

EXHIBIT D
DEFENDANTS’ PROPOSED INSTRUCTIONS
FOR VIOLATIONS OF NIGERIAN LAW

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I. PLAINTIFFS' CLAIMS AGAINST ROYAL DUTCH PETROLEUM COMPANY AND THE "SHELL" TRANSPORT AND TRADING COMPANY, P.L.C. FOR VIOLATIONS OF NIGERIAN LAW¹

Plaintiffs bring one or more claims against each of the corporate defendants which are governed by Nigerian law.

In this case, plaintiffs do not claim that the Royal Dutch Petroleum Company and The "Shell" Transport and Trading Company, p.l.c. directly violated Nigerian law. Rather, plaintiffs claim that Shell Petroleum Development Company of Nigeria ("SPDC"), through participation with the Nigerian Government, indirectly violated Nigerian law and that the corporate defendants, as the shareholders of a holding company that owns all of SPDC's stock, are each liable for SPDC's indirect participation with the Nigerian Government in the violations of Nigerian law plaintiffs allege here.

Unlike the claims plaintiffs bring under international law, where plaintiffs are required to satisfy their burden of proof by a preponderance of the evidence for all of the elements of each claim, for certain claims brought here under Nigerian law, plaintiffs must prove all the elements of those claims beyond a reasonable doubt. As I instructed you before, "proof beyond a reasonable doubt" is a stricter standard than "preponderance of the evidence". It is the highest burden of proof. Proof beyond a reasonable doubt must be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it in the most important of his or her own affairs. I will instruct you later as to which claims that stricter burden of proof applies.

I will now give you instructions on how to determine whether these defendants willfully participated in each of the alleged violations of Nigerian law.

¹ (See Defs.' R&O Stmt. Part II.A.)

For three of the Nigerian law claims—assault, battery, and wrongful death—plaintiffs Ken Wiwa, Blessing Kpuinen, Owens Wiwa, and Karalolo Kogbara claim that the Nigerian Government violated Nigerian law, and that SPDC willfully participated in that particular unlawful conduct of the Nigerian Government in one of nine ways that plaintiffs claim SPDC can be legally responsible for the conduct of another that I will describe to you later. These plaintiffs further claim that Royal Dutch and Shell Transport willfully participated in SPDC’s alleged participation in the Nigerian Government’s violation of Nigerian law in one of five ways that plaintiffs claim defendants can be legally responsible for the conduct of another that I will describe to you later.

In order to prove these claims against defendants, plaintiffs Ken Wiwa, Blessing Kpuinen, Owens Wiwa, and Karalolo Kogbara must prove each of the following elements:

First, each plaintiff must prove that the Nigerian Government committed a violation of Nigerian law against that plaintiff. If you find that any plaintiffs have failed to satisfy their burden of proving that the Nigerian Government violated Nigerian law with respect to them, you must find in favor of defendants.

Second, if you find, however, that plaintiffs each have met their burden of proof to show that the Nigerian Government violated Nigerian law with respect to them, you must then determine whether SPDC willfully participated in that particular unlawful conduct of the Nigerian Government. Plaintiffs must prove each element of at least one of nine theories I will instruct you about later. If you find that any plaintiffs have failed

to prove that SPDC willfully participated in that particular unlawful conduct of the Nigerian Government under one of those theories, you must find in favor of defendants.

Third, if you find, however, that plaintiffs each have met their burden of proof to show that SPDC willfully participated in that particular unlawful conduct of the Nigerian Government, you must then decide if each defendant willfully participated in the conduct of SPDC under one of five theories I will instruct you about later. If you find that any plaintiffs have failed to prove that defendants willfully participated in SPDC's participation in the Nigerian Government's unlawful conduct, you must find in favor of defendants.

For plaintiffs' remaining three claims under Nigerian law—intentional infliction of emotional distress, negligent infliction of emotional distress, and negligence—plaintiffs Ken Wiwa, Blessing Kpuinen, Owens Wiwa, and Karalolo Kogbara claim that SPDC violated Nigerian law, and that defendants willfully participated in that particular conduct of SPDC in one of five ways that plaintiffs claim defendants can be legally responsible for the conduct of another that I will describe to you later.

In order to prove these claims against defendants, plaintiffs Ken Wiwa, Blessing Kpuinen, Owens Wiwa, and Karalolo Kogbara must prove each of the following elements:

First, each plaintiff must prove that SPDC committed a violation of Nigerian law against that plaintiff. If you find that any plaintiffs have failed to satisfy their burden of proving that SPDC violated Nigerian law with respect to them, you must find in favor of defendants.

Second, if you find, however, that plaintiffs each have met their burden of proof to show that SPDC violated Nigerian law with respect to them, you must then determine whether defendants willfully participated in that particular unlawful conduct of SPDC under one or more of the five theories I will instruct you about later. If you find that any plaintiffs have failed to prove that defendants willfully participated in that particular unlawful conduct of SPDC under one of those theories, you must find in favor of defendants.

You must look at each of the six Nigerian law claims separately. For each claim, you should carefully follow the steps laid out in these instructions to determine whether each defendant willfully participated in the violation of Nigerian law under each of plaintiffs' theories. If you find that any plaintiffs have failed to prove each of the elements of any part of the instructions for a given claim, then you must find in favor of defendants for that claim.

SOURCES: *Globalnet Financial.com v. Frank Crystal & Co.*, 449 F.3d 377, 384 (2d Cir. 2006); *Okuarume v. Obabokor*, [1965] N.S.C.C. 286, 286-87; Nigerian Evidence Act (1990), Cap. 112, § 138(1); *Smithfield Foods Inc. v. United Food & Commercial Workers Int'l Union*, -No. 3:07-cv-641, 2008 Jury Instr. LEXIS 761, 2007 U.S. Dist. Ct. Jury Instr. 267009 (E.D. Va. Oct. 14, 2008).

Plaintiffs' General Objections to Defendants' State Law Claims Instructions

1. Plaintiffs object to the application of Nigerian law for the substantive state law claims, as laid out in the choice of law argument above.
2. With respect to assault and battery, plaintiffs object to the use of the beyond a reasonable doubt standard. Even if Nigerian law applies to the substantive claims, New York law burdens of proof should apply here, as laid out in the choice of law argument above.
3. Plaintiffs object to the use of the legalese "individually and on behalf of." The only information relevant for the jury is who the victims are, not who brings the claims. This terminology could confuse the jury; it is sufficient to state, for example, "Plaintiffs contend that defendants are liable for assault against Ken Saro-Wiwa, Blessing Kpuinen, and John Kpuinen," rather than "Ken Wiwa, on behalf of Ken Saro-Wiwa, contends that

defendants are liable for assault against Ken Saro Wiwa, and Blessing Kpuinen, individually and on behalf of John Kpuinen, contends that defendants are liable for assault against her and John Kpuinen.”

4. With respect to assault, battery, and wrongful death, plaintiffs object to the use of the term “unlawfully”; with respect to all instructions, plaintiffs object to any reference to “in violation of Nigerian law” or a similar expression. Such terms are both confusing and misleading: confusing, because no guidance is given on whether Nigerian law has been violated, leaving the jury to wonder whether this is additional to the elements that have been put in front of them; misleading, because none of these torts must be criminally unlawful in order to be actionable. If the elements of each tort have been laid out, there is simply no reason to confuse the jury by suggesting that a claim must be in violation of Nigerian law, something the jury is not equipped to decide.

5. Defendants erroneously suggest that plaintiffs need to show “willful participation” for every theory of liability, including vicarious liability theories. Plaintiffs object to the notion that SPDC or Brian Anderson must have “willfully participated” in the military’s conduct, or that the corporate defendants must have “willfully participated” in SPDC’s conduct. “Willful participation” is not defined, and is so vague, it could only serve to mislead. Nonetheless, under any definition it is not an element of many of the theories of liability applicable here. For example, plaintiffs’ vicarious liability theories do not require any participation whatsoever. Throughout the instructions “willful participation” should be replaced with the notion that SPDC is responsible for the military’s conduct and that defendants are liable for SPDC’s conduct. *E.g.*, instead of the following: “*Third*, if you find, however, that plaintiffs have met their burden of proof to show that SPDC **willfully participated in** that particular unlawful conduct of the Nigerian Government, you must then decide if each defendant **willfully participated in** the conduct of SPDC under one of the five theories I will instruct you about later,” the more appropriate instruction (aside from any other objections) would be, “*Third*, if you find, however, that plaintiffs have met their burden of proof to show that SPDC **is responsible for** the particular unlawful conduct of the Nigerian Government, you must then decide if each defendant **is liable for** the conduct of SPDC under one of the five theories I will instruct you about later.” In short, the elements of each theory of liability should be described in the instruction for that theory of liability. There is no warrant for defendants’ attempt to add an additional element to *all* of the claims. There can be no question the term is inapplicable to vicarious liability theories. For other theories, the parties may dispute its applicability, but the Court need not resolve that dispute—if defendants are correct that “willful participation” is required, the term is redundant of the elements; if plaintiffs are correct, the term is legal error.

6. Plaintiffs object to the term “the Nigerian Government.” Many of the acts at issue were carried out by members of the Nigerian military, and may or may not have been authorized by the Nigerian government. They need not be acts of the government in order to be actionable. Additionally, this term is vague.

7. Plaintiffs object to the phrasing of the paragraph following the elements of each claim, which states: “You may find that the Nigerian Government committed [*claim*] only if plaintiffs have proven all of the elements listed above. If they have not proven all of the elements of this claim, their claim for [*claim*] must fail and you must find in favor of defendants.” Both sentences are slanted toward defendants’ case, and neither suggests what should be done if the jury finds these elements. Plaintiffs suggest that a more neutral phrasing would be: “If you find that plaintiffs have proven all of the elements listed above as to any victim, you must consider whether defendants are liable under any of the following theories of liability. If plaintiffs have not proven all of the elements of this claim, you must find in favor of defendants.”

8. Plaintiffs object to the use of the term “plaintiffs” for the victims of the torts. Some of the victims are decedents and this may confuse the jury. Plaintiffs propose using the term “victims” or simply using the names of the victims.

9. In every place that Defendants indicate “REPEAT” for instructing on their theories of liability (see e.g. I.B.2.a) Plaintiffs hereby incorporate by reference Plaintiffs’ corresponding objections.

Plaintiffs’ Objection to Defendants’ Proposed “Overview” Instruction on Plaintiffs’ Claims Against Royal Dutch Petroleum Company and The “Shell” Transport and Trading Company, p.l.c. for Violations of Nigerian Law

Defendants misstate plaintiffs’ claims in their proposed instruction that: “Plaintiffs claim . . . that the corporate defendants, *as the shareholders of a holding company that owns all of SPDC’s shares*, are liable for SPDC’s indirect participation with the Nigerian Government in the violations of Nigerian law plaintiffs allege here.” (emphasis added). As is abundantly clear from plaintiffs’ proposed instructions, this is not the basis upon which plaintiffs allege the corporate defendants can be held liable. Plaintiffs’ Proposed Instruction XXX.

Plaintiffs also object to defendants’ characterization of their theories of liability as “ways that plaintiffs claim SPDC can be legally responsible” and “ways that plaintiffs claim defendants can be legally responsible for the conduct of another”. Although the substance of instructions regarding liability are in dispute, once the Court resolves the dispute, they instructions represent the Court’s view of the law, not “ways that plaintiffs claim” liability ensues.

The last sentence of the instruction is skewed toward defendants. Another sentence should be added that states that: “If you find that plaintiffs have proved each of the elements with respect to any claim, then you must find in favor of plaintiffs on that claim.”

Plaintiffs’ Objections to Defendants’ Proposed “Introductory” Instruction on Each Claim

The introductory paragraphs to each claim are largely the same except for the name of the claim and these objections apply throughout.

Defendants' proposed instruction fails to reflect the fact that defendants can be held liable for their own participation in a conspiracy with members of the Nigerian military. The instruction should be amended to include the bold: "*Second*, if you find, however, that plaintiffs have met their burden of proving that the Nigerian Government [*committed the abuse at issue*], you must then decide, **whether defendants are liable either because they directly conspired with members of the Nigerian military or the Nigerian military government, or because they are liable for the responsibility of SPDC. Defendants, however, can be held liable for their own conspiracy irrespective of whether they can be held liable for the responsibility of SPDC. I will instruct you on the standards for conspiracy below. If you find that a defendant conspired, that defendant is liable. As for plaintiffs' separate claim that defendants are liable for the responsibility of SPDC, you must consider whether**, under one or more of the legal theories I will describe below. . . you must find in favor of defendants **on plaintiffs' theory that defendants are liable for the responsibility of SPDC. . .**". If you find that defendants did not willfully participate in SPDC's alleged participation, you must find in favor of defendants **on plaintiffs' theory that defendants are liable for the responsibility of SPDC."**

The last sentence of the instruction is skewed toward defendants. Another sentence should be added that states that: "If you find that a defendant is liable for SPDC's responsibility under any of these theories, then you must find in favor of the plaintiffs against that defendant."

