of element 3 in the following instruction and confusing.

K. Defendants' Proposed Instruction: Conspiracy – Substantial Effect

Plaintiffs must also establish that the alleged activities of the corporate defendants which were part of the enterprise had a substantial effect on the United States. If the activities had only a remote or indirect effect on the United States, then defendants cannot be held liable under this claim.

DEFENDANTS' COMMENTS AND OBJECTIONS:

In order to establish a RICO claim here, plaintiffs must show that defendants' alleged illegal activities *substantially affected* commerce. Plaintiffs must establish that the alleged activities of defendants which were part of a RICO enterprise had a substantial effect on the United States. If the activities had only a remote or indirect effect on the United States, then defendants cannot be held liable under this claim. (*See* Defs.' Motion to Dismiss Pls.' RICO Claim, Wiwa Docket Nos. 309, 328.)

PLAINTIFFS' OBJECTIONS: This instruction is not reflected in the pattern instructions. Plaintiffs' argument regarding this test is set forth in the RICO briefing, but even if this is a jurisdictional requirement, there is no support for a jury instruction on this issue. Instead, the pattern instructions require that the enterprise have an affect or potential affect on interstate or foreign commerce.