A. Assault²

Ken Wiwa, on behalf of Ken Saro-Wiwa, contends that defendants are liable for assault against Ken Saro-Wiwa, Blessing Kpuinen, individually and on behalf of John Kpuinen, contends that defendants are liable for assault against her and John Kpuinen, and Owens Wiwa and Karalolo Kogbara each contends that defendants are liable for assault against them individually because (1) the Nigerian Government committed unlawful assault against Ken Saro-Wiwa, Blessing Kpuinen, John Kpuinen, Owens Wiwa, and Karalolo Kogbara, (2) SPDC willfully participated in the alleged

² (See Defs.' R&O Stmt. Part I.B.1.)

unlawful assaults against those individuals by the Nigerian Government, and (3) defendants willfully participated in SPDC's alleged participation in those assaults.

Under Nigerian law, a stricter standard of proof applies to this claim. Plaintiffs must satisfy their burden of proof for this claim by proving each of the following elements beyond a reasonable doubt:

First, plaintiffs must prove that the Nigerian Government unlawfully assaulted Ken Saro-Wiwa, Blessing Kpuinen, John Kpuinen, Owens Wiwa, and Karalolo Kogbara. If plaintiffs cannot prove that the Nigerian Government unlawfully assaulted one or more of these individuals, you must find in favor of defendants.

Second, if you find, however, that plaintiffs each have met their burden of proving that the Nigerian Government unlawfully assaulted one or more of those individuals, you must then decide, under one or more of the legal theories I will describe below in the section entitled "SPDC's Alleged Willful Participation in the Nigerian Government's Conduct", whether SPDC willfully participated in the alleged assaults against those individuals by the Nigerian Government. If you find that SPDC did not willfully participate in the alleged assaults by the Nigerian Government under any of those theories, you must find in favor of defendants.

Third, if you find, however, that SPDC did willfully participate in the alleged assaults by the Nigerian Government, you must then decide if each defendant willfully participated in SPDC's alleged participation in those assaults under one or more of the legal theories I will describe below in the section entitled "Defendants' Alleged Willful Participation in SPDC's Conduct". If you find that defendants did not willfully participate in SPDC's alleged participation, you must find in favor of defendants.

1. The Nigerian Government's Conduct

In order for you to find that the Nigerian Government committed assault in violation of Nigerian law, plaintiffs must prove each of the following elements separately with respect to each individual plaintiff:

First, the Nigerian Government acted overtly, and without legal justification attempted or threatened to apply force intending to cause harmful contact to the plaintiff without his or her consent. In determining whether the Nigerian Government had legal justification or intended to commit assault, you may infer a person's intent from surrounding circumstances. You may consider any statement made or act done or omitted by a party whose intent is in issue, and all other facts and circumstances which indicate the party's state of mind. You may consider it reasonable to draw the inference and find that a person intends the natural and probable consequences of acts knowingly done or knowingly committed. It is for you to decide what facts have been established by the evidence.

Second, there was a reasonable apprehension of immediate harmful contact to that plaintiff.

Third, the Nigerian Government had the ability to carry its intention into effect.

For each plaintiff, you may find that the Nigerian Government committed assault only if that plaintiff has proven all of the elements listed above. If a plaintiff has not proven all of the elements of this claim, his claim for assault must fail and you must find in favor of defendants.

Plaintiffs' Objection to Defendants' Proposed Instruction on Assault I.A and I.A.1 (Conduct of Nigerian Government)

1. Plaintiffs object to the use of the phrase "acted overtly." This does not appear to be supported by the sources cited and its meaning is unclear.
2. Plaintiffs object to the element that the assailant must have intended to cause a harmful contact. The treatise cited by defendants states that "an assault means any act which puts the plaintiff in fear that a battery is about to be committed against him." G. Kodilinye, Nigerian Law of Torts 12 (1996).
3. Plaintiffs object to the phrase "without legal justification." Presumably this is designed to cover some affirmative defense, but no affirmative defenses are instructed here. This term is not defined here, and the jury has no assistance in determining whether an assault may have been legally justified. Since there are no facts here that would justify any affirmative defense, this phrase is superfluous and confusing.
4. Plaintiffs object to the element that the perpetrator must have had the ability to carry its intention into effect. This does not appear to be supported by any of the Nigerian sources cited. Indeed, the treatise cited by defendants specifically considers an example in which an assailant points an unloaded gun at the plaintiff, and concludes that the "better view . . . is that there would be an assault, on the ground that an assault 'involves reasonable apprehension of impact of something on one's body, and that is exactly what happens when a firearm is pointed by an aggressor.'" G. Kodilinye, Nigerian Law of Torts 13 (1996).

2. SPDC's Alleged Willful Participation in the Nigerian Government's Conduct³

If you find that one or more plaintiffs have proven all of the above elements of their claim with respect to the Nigerian Government, for each such plaintiff you must then decide whether SPDC willfully participated in that unlawful conduct of the Nigerian Government under one or more of plaintiffs' nine theories presented below.

Plaintiffs' Objections to Defendants' Proposed Instruction I.A.2. SPDC's Alleged Willful Participation in the Nigerian Government's Conduct

Plaintiffs incorporate by reference Plaintiffs' Objections to Defendants' Proposed ATS Instruction I.A.2. (Summary Execution) SPDCs Alleged Willful Participation in the Nigerian Government's Conduct.

³ (See Defs.' R&O Stmt. Part I.C.)

a. Plaintiffs' Theory of Aiding and Abetting

In order to prove SPDC willfully participated in the Nigerian Government's violation of Nigerian law under plaintiffs' aiding and abetting theory, plaintiffs must prove each of the following elements:

First, SPDC intended that the Nigerian Government would violate Nigerian law. If you find that SPDC only had knowledge that the Nigerian Government was going to violate or had violated Nigerian law and it failed to prevent that violation, you may not conclude that SPDC aided and abetted the Nigerian Government.

Second, SPDC knew that the Nigerian Government had the ability to carry its intention into effect.

Third, SPDC knowingly assisted the Nigerian Government in violating Nigerian law.

If you find that plaintiffs have failed to prove any of the above elements, you must find in favor of defendants on this theory.

Plaintiffs' Objections to Defendants' Proposed Instruction I.A.2.a. Plaintiffs' Theory of Aiding and Abetting

Plaintiffs incorporate by reference Plaintiffs' Objections to Defendants' Proposed ATS Instruction I.A.3.a (Summary Execution) Plaintiffs' Theory of Piercing on Aiding and Abetting.

There is no requirement that "SPDC knew that the Nigerian Government had the ability to carry its intention into effect," since there is not even any requirement that the perpetrator had such ability. See Plaintiffs' Objection to Defendants' Proposed Instruction on Assault (Conduct of Nigerian Government).

Plaintiffs' Objections to Defendants' Proposed Instruction I.A.2.b. Plaintiffs' Theory of Agency

Plaintiffs incorporate by reference Plaintiffs' Objections to Defendants' Proposed ATS Instruction I.A.2.b (Summary Execution) Plaintiffs' Theory of Piercing on Agency.

b. Plaintiffs' Theory of Agency

In order to prove SPDC willfully participated in the Nigerian Government's violation of Nigerian law under plaintiffs' agency theory, plaintiffs must prove each of the following elements:

First, SPDC and the Nigerian Government entered into an agreement that intended that SPDC would knowingly assist the Nigerian Government in violating Nigerian law.

Second, SPDC and the Nigerian Government acted for all intents and purposes as one in violating Nigerian law, or that SPDC controlled every action of the Nigerian Government in violating Nigerian law.

If you find that plaintiffs have failed to prove any of the above elements, you must find in favor of defendants on this theory.

Plaintiffs' Objections to Defendants' Proposed Instruction I.A.2.b. Plaintiffs' Theory of Agency

Plaintiffs incorporate by reference Plaintiffs' Objections to Defendants' Proposed ATS Instruction I.A.2.b (Summary Execution) Plaintiffs' Theory of Piercing on Agency.

c. Plaintiffs' Theory of Conspiracy

Plaintiffs allege that defendants conspired indirectly, through SPDC, and directly, with the Nigerian Government to violate Nigerian law.

(1) Plaintiffs' Indirect Theory of Conspiracy

With respect to plaintiffs' indirect theory of conspiracy, plaintiffs contend that SPDC conspired with the Nigerian Government to violate Nigerian law:

In order to prove that SPDC willfully participated in the Nigerian Government's violation of Nigerian law under plaintiffs' conspiracy theory, plaintiffs must prove each of the following elements:

First, SPDC had the intent to participate in a conspiracy with the Nigerian Government to violate Nigerian law.

Second, SPDC and the Nigerian Government both intended, or had a common purpose, to cause injury by violating Nigerian law. For a common purpose to exist, there must have been an understanding or arrangement between SPDC and the Nigerian Government amounting to an agreement that they would violate Nigerian law.

Third, SPDC and the Nigerian Government each performed acts in furtherance of the conspiracy to violate Nigerian law.

If you find that plaintiffs have failed to prove any of the above elements, you must find in favor of defendants on this theory. If, however, you find that SPDC conspired with the Nigerian Government to violate Nigerian law, you must then decide if defendants are liable for SPDC's conduct under one of plaintiffs' five theories below in the section entitled "Defendants' Alleged Willful Participation in SPDC's Conduct".

Plaintiffs' Objections to Defendants' Proposed Instruction I.A.2.c.(1) Plaintiffs' Theory of Indirect Conspiracy

Plaintiffs incorporate by reference Plaintiffs' Objections to Defendants' Proposed ATS Instruction I.A.2.c.(1) (Summary Execution) Plaintiffs' Theory of Indirect Conspiracy.

(2) Plaintiffs' Direct Theory of Conspiracy

With respect to plaintiffs' direct theory of conspiracy, plaintiffs contend that defendants directly conspired with the Nigerian Government to violate Nigerian law.

In order to prove that defendants willfully participated in the Nigerian Government's violation of Nigerian law under plaintiffs' conspiracy theory, plaintiffs must prove each of the following elements:

First, defendants had the intent to participate in a conspiracy with the Nigerian Government to violate Nigerian law.

Second, defendants and the Nigerian Government both intended, or had a common purpose, to cause injury by violating Nigerian law. For a common purpose to exist, there must have been an understanding or arrangement between defendants and the Nigerian Government amounting to an agreement that they would violate Nigerian law.

Third, defendants and the Nigerian Government performed acts in furtherance of the conspiracy to violate Nigerian law.

If you find that plaintiffs have failed to prove any of the above elements, you must find in favor of defendants on this theory.

Plaintiffs' Objections to Defendants' Proposed Instruction I.A.2.c.(2) Plaintiffs' Direct Theory of Conspiracy.

Plaintiffs incorporate by reference Plaintiffs' Objections to Defendants' Proposed ATS Instruction I.A.2.c.(2) (Summary Execution) Plaintiffs' Theory of Indirect Conspiracy.

d. Plaintiffs' Theory of Ratification

In order to prove SPDC willfully participated in the Nigerian Government's violation of Nigerian law under plaintiffs' ratification theory, plaintiffs must prove each of the following elements:

First, the Nigerian Government was acting on behalf of SPDC in violating Nigerian law. If the Nigerian Government was acting on its own behalf, or on behalf of

anyone other than SPDC, SPDC cannot be liable for the Nigerian Government's unlawful conduct.

Second, SPDC knew about the Nigerian Government's unlawful conduct. SPDC must have had full knowledge of all the material circumstances surrounding the Nigerian Government's conduct in violating Nigerian law.

Third, SPDC ratified the Nigerian Government's unlawful conduct. Ratification here means that SPDC willingly affirmed the prior act of the Nigerian Government. There can be no ratification unless SPDC could have authorized the Nigerian Government to do the act in the first instance.

If you find that plaintiffs have failed to prove any of the above elements, you must find in favor of defendants on this theory.

Plaintiffs' Objections to Defendants' Proposed Instruction I.A.2.d. Plaintiffs' Theory of Ratification

Plaintiffs incorporate by reference Plaintiffs' Objections to Defendants' Proposed ATS Instruction I.A.2.d (Summary Execution) Plaintiffs' Theory of Indirect Conspiracy.

e. Plaintiffs' Theory of Joint Venture

In order to prove SPDC willfully participated in the Nigerian Government's violation of Nigerian law under plaintiffs' joint venture theory, plaintiffs must prove each of the following elements:

First, SPDC and the Nigerian Government entered into a specific agreement to carry on an enterprise whose purpose was to violate Nigerian law, from which they sought to profit.

Second, SPDC and the Nigerian Government each intended to be joint venturers in a venture intended for violating Nigerian law.

Third, SPDC and the Nigerian Government each contributed either property, financing, skill, knowledge or effort to violate Nigerian law.

Fourth, both SPDC and the Nigerian Government each had a degree of joint control over the venture for violating Nigerian law.

Fifth, SPDC and the Nigerian Government shared in both the profits and losses of the venture through the violation of Nigerian law

If you find that plaintiffs have failed to prove any of the above elements, you must find in favor of defendants on this theory.

Plaintiffs' Objections to Defendants' Proposed Instruction I.A.2.e. Plaintiffs' Theory of Joint Venture

Plaintiffs incorporate by reference Plaintiffs' Objections to Defendants' Proposed ATS Instruction I.A.2.e (Summary Execution) Plaintiffs' Theory of Joint Venture.

f. Plaintiffs' Theory of Instigation or Inducement of Wrongful Acts

In order to prove SPDC willfully participated in the Nigerian Government's violation of Nigerian law under plaintiffs' instigation or inducement of wrongful acts theory, plaintiffs must prove each of the following elements:

First, SPDC intentionally induced the Nigerian Government to violate Nigerian law.

Second, SPDC used wrongful means to induce the Nigerian Government to violate Nigerian law. Wrongful means includes physical violence, fraud or misrepresentation, or economic pressure.

Third, but for SPDC's inducement, the Nigerian Government would not have violated Nigerian law.

If you find that plaintiffs have failed to prove any of the above elements, you must find in favor of defendants on this theory.

Plaintiffs' Objections to Defendants' Proposed Instruction I.A.2.f. Plaintiffs' Theory of Instigation or Inducement of Wrongful Acts

Plaintiffs incorporate by reference Plaintiffs' Objections to Defendants' Proposed ATS Instruction I.A.2.f (Summary Execution) Plaintiffs' Theory of Instigation or Inducement of Wrongful Acts.

g. Plaintiffs' Theory of Reckless Disregard

In order to prove SPDC willfully participated in the Nigerian Government's violation of Nigerian law under plaintiffs' reckless disregard theory, plaintiffs must prove each of the following elements:

First, SPDC either (a) acted to facilitate the Nigerian Government's violation of Nigerian law, or (b) intentionally failed to act to prevent the violation of Nigerian law where SPDC had a duty to plaintiffs to prevent such violations.

Second, SPDC's conduct created an unjustifiably high risk of violating Nigerian law.

Third, this risk of violating Nigerian law was either known or so obvious that it should have been known to SPDC.

If you find that plaintiffs have failed to prove any of the above elements, you must find in favor of defendants on this theory.

Plaintiffs' Objections to Defendants' Proposed Instruction I.A.2.g. Plaintiffs' Theory of Reckless Disregard

Plaintiffs incorporate by reference Plaintiffs' Objections to Defendants' Proposed ATS Instruction I.A.2.g (Summary Execution) Plaintiffs' Theory of Reckless Disregard.

h. Plaintiffs' Theory of Joint Enterprise

In order to prove SPDC willfully participated in the Nigerian Government's violation of Nigerian law under plaintiffs' joint enterprise theory, plaintiffs must prove each of the following elements:

First, SPDC and the Nigerian Government united to achieve a common purpose in violating Nigerian law.

Second, SPDC and the Nigerian Government both had express or implied authority to act for all with respect to the control of the means or agencies employed to execute the plan of violating Nigerian law. Essential to the finding of a joint enterprise is the equal right of each member to direct or control the other in violating Nigerian law.

If you find that plaintiffs have failed to prove any of the above elements, you must find in favor of defendants on this theory.

Plaintiffs' Objections to Defendants' Proposed Instruction I.A.2.h Plaintiffs' Theory of Joint Enterprise

Plaintiffs incorporate by reference Plaintiffs' Objections to Defendants' Proposed ATS Instruction I.A.2.h. (Summary Execution) Plaintiffs' Theory of Joint Enterprise.

i. Plaintiffs' Theory of Inherent Danger

In order to prove SPDC willfully participated in the Nigerian Government's violation of Nigerian law under plaintiffs' inherent danger theory, plaintiffs must prove each of the following elements:

First, SPDC hired the Nigerian Government as an independent contractor to violate Nigerian law.

Second, the Nigerian Government engaged in inherently dangerous activities for SPDC that SPDC knew or had reason to know would be part of the Nigerian Government's work to violate Nigerian law.

Third, SPDC failed to take reasonable precautions against such danger and in avoiding a violation of Nigerian law.

Fourth, the Nigerian Government's activities in violating Nigerian law for SPDC must have been on public property, not private premises.

If you find that plaintiffs have failed to prove any of the above elements, you must find in favor of defendants on this theory.

Plaintiffs' Objections to Defendants' Proposed Instruction I.A.2.i. Plaintiffs' Theory of Inherent Danger

Plaintiffs incorporate by reference Plaintiffs' Objections to Defendants' Proposed ATS Instruction I.A.2.i. (Summary Execution) Plaintiffs' Theory of Inherent Danger.

* * *

If plaintiffs have not proven that SPDC willfully participated in the Nigerian Government's violation of Nigerian law by proving each element of at least one of plaintiffs' theories described above, you must find in favor of defendants on plaintiffs' claim for violation of Nigerian law.

Plaintiffs' Objections to Defendants' Proposed "Wrap-up" Instruction (Below *)**

Plaintiffs incorporate by reference Plaintiffs' Objections to Defendants' Proposed "Wrap-up" Instruction (Below ***) (Summary Execution)

3. Defendants' Alleged Willful Participation in SPDC's Conduct⁴

If you find that plaintiffs have proven that SPDC willfully participated in the Nigerian Government's violation of Nigerian law by proving each element of one of the above described plaintiffs' theories, you must now decide whether defendants willfully participated in SPDC's alleged participation in the Nigerian Government's violation of Nigerian law.

Typically, a parent corporation is not liable for the acts of its subsidiaries. Only under extraordinary circumstances will a parent be held liable for the acts of its subsidiaries. Plaintiffs do not contend that defendants are liable for SPDC's conduct simply because of their ownership relationship to SPDC. An ownership relationship between two corporations neither establishes nor precludes liability. Thus, defendants cannot be held liable for SPDC's conduct unless plaintiffs can prove each of the elements of one of the following plaintiffs' legal theories.

Plaintiffs' Objections to Defendants' Proposed Instruction I.A.3. Defendants' Alleged Willful Participation in SPDC's Conduct

Plaintiffs incorporate by reference Plaintiffs' Objections to Defendants' Proposed ATS Instruction I.A.3. Defendants' Alleged Willful Participation in SPDC's Conduct

a. Plaintiffs' Theory of Aiding and Abetting

In order to prove that each of the defendants willfully participated in SPDC's conduct under plaintiffs' aiding and abetting theory, plaintiffs must prove each of the following elements separately with respect to each defendant:

⁴ (See Defs.' R&O Stmt. Part I.C.)

First, defendants intended that SPDC violate Nigerian law. If you find that defendants only had knowledge that SPDC was going to violate Nigerian law and they failed to prevent that violation, you may not conclude that defendants aided and abetted SPDC.

Second, defendants knew that SPDC had the ability to carry its intention into effect.

Third, defendants knowingly assisted SPDC in violating Nigerian law.

If you find that plaintiffs have failed to prove any of the above elements, you must find in favor of defendants on this theory.

Plaintiffs' Objections to Defendants' Proposed Instruction I.A.3.a. Plaintiffs' Theory of Aiding and Abetting

Plaintiffs incorporate by reference Plaintiffs' Objections to Defendants' Proposed Instruction I.A.2.a. (Assault) Plaintiffs' Theory of Aiding and Abetting

b. Plaintiffs' Theory of Agency

In order to prove that each of the defendants willfully participated in SPDC's conduct under plaintiffs' agency theory, plaintiffs must prove each of the following elements separately with respect to each defendant:

First, defendants and SPDC entered into an agreement that intended that defendants would knowingly assist the SPDC in violating Nigerian law.

Second, defendants and SPDC acted for all intents and purposes as one in knowingly assisting the Nigerian Government to violate Nigerian law, or that defendants controlled every action of SPDC in knowingly assisting the Nigerian Government to violate Nigerian law.

If you find that plaintiffs have failed to prove any of the above elements, you must find in favor of defendants on this theory.

Plaintiffs' Objections to Defendants' Proposed Instruction I.A.3.b Plaintiffs' Theory of Agency

Plaintiffs incorporate by reference Plaintiffs' Objections to Defendants' Proposed ATS Instruction I.A.3.c (Summary Execution) Plaintiffs' Theory of Agency.

c. Plaintiffs' Theory of Conspiracy

In order to prove that each of the defendants willfully participated in SPDC's conduct under plaintiffs' conspiracy theory, plaintiffs must prove each of the following elements separately with respect to each defendant:

First, defendants had the intent to participate in a conspiracy with the SPDC to violate Nigerian law.

Second, defendants and SPDC both intended, or had a common purpose, to cause injury by violating Nigerian law. For a common purpose to exist, there must have been an understanding or arrangement between defendants and SPDC amounting to an agreement that they would violate Nigerian law.

Third, defendants and SPDC performed acts in furtherance of the conspiracy to violate Nigerian law.

If you find that plaintiffs have failed to prove any of the above elements, you must find in favor of defendants on this theory.

Plaintiffs' Objections to Defendants' Proposed Instruction I.A.3.c Plaintiffs' Theory of Conspiracy

Plaintiffs incorporate by reference Plaintiffs' Objections to Defendants' Proposed ATS Instruction I.A.3.d (Summary Execution) Plaintiffs' Theory of Conspiracy.

d. Plaintiffs' Theory of Ratification

In order to prove that each of the defendants willfully participated in SPDC's conduct under plaintiffs' ratification theory, plaintiffs must prove each of the following elements separately with respect to each defendant:

First, SPDC was acting on behalf of one or both defendants in violating Nigerian law. If SPDC did not violate Nigerian law or was acting on its own behalf or on behalf of anyone other than defendants in violating Nigerian law, defendants cannot be liable for SPDC's conduct.

Second, defendants knew about SPDC's conduct. Defendants must have had full knowledge of all the material circumstances surrounding SPDC's conduct in violating Nigerian law.

Third, defendants ratified SPDC's unlawful conduct. Ratification here means that defendants willingly affirmed the prior acts of SPDC.

If you find that plaintiffs have failed to prove any of the above elements, you must find in favor of defendants on this theory.

Plaintiffs' Objections to Defendants' Proposed Instruction I.A.3.d Plaintiffs' Theory of Ratification

Plaintiffs incorporate by reference Plaintiffs' Objections to Defendants' Proposed ATS Instruction I.A.3.e (Summary Execution) Plaintiffs' Theory of Ratification.

e. Plaintiffs' Theory of Joint Venture

In order to prove defendants willfully participated in SPDC's violation of the Nigerian law under plaintiffs' joint venture theory, each plaintiff must prove each of the following elements:

First, defendants and SPDC entered into a specific agreement to carry on an enterprise whose purpose was to violate Nigerian law, from which they sought to profit.

Second, defendants and SPDC each intended to be joint venturers in a venture intended for violating Nigerian law.

Third, defendants and SPDC each contributed either property, financing, skill, knowledge or effort to violate Nigerian law.

Fourth, both defendants and SPDC each had a degree of joint control over the venture for violating Nigerian law.

Fifth, defendants and SPDC shared in both the profits and losses of the venture through the violation of Nigerian law.

If you find that plaintiffs have failed to prove any of the above elements, you must find in favor of defendants on this theory.

Plaintiffs' Objections to Defendants' Proposed Instruction I.A.3.e. Plaintiffs' Theory of Joint Venture

Plaintiffs incorporate by reference Plaintiffs' Objections to Defendants' Proposed ATS Instruction I.A.2.e (Summary Execution) Plaintiffs' Theory of Joint Venture

Plaintiffs object to defendants' references to "international law".

* * *

In summary, you may not find defendants liable unless plaintiffs have proven each of the following elements:

First, the Nigerian Government violated Nigerian law;

Second, SPDC willfully participated in that particular unlawful conduct of the Nigerian Government under one of plaintiffs' nine legal theories I described in the section entitled "SPDC's Alleged Willful Participation in the Nigerian Government's Conduct" (Part ____); and

Third, defendants willfully participated in SPDC's alleged participation in the Nigerian Government's violation of Nigerian law under one of plaintiffs' five legal theories I described in the section entitled "Defendants' Alleged Willful Participation in SPDC's Conduct" (Part ____).

If any plaintiffs have failed to prove any one of those elements you must find in favor of defendants on that claim for violation of Nigerian law.

Plaintiffs' Objections to Defendants' Proposed "Wrap-up" Instruction (Below *)**
Plaintiffs incorporate by reference Plaintiffs' Objections to Defendants' Proposed "Wrap-up" Instruction (Below ***) (Summary Execution)

SOURCES: *Okuarume v. Obabokor*, [1965] N.S.C.C. 286, 286-87; Nigerian Evidence Act (1990), Cap. 112, § 138(1); Nigerian Criminal Code Act § 252; G. Kodilinye, Nigerian Law of Torts 12-14 (1996); *Obaseki v. Oyakhire*, [1987] 1 Q.L.R.N. 105, 114, 118-19; Federal Constitution of Nigeria § 194(b); *Eze v. George*, [1993] 2 N.W.L.R. 86, 90; *Buje v. State*, [1991] 4 N.W.L.R. 287; Nigerian Criminal Code Act, §§ 516-18 O'Malley et al., Federal Jury Practice and Instructions §§ 121.01, 108.05; Rome Statute of the International Criminal Court, art. 25(3)(c)-(d), July 17, 1998, 37 I.L.M. 999; *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 275-77 (2d Cir. 2007) (Katzmann, J., concurring). *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, Judgment, ¶ 233-34 (Dec. 10, 1998); *Prosecutor v. Vasiljevic*, Case No. IT-98-32-A, Judgment, ¶ 102 (Feb. 25, 2004); *Prosecutor v. Tadic*, ICTY-94-1, ¶ 688 (May 7, 1997); *Prosecutor v. Tadic*, Case No. IT-94-1-A, Judgment, ¶ 229 (July 15, 1999); *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, Judgment, 1986 I.C.J.

REP. 392, June 27, 1986, ¶¶ 115-16; Sand et al., *Modern Federal Jury Instructions*, Vol. 4, Instr. 72-2; Restatement (Second) of Agency §§ 82, 84-85, 91; *Larsen Chelsey Realty Co. v. Larsen*, 232 Conn. 480, 505-06 (Ct. 1994); *Ansonia v. Cooper*, 64 Conn. 536, 544 (1894); *Prosecutor v. Tadic*, Case No. IT-94-1-A, Judgment, ¶¶ 31, 195-96, 227(iii) (July 15, 1999); *Prosecutor v. Blagojevic*, Case No. IT-02-60-T, Judgment, ¶ 703 (Jan. 17, 2005); *Prosecutor v. Krnojelac*, Case No. IT-97-25-T, Judgment, ¶ 80 (Mar. 15, 2002); *Flammia v. Mite Corp.*, 401 F. Supp. 1121, 1127 (E.D.N.Y. 1975), *aff'd without opinion*, 553 F.2d 93 (2d Cir. 1977); *ITEL Containers Int'l Corp. v. Atlantrafik Express Service, Ltd.*, 909 F.2d 698, 701 (2d Cir. 1990); *Int'l Equity Invs., Inc. v. Opportunity Equity Partners, Ltd.*, 472 F. Supp. 2d 544, 552 (S.D.N.Y. 2007); *Fairbairn v. State*, 107 A.D.2d 864, 864-65 (N.Y. App. Div. 1985); *NYC Mgmt. Group Inc. v. Brown-Miller*, No. 03 Civ. 2617, 2004 U.S. Dist. LEXIS 8652, at *23 (S.D.N.Y. May 13, 2004); *Perkins Sch. for the Blind v. Maxi-Aids, Inc.*, 274 F. Supp. 2d 319, 328 (E.D.N.Y. 2003); *Tropea v. Shell Oil Co.*, 307 F.2d 757, 771-72 (2d Cir. 1962); *Rosenberg v. Equitable Life Assurance Soc.*, 79 N.Y.2d 663, 668-69 (N.Y. 1992); Restatement [Second] of Torts § 427; *Farmer v. Brennan*, 511 U.S. 825, 836 (1994); Restatement (Second) of Torts § 500, p 587 (1963-1964); *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47 (2007); *Musa v. Ehidihamhen*, [1994] 3 N.W.L.R. 544, 557 (C.A.); *Marina Nominees Ltd. v. Fed. Bd. of Inland Revenue*, [1986] N.W.L.R. 48, 55-58 (S.C.); *Union Beverages Ltd. v. Pepsicola Int'l Ltd.*, [1994] 3 N.W.L.R. 1, 22 (S.C.) (Mohammed, J., concurring); *Woolfson v. Strathclyde Reg'l Council*, [1978] 38 P. & C.R. 521; *Gilford Motor Co. v. Horne*, [1933] All E.R. 109 (A.C.); *United States v. Bestfoods*, 542 U.S. 51, 61 (1998); *Kingston Dry Dock Co. v. Lake Champlain Transp. Co.*, 31 F.2d 265, 267 (2d Cir. 1929); O'Malley et al., *Federal Jury Practice and Instructions* §§ 103.13, 108.05.

B. Battery⁵

Ken Wiwa, on behalf of Ken Saro-Wiwa, contends that defendants are liable for battery against Ken Saro-Wiwa, Blessing Kpuinen, individually and on behalf of John Kpuinen contends that defendants are liable for battery against her and John Kpuinen, and Owens Wiwa and Karalolo Kogbara each contends that defendants are liable for battery against the, individually because (1) the Nigerian Government committed unlawful battery against Ken Saro-Wiwa, Blessing Kpuinen, John Kpuinen, Owens Wiwa, and Karalolo Kogbara, (2) SPDC willfully participated in the alleged

⁵ (See Defs.' R&O Stmt. Part I.B.1.)

unlawful battery against those individuals by the Nigerian Government, and (3) defendants willfully participated in SPDC's alleged participation in those batteries.

Under Nigerian law, a stricter standard of proof applies to this claim. Plaintiffs must satisfy their burden of proof for this claim by proving beyond a reasonable doubt each of the elements of this claim.

In order to prove this claim against defendants, plaintiffs must prove each of the following elements beyond a reasonable doubt:

First, plaintiffs must prove that the Nigerian Government unlawfully committed battery against Ken Saro-Wiwa, Blessing Kpuinen, John Kpuinen, Owens Wiwa, and Karalolo Kogbara. If plaintiffs cannot prove that the Nigerian Government unlawfully committed battery against one or more of these individuals, you must find in favor of defendants.

Second, if you find, however, that plaintiffs each have met their burden of proving that the Nigerian Government unlawfully committed battery against one or more of those individuals, you must then decide, under one or more of the legal theories described in the section entitled "SPDC's Alleged Willful Participation in the Nigerian Government's Conduct" (Part __), whether SPDC willfully participated in the alleged batteries against those individuals by the Nigerian Government. If you find that SPDC did not willfully participate in the alleged batteries against those individuals by the Nigerian Government under any of those theories, you must find in favor of defendants.

Third, if you find, however, that SPDC did willfully participate in the alleged batteries by the Nigerian Government, you must then decide if each defendant willfully participated in SPDC's alleged participation in those batteries under one or more

of the legal theories described in the section entitled “Defendants’ Alleged Willful Participation in SPDC’s Conduct” (Part __). If you find that defendants did not willfully participate in SPDC’s alleged participation, you must find in favor of defendants.

1. The Nigerian Government’s Conduct

In order for you to find that the Nigerian Government committed battery in violation of Nigerian law, plaintiffs must prove each of the following elements separately with respect to each individual plaintiff:

First, the Nigerian Government intentionally or negligently used physical force on the plaintiff without legal justification. In determining whether the Nigerian Government intended to commit unlawful battery, you may infer a person’s intent from surrounding circumstances. You may consider any statement made or act done or omitted by a party whose intent is in issue, and all other facts and circumstances which indicate the party’s state of mind. You may consider it reasonable to draw the inference and find that a person intends the natural and probable consequences of acts knowingly done or knowingly committed. It is for you to decide what facts have been established by the evidence.

Second, the force was used without the consent of that plaintiff.

You may find that the Nigerian Government committed unlawful battery only if plaintiffs have proven all of the elements listed above. If they have not proven all of the elements of this claim, their claim for battery must fail and you must find in favor of defendants.

Plaintiffs’ Objections to Defendants’ Proposed Instruction on Battery I.B. and I.B.1 (Conduct of Nigerian Government)

1. Plaintiffs object to the phrase “without legal justification.” Presumably this is designed to cover some affirmative defense, but no affirmative defenses are instructed

here. This term is not defined here, and the jury has no assistance in determining whether a battery may have been legally justified. Since there are no facts here that would justify any affirmative defense, this phrase is superfluous and confusing.

2. SPDC's Alleged Willful Participation in the Nigerian Government's Conduct

[REPEAT Alleged Willful Participation in the Nigerian Government's Conduct instruction from Part ____.]

a. Plaintiffs' Theory of Aiding and Abetting

[REPEAT Aiding and Abetting instruction from Part ____.]

b. Plaintiffs' Theory of Agency

[REPEAT Agency instruction from Part ____.]

c. Plaintiffs' Theory of Conspiracy

[REPEAT Conspiracy instruction from Part ____.]

d. Plaintiffs' Theory of Ratification

[REPEAT Ratification instruction from Part ____.]

e. Plaintiffs' Theory of Joint Venture

[REPEAT Joint Venture instruction from Part ____.]

f. Plaintiffs' Theory of Instigation or Inducement of Wrongful Acts

[REPEAT Instigation or Inducement of Wrongful Acts instruction from Part ____.]

g. Plaintiffs' Theory of Reckless Disregard

[REPEAT Reckless Disregard instruction from Part ____.]

h. Plaintiffs' Theory of Joint Enterprise

[REPEAT Joint Enterprise instruction from Part ____.]

i. Plaintiffs' Theory of Inherent Danger

[REPEAT Inherent Danger instruction from Part ____.]

3. Defendants' Alleged Willful Participation in SPDC's Conduct

[REPEAT Defendants' Alleged Willful Participation in SPDC's Conduct instruction from Part ____.]

a. Plaintiffs' Theory of Aiding and Abetting

[REPEAT Aiding and Abetting instruction from Part ____.]

b. Plaintiffs' Theory of Agency

[REPEAT Agency instruction from Part ____.]

c. Plaintiffs' Theory of Conspiracy

[REPEAT Conspiracy instruction from Part ____.]

d. Plaintiffs' Theory of Ratification

[REPEAT Ratification instruction from Part ____.]

e. Plaintiffs' Theory of Joint Venture

[REPEAT Joint Venture instruction from Part ____.]

SOURCES: *Okuarume v. Obabokor*, [1965] N.S.C.C. 286, 286-87; Nigerian Evidence Act (1990), Cap. 112, § 138(1); *Ndibe v. Ndibe*, [1998] 5 N.W.L.R. 632, 647 (C.A.); *Okekearu v. Tanko*, [2002] 15 N.W.L.R. 657, 660, 665-67 (S.C.); Federal Constitution of Nigeria § 194(b); O'Malley et al., Federal Jury Practice and Instructions §§ 121.01, 108.05.

C. Wrongful Death

Ken Wiwa, on behalf of Ken Saro-Wiwa, contends that defendants are liable for the death of Ken Saro-Wiwa, and Blessing Kpuinen, on behalf of John Kpuinen, contends that defendants are liable for the death of John Kpuinen, because (1) the Nigerian Government unlawfully caused the deaths of Ken Saro-Wiwa and John Kpuinen, (2) SPDC willfully participated in those unlawful executions by the Nigerian Government, and (3) defendants willfully participated in SPDC's alleged participation in those unlawful executions.

In order to prove this claim against defendants, plaintiffs must prove each of the following elements:

First, plaintiffs must prove that the Nigerian Government unlawfully caused the deaths of Ken Saro-Wiwa and John Kpuinen. If plaintiffs cannot prove that the Nigerian Government unlawfully caused the deaths of one or more of these individuals, you must find in favor of defendants.

Second, if you find, however, that plaintiffs each have met their burden of proving that the Nigerian Government unlawfully caused the deaths of one or more of those individuals, you must then decide, under one or more of the legal theories described in the section entitled "SPDC's Alleged Willful Participation in the Nigerian Government's Conduct" (Part __), whether SPDC willfully participated in the alleged unlawful executions of those individuals by the Nigerian Government. If you find that SPDC did not willfully participate in the alleged unlawful executions by the Nigerian Government under any of those theories, you must find in favor of defendants.

Third, if you find, however, that SPDC did willfully participate in the unlawful executions of those individuals by the Nigerian Government, you must then

decide if each defendant willfully participated in SPDC's alleged participation in the unlawful executions under one or more of the legal theories described in the section entitled "Defendants' Alleged Willful Participation in SPDC's Conduct" (Part __). If you find that defendants did not willfully participate in SPDC's alleged participation, you must find in favor of defendants.

1. The Nigerian Government's Conduct

In order for you to find that the Nigerian Government unlawfully caused the deaths of these individuals in violation of Nigerian law to establish plaintiffs' claim for wrongful death, plaintiffs must prove each of the following elements separately with respect to each individual plaintiff:

First, in executing Ken Saro-Wiwa and John Kpuinen, the Nigerian Government acted without legal justification and unlawfully caused the deaths of Ken Saro-Wiwa and John Kpuinen through a battery or negligent act.

Second, Ken Wiwa and/or Blessing Kpuinen suffered economic loss as a result of their deaths (*i.e.*, they were economically dependent on Ken Saro-Wiwa and John Kpuinen, respectively).

You may find that the Nigerian Government is responsible for the wrongful death of these individuals only if plaintiffs have proven all of the elements listed above. If they have not proven all of the elements of this claim, their claim for wrongful death must fail and you must find in favor of defendants.

If either Ken Wiwa or Blessing Kpuinen fail to prove that they suffered any economic loss as a result of the deaths of Ken Saro-Wiwa and John Kpuinen, then they have failed to establish their wrongful death claim, even if you find the Nigerian

Government unlawfully caused their death through a battery or negligent act. In that case, you must find in favor of defendants.

Plaintiffs' Objections to Defendants' Proposed Instruction on Wrongful Death (Conduct of Nigerian Government)

1. Plaintiffs object to the element that wrongful death involves action "without legal justification" and "unlawfully" causing death "through a battery or negligent act." According to the Fatal Accidents Act, the applicable Nigerian law, a wrongful death claim may be brought if death results from any tort. There is no requirement that the tort be "without legal justification" or "unlawful," and those terms are additionally confusing as they are not defined for the jury. *See* Laws of Eastern Nigeria, Fatal Accidents Act, ch. 52, § 3 (1961) ("whenever the death of a person shall be caused by a wrongful act, neglect or default of another person and the act, neglect or default is such as would, if death had not ensued, have entitled the person injured to maintain an action . . . then and in every case the person, who would have been liable if death had not ensued, shall be liable in an action for damages, notwithstanding the death of the person injured.")

2. Plaintiffs object to the notion that economic loss or dependence is an element of a wrongful death claim. No such element appears on the face of the statute. Laws of Eastern Nigeria, Fatal Accidents Act, ch. 52, §§ 3, 4 (1961). There is no support for the notion that this claim fails if economic dependence is not shown; for example, a defendants could be liable for punitive damages even if there is no economic dependence. Furthermore, the term "economic loss" is not defined here. In *Bowoto v. Chevron Corp.*, where Nigerian wrongful death law was applied, the Court instructed that compensable losses included the "monetary value" of the loss of "love, companionship, comfort, care, assistance, protection, affection, society, moral support"; for a spouse, "[t]he loss of the enjoyment of sexual relations"; and for a child, the loss of "training and guidance." XXX at 51.

2. SPDC's Alleged Willful Participation in the Nigerian Government's Conduct

[REPEAT Alleged Willful Participation in the Nigerian Government's Conduct instruction from Part ____.]

a. Plaintiffs' Theory of Aiding and Abetting

[REPEAT Aiding and Abetting instruction from Part ____.]

b. Plaintiffs' Theory of Agency

[REPEAT Agency instruction from Part ____.]

c. Plaintiffs' Theory of Conspiracy

[REPEAT Conspiracy instruction from Part ____.]

d. Plaintiffs' Theory of Ratification

[REPEAT Ratification instruction from Part ____.]

e. Plaintiffs' Theory of Joint Venture

[REPEAT Joint Venture instruction from Part ____.]

f. Plaintiffs' Theory of Instigation or Inducement of Wrongful Acts

[REPEAT Instigation or Inducement of Wrongful Acts instruction from Part ____.]

g. Plaintiffs' Theory of Reckless Disregard

[REPEAT Reckless Disregard instruction from Part ____.]

h. Plaintiffs' Theory of Joint Enterprise

[REPEAT Joint Enterprise instruction from Part ____.]

i. Plaintiffs' Theory of Inherent Danger

[REPEAT Inherent Danger instruction from Part ____.]

3. Defendants' Alleged Willful Participation in SPDC's Conduct

[REPEAT Defendants' Alleged Willful Participation in SPDC's Conduct instruction from Part ____.]

a. Plaintiffs' Theory of Aiding and Abetting

[REPEAT Aiding and Abetting instruction from Part ____.]

b. Plaintiffs' Theory of Agency

[REPEAT Agency instruction from Part ____.]

c. Plaintiffs' Theory of Conspiracy

[REPEAT Conspiracy instruction from Part ____.]

d. Plaintiffs' Theory of Ratification

[REPEAT Ratification instruction from Part ____.]

e. Plaintiffs' Theory of Joint Venture

[REPEAT Joint Venture instruction from Part ____.]

SOURCES: Laws of Eastern Nigeria, Fatal Accidents Act, ch. 52, §§ 2-3 (1961); *Omole & Sons Ltd. v. Adeyemo*, [1994] 4 N.W.L.R. 48, 64-67 (S.C.) (noting that earnings of decedent must be "strictly" proven and dismissing wrongful death claim because plaintiffs could not prove dependence or earnings).

D. Intentional Infliction of Emotional Distress⁶

Ken Wiwa, on behalf of Ken Saro-Wiwa, contends that defendants are liable for intentional infliction of emotional distress against Ken Saro-Wiwa, Blessing Kpuinen, individually and on behalf of John Kpuinen contends that defendants are liable for intentional infliction of emotional distress against her and John Kpuinen, and Owens Wiwa and Karalolo Kogbara each contends that defendants are liable for intentional infliction of emotional distress against them individually because (1) SPDC intentionally inflicted emotional distress against Ken Saro-Wiwa, Blessing Kpuinen, John Kpuinen, Owens Wiwa, and Karalolo Kogbara, and (2) defendants willfully participated in SPDC's alleged intentional infliction of emotional distress against each of those individuals.

In order to prove this claim against defendants, plaintiffs must prove each of the following elements:

⁶ (See Defs.' R&O Stmt. Part I.B.2.)

First, plaintiffs must prove that SPDC intentionally inflicted emotional distress on Ken Saro-Wiwa, Blessing Kpuinen, John Kpuinen, Owens Wiwa, and Karalolo Kogbara. If plaintiffs cannot prove that SPDC intentionally inflicted emotional distress on one or more of these individuals, you must find in favor of defendants.

Second, if you find, however, that plaintiffs each have met their burden of proving that SPDC intentionally inflicted emotional distress on plaintiffs, you must then decide, under one or more of the legal theories I will describe below in the section entitled “Defendants’ Alleged Willful Participation in SPDC’s Conduct”, whether each defendant willfully participated in the intentional infliction of emotional distress against each of those individuals by SPDC. If you find that defendants did not willfully participate in the intentional infliction of emotional distress against each of those individuals by SPDC under any of those theories, you must find in favor of defendants.

1. SPDC’s Alleged Conduct

In order for you to find that SPDC intentionally inflicted emotional distress on plaintiffs, plaintiffs must prove each of the following elements separately with respect to each individual plaintiff:

First, SPDC’s conduct was extreme and outrageous. In order for you to find that SPDC’s conduct was extreme and outrageous, it must have gone beyond all possible bounds of decency, and it must be regarded as atrocious, and utterly intolerable in a civilized community. Outrageous conduct does not include trivialities such as indignities, annoyances, hurt feelings, or bad manners that a reasonable person is expected to endure.

Second, SPDC intended to cause severe emotional distress, or acted with reckless disregard of the substantial probability that the above named persons would

suffer severe emotional distress as a result of SPDC's conduct. For SPDC to have acted with reckless disregard, it must have been acting with knowledge that severe emotional distress would probably result from its actions, or it was acting while giving little or no thought to the probable effects of its conduct.

Third, the above named individuals actually suffered severe emotional distress. Emotional distress includes suffering, anguish, fright, horror, nervousness, grief, anxiety, worry, shock, humiliation, and shame. "Severe emotional distress" is not mild or brief; it must be so substantial or long lasting that no reasonable person in a civilized society should be expected to bear it. Plaintiffs must show that the alleged conduct caused mental or physical symptoms that indicate the presence of emotional distress.

Fourth, SPDC actually caused such severe emotional distress.

You may find that SPDC intentionally inflicted emotional distress with respect to each plaintiff only if that plaintiff has proven all of the elements listed above. If any plaintiff fails to prove all of the elements of this claim, their claim for intentional infliction of emotional distress must fail and you must find in favor of defendants.

Plaintiffs' Objections to Defendants' Proposed Instruction on Intentional Infliction of Emotional Distress I.D and I.D.1.

Plaintiffs object to the notion that severe emotional distress requires manifestation by physical or mental harm. This requirement is not found in the New York pattern instructions or supported by New York law.

2. Defendants' Alleged Willful Participation in SPDC's Conduct

Typically, a parent corporation is not liable for the acts of its subsidiaries. Only under extraordinary circumstances will a parent be held liable for the acts of its subsidiaries. Plaintiffs do not contend that defendants are liable for SPDC's conduct simply because of their ownership relationship to SPDC. An ownership relationship

between two corporations neither establishes nor precludes liability. Thus, defendants cannot be held liable for SPDC's conduct unless plaintiffs can prove each of the elements of one of the following plaintiffs' legal theories.

a. Plaintiffs' Theory of Aiding and Abetting

In order to prove that each of the defendants willfully participated in SPDC's conduct under plaintiffs' aiding and abetting theory, plaintiffs must prove each of the following elements separately with respect to each defendant:

First, defendants intended that SPDC violate Nigerian law. If you find that defendants only had knowledge that SPDC was going to violate Nigerian law and they failed to prevent that violation, you may not conclude that defendants aided and abetted SPDC.

Second, defendants knew that SPDC had the ability to carry its intention into effect.

Third, defendants knowingly assisted SPDC in violating Nigerian law.

If you find that plaintiffs have failed to prove any of the above elements, you must find in favor of defendants on this theory.

b. Plaintiffs' Theory of Agency

In order to prove that each of the defendants willfully participated in SPDC's conduct under plaintiffs' agency theory, plaintiffs must prove each of the following elements separately with respect to each defendant:

First, defendants and SPDC entered into an agreement that intended that defendants would knowingly assist the SPDC in violating Nigerian law.

Second, defendants and SPDC acted for all intents and purposes as one in violating Nigerian law, or that defendants controlled every action of SPDC in violating Nigerian law.

If you find that plaintiffs have failed to prove any of the above elements, you must find in favor of defendants on this theory.

c. Plaintiffs' Theory of Conspiracy

In order to prove that each of the defendants willfully participated in SPDC's alleged unlawful conduct under plaintiffs' conspiracy theory, plaintiffs must prove each of the following elements separately with respect to each defendant:

First, defendants had the intent to participate in a conspiracy with the SPDC to violate Nigerian law.

Second, defendants and SPDC both intended, or had a common purpose, to cause injury by violating Nigerian law. For a common purpose to exist, there must have been an understanding or arrangement between defendants and SPDC amounting to an agreement that they would violate Nigerian law.

Third, defendants and SPDC performed acts in furtherance of the conspiracy to violate Nigerian law.

If you find that plaintiffs have failed to prove any of the above elements, you must find in favor of defendants on this theory.

d. Plaintiffs' Theory of Ratification

In order to prove that each of the defendants willfully participated in SPDC's alleged unlawful conduct under plaintiffs' ratification theory, plaintiffs must prove each of the following elements separately with respect to each defendant:

First, SPDC was acting on behalf of one or both defendants in violating Nigerian law. If SPDC did not violate Nigerian law or was acting on its own behalf or on behalf of anyone other than defendants in violating Nigerian law, defendants cannot be liable for SPDC's conduct.

Second, defendants knew about SPDC's conduct. Defendants must have had full knowledge of all the material circumstances surrounding SPDC's conduct in violating Nigerian law.

Third, defendants ratified SPDC's unlawful conduct. Ratification here means that defendants willingly affirmed the prior acts of SPDC.

If you find that plaintiffs have failed to prove any of the above elements, you must find in favor of defendants on this theory.

e. Plaintiffs' Theory of Joint Venture

In order to prove defendants willfully participated in SPDC's violation of Nigerian law under plaintiffs' joint venture theory, each plaintiff must prove each of the following elements:

First, defendants and SPDC entered into a specific agreement to carry on an enterprise whose purpose was to violate Nigerian law, from which they sought to profit.

Second, defendants and SPDC each intended to be joint venturers in a venture intended for violating Nigerian law.

Third, defendants and SPDC each contributed either property, financing, skill, knowledge or effort to violate Nigerian law.

Fourth, both defendants and SPDC each had a degree of joint control over the venture for violating Nigerian law.

Fifth, defendants and SPDC shared in both the profits and losses of the venture through the violation of Nigerian law.

If you find that plaintiffs have failed to prove any of the above elements, you must find in favor of defendants on this theory.

Plaintiffs' Objections to Defendants' Proposed Instructions on Theories of Liability for Intentional Infliction of Emotional Distress: I.D.2.a – d.

For all theories of liability ie. Defendants Proposed Instructions D.2.a – d., , Plaintiffs incorporate all objections as set out in Plaintiffs objections to defendants proposed instructions I.A.3.a – d. (Assault)

* * *

In summary, you may not find defendants liable unless plaintiffs have proven each of the following elements:

First, SPDC violated Nigerian law; and

Second, defendants willfully participated in that particular unlawful conduct of SPDC under one of plaintiffs' five legal theories I described in the section entitled "Defendants' Alleged Willful Participation in SPDC's Conduct" (Part ____).

If plaintiffs failed to prove any one of those elements you must find in favor of defendants on plaintiffs' claim for violation of Nigerian law.

SOURCES: *Simon v. Unum Group*, 07 Civ. 11426 (SAS), 2008 WL 2477471, at *4 (S.D.N.Y. June 18, 2008); *Sheila C. v. Povich*, 11 A.D.3d 120, 130-31 (2004); *Stuto v. Fleishman*, 164 F.3d 820, 827 (2d Cir. 1999); *Howell v. N.Y. Post Co.*, 81 N.Y.2d 115, 121 (N.Y. Ct. App. 1993); *Hanly v. Powell Goldstein, L.L.P.*, 290 Fed. Appx. 435, 440 (2d Cir. 2008) (noting that a claim for intentional infliction of emotional distress is "notoriously difficult" to satisfy under New York law); *Murphy v. Am. Home Prods. Corp.*, 58 N.Y.2d 293, 303 (N.Y. Ct. App. 1983); Restatement (Second) of Torts § 46 cmt. d (1965); Jury Instructions, *Bowoto v. Chevron Texaco Corp.*, No. C 99-02506 SI, Nov. 25, 2008, at 25; *Cronk v. Suffern Senior High School*, 10 Misc.3d 1061(A), at *3 (N.Y. Sup. Ct. 2005); *Elbogen v. Esikoff*, 266 A.D.2d 15, 15 (N.Y. App. Div. 1999); *Eze v. George*, [1993] 2 N.W.L.R. 86, 90; *Buje v. State*, [1991] 4 N.W.L.R. 287; Nigerian Criminal Code Act, §§ 516-18; Rome Statute of the International Criminal Court, art.

25(3)(c)-(d), July 17, 1998, 37 I.L.M. 999; *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 275-77 (2d Cir. 2007) (Katzmann, J., concurring); *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, Judgment, ¶ 233-34 (Dec. 10, 1998); *Prosecutor v. Vasiljevic*, Case No. IT-98-32-A, Judgment, ¶ 102 (Feb. 25, 2004); *Prosecutor v. Tadic*, ICTY-94-1, ¶ 688 (May 7, 1997); *Prosecutor v. Tadic*, Case No. IT-94-1-A, Judgment, ¶ 229 (July 15, 1999); Sand et al., Modern Federal Jury Instructions, Vol. 4, Instr. 72-2; Restatement (Second) of Agency §§ 82, 84-85, 91; *Larsen Chelsey Realty Co. v. Larsen*, 232 Conn. 480, 505-06 (Ct. 1994); *Ansonia v. Cooper*, 64 Conn. 536, 544 (1894); *Prosecutor v. Tadic*, Case No. IT-94-1-A, Judgment, ¶¶ 31, 195-96, 227(iii) (July 15, 1999); *Prosecutor v. Blagojevic*, Case No. IT-02-60-T, Judgment, ¶ 703 (Jan. 17, 2005); *Prosecutor v. Krnojelac*, Case No. IT-97-25-T, Judgment, ¶ 80 (Mar. 15, 2002); *Musa v. Ehidihamhen*, [1994] 3 N.W.L.R. 544, 557 (C.A.); *Marina Nominees Ltd. v. Fed. Bd. of Inland Revenue*, [1986] N.W.L.R. 48, 55-58 (S.C.); *Union Beverages Ltd. v. Pepsicola Int'l Ltd.*, [1994] 3 N.W.L.R. 1, 22 (S.C.) (Mohammed, J., concurring); *United States v. Bestfoods*, 542 U.S. 51, 61 (1998); *Kingston Dry Dock Co. v. Lake Champlain Transp. Co.*, 31 F.2d 265, 267 (2d Cir. 1929); O'Malley et al., Federal Jury Practice and Instructions § 103.13.

Plaintiffs' Objections to Defendants' Proposed Instruction on Intentional Infliction of Emotional Distress (SPDC/Brian Anderson)

1. Plaintiffs object to the notion that severe emotional distress requires manifestation by physical or mental harm. This requirement is not found in the New York pattern instructions or supported by New York law.

E. Negligent Infliction of Emotional Distress⁷

Ken Wiwa, on behalf of Ken Saro-Wiwa, contends that defendants are liable for negligent infliction of emotional distress against Ken Saro-Wiwa, Blessing Kpuinen, individually and on behalf of John Kpuinen, contends that defendants are liable for negligent infliction of emotional distress against her and John Kpuinen, and Owens Wiwa and Karalolo Kogbara each contends that defendants are liable for negligent infliction of emotional distress against them individually because (1) SPDC negligently inflicted emotional distress against Ken Saro-Wiwa, Blessing Kpuinen, John Kpuinen,

⁷ (See Defs.' R&O Stmt. Part I.B.3.)

Owens Wiwa, and Karalolo Kogbara, and (2) defendants willfully participated in SPDC's alleged negligent infliction of emotional distress against each of those individuals.

In order to prove this claim against defendants, plaintiffs must prove each of the following elements:

First, plaintiffs must prove that SPDC negligently inflicted emotional distress on Ken Saro-Wiwa, Blessing Kpuinen, John Kpuinen, Owens Wiwa, and Karalolo Kogbara. If plaintiffs cannot prove that SPDC negligently inflicted emotional distress on one or more of these individuals, you must find in favor of defendants.

Second, if you find, however, that plaintiffs each have met their burden of proving that SPDC negligently inflicted emotional distress against one or more of them, you must then decide, under one or more of the legal theories described in the section entitled "Defendants' Alleged Willful Participation in SPDC's Conduct" (Part __), whether each defendant willfully participated in the negligent infliction of emotional distress against plaintiffs by SPDC. If you find that defendants did not willfully participate in the alleged negligent infliction of emotional distress against these individuals by SPDC under any of those theories, you must find in favor of defendants.

1. SPDC's Alleged Conduct

There are two alternative tests for determining whether SPDC negligently inflicted emotional distress against these plaintiffs. I will instruct you on each tests.

Under the first test, in order for you to find that SPDC negligently inflicted emotional distress against plaintiffs, plaintiffs must prove each of the following elements separately with respect to each individual plaintiff:

First, SPDC was negligent.

Second, the plaintiff him or herself was threatened with physical harm as a result of SPDC's negligence.

Third, plaintiff suffered actual emotional injury from witnessing the death or bodily injury of a member of their immediate family. Plaintiffs must establish that SPDC caused serious physical harm or death to a member of their immediate family in their presence. If plaintiffs cannot establish that they were present at the time of the serious injury or death, you cannot find in favor of plaintiffs and you must rule in favor of defendants.

Under the second test, in order for you to find that SPDC negligently inflicted emotional distress against plaintiffs, plaintiffs must prove each of the following elements separately with respect to each individual plaintiff:

First, SPDC breached a duty owed to plaintiff. In order to prove a duty, plaintiff must show that there was a special relationship between plaintiffs and SPDC. In other words, the duty must be specific to the plaintiffs, not a generalized duty of care. If plaintiffs cannot show that SPDC had a specific duty to plaintiffs, you must find in favor of defendants.

Second, that breach unreasonably endangered their physical safety.

Third, plaintiff suffered an actual emotional injury from SPDC's breach of duty that endangered their physical safety.

* * *

You may find that SPDC negligently inflicted emotional distress only if plaintiffs have proven all of the elements listed above for one of the two tests. If they

have not proven all of the elements of this claim, their claim for negligent infliction of emotional distress must fail and you must find in favor of defendants.

Plaintiffs' Objections to Defendants' Proposed Instruction on Negligent Infliction of Emotional Distress I.E. and I.E.1

1. Plaintiffs object to the use of the term "test" to describe the alternate theories; a better term would be "method."
2. Plaintiffs object to the phrase "threatened with physical harm" in the second element of the first method, because "threatened" is ambiguous. A better phrasing would be "exposed to a risk of physical harm." *See* 61 NY Jur. Fright, Shock & Mental Disturbance § 12 ("A plaintiff may recover damages for injuries suffered in consequence of shock or fright resulting from the contemporaneous observation of serious physical injury or death of a member of his or her immediate family, where the defendant's conduct negligently **exposes the plaintiff to unreasonable risk of bodily injury or death**, and is also a substantial factor bringing about injury or death of plaintiff's immediate family member.")
3. Plaintiffs object to the first element of the second method as given insufficient instruction. "Duty of care" is not defined nor does the jury have any ability to determine whether a duty exists. The general duty is to exercise reasonable care, and this should be how the jury is instructed. A "special relationship" is not supported by the caselaw. Furthermore
4. Plaintiffs object to the second element of the second method as omitting the possibility that a plaintiff is placed in fear for his or her safety. *See* 61 NY Jur. Fright, Shock, and Mental Disturbance § 11 ("[S]uch cause of action must generally be premised upon a breach of a duty owed directly to the plaintiff which either unreasonably endangers the plaintiff's physical safety **or causes the plaintiff to fear for his or her own safety.**")
5. Plaintiffs object to the omission of the third test under New York law: where the defendants' negligence toward plaintiff causes emotional injury without physical endangerment. *See, e.g. Martinez v. Long Island Jewish Hillside Medical Center*, 70 N.Y.2d 697, 699 (1987) (where the plaintiff's "mental anguish and depression are the direct result of defendants' breach of a duty owed directly to her," and not from "observing or learning of injury or death to a third person," plaintiff may recover; "where there is a breach of a duty owed by defendant to plaintiff, the breach of that duty resulting directly in emotional harm is actionable"); *Sheppard-Mobley v. King*, 4 N.Y.3d 627, 637-38 (2005) (recovery for negligent infliction of emotional distress may be allowed where "as a result of defendants' breach of their duties owed directly to" a plaintiff, the plaintiff "suffered mental anguish resulting from an independent injury").

2. Defendants' Alleged Willful Participation in SPDC's Conduct

[REPEAT Defendants' Alleged Willful Participation in SPDC's Conduct instruction from Part ____.]

a. Plaintiffs' Theory of Aiding and Abetting

[REPEAT Aiding and Abetting instruction from Part ____.]

b. Plaintiffs' Theory of Agency

[REPEAT Agency instruction from Part ____.]

c. Plaintiffs' Theory of Conspiracy

[REPEAT Conspiracy instruction from Part ____.]

d. Plaintiffs' Theory of Ratification

[REPEAT Ratification instruction from Part ____.]

e. Plaintiffs' Theory of Joint Venture

[REPEAT Joint Venture instruction from Part ____.]

SOURCES: *Baker v. Dorfman*, 239 F.3d 415, 421 (2d Cir. 2000); *Mortise v. United States*, 102 F.3d 693, 696 (2d Cir. 1996); *Bovsun v. Sanperi*, 61 N.Y.2d 219 (1984); *Johnson v. Jamaica Hosp.*, 62 N.Y.2d 523, 526-27 (1984).

F. Negligence

Ken Wiwa, individually and on behalf of Ken Saro-Wiwa, contends that defendants are liable for negligence against him and Ken Saro-Wiwa, Blessing Kpuinen, individually and on behalf of John Kpuinen contends that defendants are liable for negligence against her and John Kpuinen, and Owens Wiwa and Karalolo Kogbara each contends that defendants are liable for negligence against them individually because (1) SPDC was negligent against and caused harm to Ken Wiwa, Ken Saro-Wiwa,

Blessing Kpuinen, John Kpuinen, Owens Wiwa, and Karalolo Kogbara, and (2) defendants willfully participated in SPDC's alleged negligence against and harm to each of those individuals.

In order to prove this claim against defendants, plaintiffs must prove each of the following elements:

First, plaintiffs must prove that SPDC was negligent against Ken Wiwa, Ken Saro-Wiwa, Blessing Kpuinen, John Kpuinen, Owens Wiwa, and Karalolo Kogbara. If plaintiffs cannot prove that SPDC was negligent against each of them, you must find in favor of defendants.

Second, if you find, however, that plaintiffs each have met their burden of proving that SPDC was negligent, you must then decide, under one or more of the legal theories described in the section entitled "Defendants' Alleged Willful Participation in SPDC's Conduct" (Part __), whether each defendant willfully participated in SPDC's alleged negligence. If you find that defendants did not willfully participate in SPDC's alleged negligence under any of those theories, you must find in favor of defendants.

1. SPDC's Alleged Conduct

In order for you to find that SPDC was negligent, plaintiffs must prove each of the following elements separately with respect to each individual plaintiff:

First, SPDC owed a duty of care to plaintiffs.

Second, SPDC breached that duty.

Third, SPDC's breach of that duty proximately caused plaintiffs' injury.

An injury is proximately caused by an act or a failure to act whenever it appears from the evidence that the act or failure to act played a substantial part in bringing about or

actually causing the injury, and that the injury was either a direct result or a reasonably probable consequence of the act or omission.

Negligence is the breach of a duty to take care imposed by common law or statute that results in damage to the plaintiff. Negligence means more than heedless or careless conduct. SPDC's conduct must be tied to a duty owed to the plaintiffs.

You may find that SPDC was negligent only if plaintiffs have proven all of the elements listed above. If they have not proven all of the elements of this claim, their claim for negligence must fail and you must find in favor of defendants.

Plaintiffs' Objections to Defendants' Proposed Instruction on Negligence I.F. and I.F.1

1. Plaintiffs object to defendants' negligence instruction in that it does not describe how the jury is to determine whether there has been a breach of the duty of care, nor what the duty of care even is. Defendants do not explain the duty to act reasonably toward foreseeable victims of harm, nor how the jury is to determine whether there is a duty owed toward all plaintiffs. The New York pattern instructions, on which plaintiffs rely, much more sensibly describe the claim as involving the failure to use reasonable care and the foreseeability of injury, not undefined legalistic terms such as duty of care. The jury has no way of knowing whether there has been a "breach of a duty to take care imposed by common law or statute."

2. Defendants' Alleged Willful Participation in SPDC's Conduct

[REPEAT Defendants' Alleged Willful Participation in SPDC's Conduct instruction from Part ____.]

a. Plaintiffs' Theory of Aiding and Abetting

[REPEAT Aiding and Abetting instruction from Part ____.]

b. Plaintiffs' Theory of Agency

[REPEAT Agency instruction from Part ____.]

c. Plaintiffs' Theory of Conspiracy

[REPEAT Conspiracy instruction from Part ____.]

d. Plaintiffs' Theory of Ratification

[REPEAT Ratification instruction from Part ____.]

e. Plaintiffs' Theory of Joint Venture

[REPEAT Joint Venture instruction from Part ____.]

SOURCES: *Makwe v. Nwukor*, [2001] 14 N.W.L.R. 356, 361 (S.C.); O'Malley et al., Federal Jury Practice and Instructions § 120.60.

II. PLAINTIFFS' CLAIMS AGAINST MR. BRIAN ANDERSON FOR VIOLATIONS OF NIGERIAN LAW⁸

Plaintiffs bring one or more claims against Mr. Anderson which are governed by Nigerian law.

Mr. Anderson did not become managing director of SPDC until January 1994. Therefore, he cannot be held liable under Nigerian law for any of the alleged events at Biara or Korokoro because he was not present in Nigeria and had not begun his employment with SPDC at the time the events occurred. Therefore, when looking at plaintiffs' claims against Mr. Anderson brought pursuant to Nigerian law, if the underlying allegations that form the basis for a claim occurred before Mr. Anderson became managing director of SPDC in January 1994, plaintiffs' claim must fail and you must find in favor of Mr. Anderson.

Unlike the claims plaintiffs bring under international law, where plaintiffs are required to satisfy their burden of proof by a preponderance of the evidence for all of the elements of each claim, for certain claims brought here under Nigerian law, plaintiffs must prove all the elements of those claims beyond a reasonable doubt. As I instructed you before, "proof beyond a reasonable doubt" is a stricter standard than "preponderance of the evidence". It is the highest burden of proof. Proof beyond a reasonable doubt must be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it in the most important of his or her own affairs. I will instruct you later as to which claims that stricter burden of proof applies.

⁸ (See Defs.' R&O Stmt. Part I.A.)

I will now give you instructions on how to determine whether these Mr. Anderson willfully participated in each of the alleged violations of Nigerian law.

For three of plaintiffs' claims under Nigerian law—assault, battery, and wrongful death—plaintiffs Ken Wiwa, Blessing Kpuinen, Owens Wiwa, and Karalolo Kogbara claim that the Nigerian Government violated Nigerian law, and that Mr. Anderson willfully participated in that particular unlawful of the Nigerian Government in one of four ways that plaintiffs claim Mr. Anderson can be legally responsible for the conduct of another that I will describe to you later.

In order to prove these claims against Mr. Anderson, plaintiffs Ken Wiwa, Blessing Kpuinen, Owens Wiwa, and Karalolo Kogbara must prove each of the following elements:

First, each plaintiff must prove that the Nigerian Government committed a violation of Nigerian law against that plaintiff. If you find that any plaintiffs have failed to satisfy their burden of proving that the Nigerian Government violated Nigerian law with respect to them, you must find in favor of Mr. Anderson.

Second, if you find, however, that plaintiffs each have met their burden of proof to show that the Nigerian Government violated Nigerian law with respect to them, you must then determine whether Mr. Anderson willfully participated in that particular unlawful of the Nigerian Government. Plaintiffs must prove each element of at least one of four theories I will instruct you about later. If you find that any plaintiffs have failed to prove that Mr. Anderson willfully participated in that particular unlawful conduct of the Nigerian Government under one of those theories, you must find in favor of Mr. Anderson.

For plaintiffs' remaining three claims under Nigerian law—intentional infliction of emotional distress, negligent infliction of emotional distress, and negligence—plaintiffs Ken Wiwa, Blessing Kpuinen, Lucky Doobee, Monday Gbokoo, Owens Wiwa, Michael Tema Vzor, Friday Nuate, and David Kiobel claim that Mr. Anderson directly violated Nigerian law.

In order to prove these claims against Mr. Anderson, plaintiffs Ken Wiwa, Blessing Kpuinen, Lucky Doobee, Monday Gbokoo, Owens Wiwa, Michael Tema Vzor, Friday Nuate, and David Kiobel must prove that Mr. Anderson himself directly violated Nigerian law. If you find that any plaintiffs have failed to satisfy their burden of proving that Mr. Anderson violated Nigerian law with respect to them, you must find in favor of Mr. Anderson.

You must look at each of the six Nigerian law claims separately. For each claim, you should carefully follow the steps laid out in these instructions to determine whether Mr. Anderson willfully participated in the violation of Nigerian law under each of plaintiffs' theories or whether he himself directly violated Nigerian law. If you find that any plaintiffs have failed to prove each of the elements of any part of the instructions for a given claim, then you must find in favor of Mr. Anderson for that claim.

Plaintiffs' Objection to Defendants' Proposed "Overview" Instruction on Plaintiffs' Claims Against Brian Anderson

Plaintiffs incorporate by reference Plaintiffs' Objections to Defendants' Proposed "Overview" Instruction on Plaintiffs' Claims Against Royal Dutch Petroleum Company and The "Shell" Transport and Trading Company, p.l.c. for Violations of Nigerian Law.

Defendants' claim that Mr. Anderson cannot be held liable for acts that occurred before he became managing director is not true with respect to plaintiffs' conspiracy theory of liability. *See* Plaintiffs' Objections to Defendants' Proposed ATS Instruction II. Plaintiffs' Claims Against Mr. Brian Anderson for Violation of Norms of International Law.

Defendants' proposed instruction asserting that some claims must be proven beyond a reasonable doubt is wrong for reasons previously noted.

SOURCES: *Globalnet Financial.com v. Frank Crystal & Co.*, 449 F.3d 377, 384 (2d Cir. 2006); *Okuarume v. Obabokor*, [1965] N.S.C.C. 286, 286-87; Nigerian Evidence Act (1990), Cap. 112, § 138(1); *Smithfield Foods Inc. v. United Food & Commercial Workers Int'l Union*, No. 3:07-cv-641, 2008 Jury Instr. LEXIS 761, 2007 U.S. Dist. Ct. Jury Instr. 267009 (E.D. Va. Oct. 14, 2008).

A. Assault

Ken Wiwa, on behalf of Ken Saro-Wiwa, contends that Mr. Anderson is liable for assault against Ken Saro-Wiwa, Blessing Kpuinen, individually and on behalf of John Kpuinen contends that Mr. Anderson is liable for assault against her and John Kpuinen, and Owens Wiwa contends that Mr. Anderson is liable for assault against him individually because (1) the Nigerian Government committed unlawful assault against Ken Saro-Wiwa, Blessing Kpuinen, John Kpuinen, and Owens Wiwa, and (2) Mr. Anderson willfully participated in the alleged unlawful assaults against those individuals by the Nigerian Government.

Under Nigerian law, a stricter standard of proof applies to this claim. Plaintiffs must satisfy their burden of proof for this claim by proving beyond a reasonable doubt each of the elements of this claim.

In order to prove this claim against Mr. Anderson beyond a reasonable doubt, plaintiffs must prove each of the following elements:

First, plaintiffs must prove that the Nigerian Government unlawfully assaulted Ken Saro-Wiwa, Blessing Kpuinen, John Kpuinen, and Owens Wiwa. If plaintiffs cannot prove that the Nigerian Government unlawfully assaulted one or more of these individuals, you must find in favor of Mr. Anderson.

Second, if you find, however, that plaintiffs each have met their burden of proving that the Nigerian Government unlawfully assaulted one or more of those

individuals, you must then decide, under one or more of the legal theories I will describe below in the section entitled “Mr. Anderson’s Alleged Willful Participation in the Nigerian Government’s Conduct”, whether Mr. Anderson willfully participated in the alleged assaults against those individuals by the Nigerian Government. If you find that Mr. Anderson did not willfully participate in the alleged assaults by the Nigerian Government under any of those theories, you must find in favor of Mr. Anderson.

1. The Nigerian Government’s Conduct

In order for you to find that the Nigerian Government committed assault in violation of Nigerian law, plaintiffs must prove each of the following elements separately with respect to each individual plaintiff:

First, the Nigerian Government acted overtly, and without legal justification attempted or threatened to apply force intending to cause harmful contact to another without his or her consent. In determining whether the Nigerian Government intended to commit assault, you may infer a person’s intent from surrounding circumstances. You may consider any statement made or act done or omitted by a party whose intent is in issue, and all other facts and circumstances which indicate the party’s state of mind. You may consider it reasonable to draw the inference and find that a person intends the natural and probable consequences of acts knowingly done or knowingly committed. It is for you to decide what facts have been established by the evidence.

Second, there was a reasonable apprehension of immediate harmful contact to that person.

Third, the Nigerian Government had the ability to carry its intention into effect.

For each plaintiff, you may find that the Nigerian Government committed assault only if plaintiffs have proven all of the elements listed above. If a plaintiff has not proven all of the elements of this claim, his claim for assault must fail and you must find in favor of Mr. Anderson.

Plaintiffs' Objection to Defendants' Proposed Instruction on Assault (Conduct of Nigerian Government) II.A., and II.A.1

Plaintiffs incorporate by reference Plaintiffs' Objections to Defendants' Proposed ATS Instruction on Assault (Conduct of Nigerian Government) I.A.1 (Summary Execution)

2. Mr. Anderson's Alleged Willful Participation in the Nigerian Government's Conduct

If you find that one or more plaintiffs have proven all of the above elements of their claim with respect to the Nigerian Government, for each such plaintiff you must then decide whether Mr. Anderson willfully participated in that unlawful conduct of the Nigerian Government under one or more of plaintiffs' four theories presented below.

Plaintiffs' Objection to Defendants' Proposed Instruction on Mr. Anderson's Alleged Willful Participation in the Nigerian Government's Conduct II.A. 2

Plaintiffs incorporate by reference Plaintiffs' Objections to Defendants' Proposed ATS Instruction I.A.2. (Summary Execution) SPDCs Alleged Willful Participation in the Nigerian Government's Conduct.

a. Plaintiffs' Theory of Aiding and Abetting

In order to prove Mr. Anderson willfully participated in the Nigerian Government's violation of Nigerian law under plaintiffs' aiding and abetting theory, plaintiffs must prove each of the following elements:

First, Mr. Anderson intended that the Nigerian Government violate Nigerian law. If you find that Mr. Anderson only had knowledge that the Nigerian Government was going to violate Nigerian law and he failed to prevent that violation, you may not conclude that Mr. Anderson aided and abetted the Nigerian Government.

Second, Mr. Anderson knew that the Nigerian Government had the ability to carry its intention into effect.

Third, Mr. Anderson knowingly assisted the Nigerian Government in violating Nigerian law.

If you find that plaintiffs have failed to prove any of the above elements, you must find in favor of Mr. Anderson on this theory.

Plaintiffs' Objections to Defendants' Proposed Instruction II.A.2.a. Plaintiffs' Theory of Aiding and Abetting

Plaintiffs incorporate by reference Plaintiffs' Objections to Defendants' Proposed Instruction I.A.3.a (Assault) Plaintiffs' Theory of Aiding and Abetting for the first paragraph.

b. Plaintiffs' Theory of Conspiracy

In order to prove Mr. Anderson willfully participated in the Nigerian Government's violation of Nigerian law under plaintiffs' conspiracy theory, plaintiffs must prove each of the following elements:

First, Mr. Anderson had the intent to participate in a conspiracy with the Nigerian Government to violate Nigerian law.

Second, Mr. Anderson and the Nigerian Government both intended, or had a common purpose, to cause injury by violating Nigerian law. For a common purpose to

exist, there must have been an understanding or arrangement between Mr. Anderson and the Nigerian Government amounting to an agreement that they would violate Nigerian law.

Third, Mr. Anderson and the Nigerian Government performed acts in furtherance of the conspiracy to violate Nigerian law.

If you find that plaintiffs have failed to prove any of the above elements, you must find in favor of Mr. Anderson on this theory.

Plaintiffs' Objections to Defendants' Proposed Instruction II.A.2.b. Plaintiffs' Theory of Conspiracy

Plaintiffs incorporate by reference Plaintiffs' objections to defendants proposed instructions I.A.2.(c) (1) and (2)(Assault).

c. Plaintiffs' Theory of Instigation or Inducement of Wrongful Acts

In order to prove Mr. Anderson willfully participated in the Nigerian Government's violation of Nigerian law under plaintiffs' instigation or inducement of wrongful acts theory, plaintiffs must prove each of the following elements:

First, Mr. Anderson intentionally induced the Nigerian Government to violate Nigerian law.

Second, Mr. Anderson used wrongful means to induce the Nigerian Government to violate Nigerian law. Wrongful means includes physical violence, fraud or misrepresentation, or economic pressure.

Third, but for Mr. Anderson's inducement, the Nigerian Government would not have violated Nigerian law.

If you find that plaintiffs have failed to prove any of the above elements, you must find in favor of Mr. Anderson on this theory.

Plaintiffs' Objections to Defendants' Proposed Instruction II.A.2.c. Plaintiffs' Theory of Instigation or Inducement of Wrongful Acts

Plaintiffs incorporate by reference Plaintiffs objections to defendants proposed instructions I.A.2.(f) (Assault).

d. Plaintiffs' Theory of Reckless Disregard

In order to prove Mr. Anderson willfully participated in the Nigerian Government's violation of Nigerian law under plaintiffs' reckless disregard theory, plaintiffs must prove each of the following elements:

First, Mr. Anderson either (a) acted to facilitate the Nigerian Government's violation of Nigerian law, or (b) intentionally failed to act to prevent the violation of Nigerian law where Mr. Anderson had a duty to plaintiffs to prevent such violations.

Second, Mr. Anderson's conduct created an unjustifiably high risk of violating Nigerian law.

Third, this risk of violating Nigerian law was either known or so obvious that it should have been known to Mr. Anderson.

If you find that plaintiffs have failed to prove any of the above elements, you must find in favor of Mr. Anderson on this theory.

Plaintiffs' Objections to Defendants' Proposed Instruction II.A.2.c. Plaintiffs' Theory of Reckless Disregard

Plaintiffs incorporate by reference Plaintiffs objections to defendants' proposed instructions I.A.2.(g) Assault.

* * *

If plaintiffs have not proven that Mr. Anderson willfully participated in the Nigerian Government's violation of Nigerian law by proving each element of at least one

of plaintiffs' theories described above, you must find in favor of Mr. Anderson on plaintiffs' claim for violation of Nigerian law.

In summary, you may not find Mr. Anderson liable unless plaintiffs have proven each of the following elements:

First, the Nigerian Government violated Nigerian law; and

Second, Mr. Anderson willfully participated in that particular unlawful conduct of the Nigerian Government under one of plaintiffs' four legal theories I described in the section entitled "Mr. Anderson's Alleged Willful Participation in the Nigerian Government's Conduct" (Part ____).

If any plaintiffs have failed to prove any one of those elements you must find in favor of Mr. Anderson on that claim for violation of Nigerian law.

Plaintiffs' Objections to Defendants' Proposed "Wrap-up" Instruction (Below *)**
Plaintiffs incorporate by reference Plaintiffs' Objections to Defendants' Proposed "Wrap-up" Instruction (Below ***) (Summary Execution)

SOURCES: *Okuarume v. Obabokor*, [1965] N.S.C.C. 286, 286-87; Nigerian Evidence Act (1990), Cap. 112, § 138(1); Nigerian Criminal Code Act § 252; *Smithfield Foods Inc. v. United Food & Commercial Workers Int'l Union*, No. 3:07-cv-641, 2008 Jury Instr. LEXIS 761, 2007 U.S. Dist. Ct. Jury Instr. 267009 (E.D. Va. Oct. 14, 2008); G. Kodilinye, Nigerian Law of Torts 12-14 (1996); *Obaseki v. Oyakhire*, [1987] 1 Q.L.R.N. 105; *Eze v. George*, [1993] 2 N.W.L.R. 86, 90; *Buje v. State*, [1991] 4 N.W.L.R. 287; Nigerian Criminal Code Act, §§ 516-18; O'Malley et al., Federal Jury Practice and Instructions §§ 121.01, 108.05; Rome Statute of the International Criminal Court, art. 25(3)(c)-(d), July 17, 1998, 37 I.L.M. 999; *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 275-77 (2d Cir. 2007) (Katzmann, J., concurring). *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, Judgment, ¶ 233-34 (Dec. 10, 1998); *Prosecutor v. Vasiljevic*, Case No. IT-98-32-A, Judgment, ¶ 102 (Feb. 25, 2004); *Prosecutor v. Tadic*, ICTY-94-1, ¶ 688 (May 7, 1997); *Prosecutor v. Tadic*, Case No. IT-94-1-A, Judgment, ¶ 229 (July 15, 1999); *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, Judgment, 1986 I.C.J. REP. 392, June 27, 1986, ¶¶ 115-16; Sand et al., Modern Federal Jury Instructions, Vol. 4, Instr. 72-2; Restatement (Second) of Agency §§ 82, 84-85, 91; *Larsen Chelsey Realty Co. v. Larsen*, 232 Conn. 480, 505-06 (Ct. 1994); *Ansonia v. Cooper*, 64 Conn. 536, 544 (1894); *Prosecutor v. Tadic*, Case No. IT-94-1-A, Judgment, ¶¶ 31, 195-96, 227(iii) (July 15, 1999); *Prosecutor v. Blagojevic*, Case

No. IT-02-60-T, Judgment, ¶ 703 (Jan. 17, 2005); *Prosecutor v. Krnojelac*, Case No. IT-97-25-T, Judgment, ¶ 80 (Mar. 15, 2002); *Flammia v. Mite Corp.*, 401 F. Supp. 1121, 1127 (E.D.N.Y. 1975), *aff'd without opinion*, 553 F.2d 93 (2d Cir. 1977); *ITEL Containers Int'l Corp. v. Atlantrafik Express Service, Ltd.*, 909 F.2d 698, 701 (2d Cir. 1990); *Int'l Equity Invs., Inc. v. Opportunity Equity Partners, Ltd.*, 472 F. Supp. 2d 544, 552 (S.D.N.Y. 2007); *Fairbairn v. State*, 107 A.D.2d 864, 864-65 (N.Y. App. Div. 1985); *NYC Mgmt. Group Inc. v. Brown-Miller*, No. 03 Civ. 2617, 2004 U.S. Dist. LEXIS 8652, at *23 (S.D.N.Y. May 13, 2004); *Perkins Sch. for the Blind v. Maxi-Aids, Inc.*, 274 F. Supp. 2d 319, 328 (E.D.N.Y. 2003); *Tropea v. Shell Oil Co.*, 307 F.2d 757, 771-72 (2d Cir. 1962); *Rosenberg v. Equitable Life Assurance Soc.*, 79 N.Y.2d 663, 668-69 (N.Y. 1992); Restatement [Second] of Torts § 427; *Farmer v. Brennan*, 511 U.S. 825, 836 (1994); Restatement (Second) of Torts § 500, p 587 (1963-1964); *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47 (2007); *Musa v. Ehidihamhen*, [1994] 3 N.W.L.R. 544, 557 (C.A.); *Marina Nominees Ltd. v. Fed. Bd. of Inland Revenue*, [1986] N.W.L.R. 48, 55-58 (S.C.); *Union Beverages Ltd. v. Pepsicola Int'l Ltd.*, [1994] 3 N.W.L.R. 1, 22 (S.C.) (Mohammed, J., concurring); *Woolfson v. Strathclyde Reg'l Council*, [1978] 38 P. & C.R. 521; *Gilford Motor Co. v. Horne*, [1933] All E.R. 109 (A.C.); *United States v. Bestfoods*, 542 U.S. 51, 61 (1998); *Kingston Dry Dock Co. v. Lake Champlain Transp. Co.*, 31 F.2d 265, 267 (2d Cir. 1929); O'Malley et al., *Federal Jury Practice and Instructions* §§ 103.13, 108.05.

B. Battery

Ken Wiwa, on behalf of Ken Saro-Wiwa, contends that Mr. Anderson is liable for battery against Ken Saro-Wiwa, Blessing Kpuinen, individually and on behalf of John Kpuinen, contends that Mr. Anderson is liable for battery against her and John Kpuinen, and Owens Wiwa contends that Mr. Anderson is liable for battery against him individually because (1) the Nigerian Government committed unlawful battery against Ken Saro-Wiwa, Blessing Kpuinen, John Kpuinen, and Owens Wiwa, and (2) Mr. Anderson willfully participated in the alleged unlawful battery against those individuals by the Nigerian Government.

Under Nigerian law, a stricter standard of proof applies to this claim. Plaintiffs must satisfy their burden of proof for this claim by proving beyond a reasonable doubt each of the elements of this claim.

In order to prove this claim against Mr. Anderson, plaintiffs must prove each of the following elements beyond a reasonable doubt:

First, plaintiffs must prove that the Nigerian Government unlawfully committed battery against Ken Saro-Wiwa, Blessing Kpuinen, John Kpuinen and Owens Wiwa. If plaintiffs cannot prove that the Nigerian Government unlawfully committed battery against one or more of these individuals, you must find in favor of Mr. Anderson.

Second, if you find, however, that plaintiffs each have met their burden of proving that the Nigerian Government unlawfully committed battery against one or more of those individuals, you must then decide, under one or more of the legal theories I will describe below in the section entitled “Mr. Anderson’s Alleged Willful Participation in the Nigerian Government’s Conduct”, whether Mr. Anderson willfully participated in the alleged batteries against those individuals by the Nigerian Government. If you find that Mr. Anderson did not willfully participate in the alleged batteries against those individuals by the Nigerian Government under any of those theories, you must find in favor of Mr. Anderson.

1. The Nigerian Government’s Conduct

In order for you to find that the Nigerian Government committed battery in violation of Nigerian law, plaintiffs must prove each of the following elements separately with respect to each individual plaintiff:

First, the Nigerian Government intentionally or negligently used physical force on the plaintiff without legal justification. In determining whether the Nigerian Government intended to commit battery, you may infer a person’s intent from surrounding circumstances. You may consider any statement made or act done or omitted by a party whose intent is in issue, and all other facts and circumstances which

indicate the party's state of mind. You may consider it reasonable to draw the inference and find that a person intends the natural and probable consequences of acts knowingly done or knowingly committed. It is for you to decide what facts have been established by the evidence.

Second, the force was used without the consent of that plaintiff.

You may find that the Nigerian Government committed battery only if plaintiffs have proven all of the elements listed above. If they have not proven all of the elements of this claim, their claim for battery must fail and you must find in favor of Mr. Anderson.

Plaintiffs' Objection to Defendants' Proposed Instruction on Battery (Conduct of Nigerian Government) II.B. and II.B.1

Plaintiffs incorporate by reference Plaintiffs' Objections to Defendants' Proposed Instruction on Battery (Conduct of Nigerian Government) I. B and I.B.1 (Battery)

2. Mr. Anderson's Alleged Willful Participation in the Nigerian Government's Conduct

[REPEAT Alleged Willful Participation in the Nigerian Government's Conduct instruction from Part ____.]

a. Plaintiffs' Theory of Aiding and Abetting

[REPEAT Aiding and Abetting instruction from Part ____.]

b. Plaintiffs' Theory of Conspiracy

[REPEAT Conspiracy instruction from Part ____.]

c. Plaintiffs' Theory of Instigation or Inducement of Wrongful Acts

[REPEAT Instigation or Inducement of Wrongful Acts instruction from Part ____.]

d. Plaintiffs' Theory of Reckless Disregard

[REPEAT Reckless Disregard instruction from Part ____.]

SOURCES: *Okuarume v. Obabokor*, [1965] N.S.C.C. 286, 286-87; Nigerian Evidence Act (1990), Cap. 112, § 138(1); *Ndibe v. Ndibe*, [1998] 5 N.W.L.R. 632, 647 (C.A.); *Okekearu v. Tanko*, [2002] 15 N.W.L.R. 657, 660 (S.C.); O'Malley et al., Federal Jury Practice and Instructions §§ 121.01, 108.05.

C. Wrongful Death

Ken Wiwa, on behalf of Ken Saro-Wiwa, contends that defendants are liable for the death of Ken Saro-Wiwa, and Blessing Kpuinen, on behalf of John Kpuinen, contends that defendants are liable for the death of John Kpuinen, because (1) the Nigerian Government unlawfully caused the deaths of Ken Saro-Wiwa and John Kpuinen, and (2) Mr. Anderson willfully participated in those unlawful executions by the Nigerian Government.

In order to prove this claim against Mr. Anderson, plaintiffs must prove each of the following elements:

First, plaintiffs must prove that the Nigerian Government unlawfully caused the deaths of Ken Saro-Wiwa and John Kpuinen. If plaintiffs cannot prove that the Nigerian Government unlawfully caused the deaths of one or more of these individuals, you must find in favor of Mr. Anderson.

Second, if you find, however, that plaintiffs each have met their burden of proving that the Nigerian Government unlawfully caused the deaths of one or more of those individuals, you must then decide, under one or more of the legal theories described in the section entitled "Mr. Anderson's Alleged Willful Participation in the Nigerian Government's Conduct", whether Mr. Anderson willfully participated in the unlawful executions of those individuals by the Nigerian Government. If you find that Mr.

Anderson did not willfully participate in the unlawful executions of those individuals by the Nigerian Government under any of those theories, you must find in favor of Mr. Anderson.

1. The Nigerian Government's Conduct

In order for you to find that the Nigerian Government unlawfully caused the deaths of these individuals in violation of Nigerian law to establish plaintiffs' claim for wrongful death, plaintiffs must prove each of the following elements separately with respect to each individual plaintiff:

First, in executing Ken Saro-Wiwa and John Kpuinen, the Nigerian Government acted without legal justification and unlawfully caused the deaths of Ken Saro-Wiwa and John Kpuinen through a battery or negligent act.

Second, Ken Wiwa and/or Blessing Kpuinen suffered economic loss as a result of their deaths (*i.e.*, they were economically dependent on Ken Saro-Wiwa and John Kpuinen, respectively).

You may find that the Nigerian Government is responsible for the wrongful death of these individuals only if plaintiffs have proven all of the elements listed above. If they have not proven all of the elements of this claim, their claim for wrongful death must fail and you must find in favor of Mr. Anderson.

If either Ken Wiwa or Blessing Kpuinen fail to prove that they suffered any economic loss as a result of the deaths of Ken Saro-Wiwa and John Kpuinen, then they have failed to establish their wrongful death claim, even if you find the Nigerian Government unlawfully caused their death through a battery or negligent act. In that case, you must find in favor of Mr. Anderson.

Plaintiffs' Objection to Defendants' Proposed Instruction on Wrongful Death (Conduct of Nigerian Government) II.C. and II.C.1.

Plaintiffs incorporate by reference Plaintiffs' Objection to Defendants' Proposed Instruction on Wrongful Death (Conduct of Nigerian Government) I.C. 1.

2. Mr. Anderson's Alleged Willful Participation in the Nigerian Government's Conduct

[REPEAT Alleged Willful Participation in the Nigerian Government's Conduct instruction from Part ____.]

a. Plaintiffs' Theory of Aiding and Abetting

[REPEAT Aiding and Abetting instruction from Part ____.]

b. Plaintiffs' Theory of Conspiracy

[REPEAT Conspiracy instruction from Part ____.]

c. Plaintiffs' Theory of Instigation or Inducement of Wrongful Acts

[REPEAT Instigation or Inducement of Wrongful Acts instruction from Part ____.]

d. Plaintiffs' Theory of Reckless Disregard

[REPEAT Reckless Disregard instruction from Part ____.]

SOURCES: Laws of Eastern Nigeria, Fatal Accidents Act, ch. 52, §§ 2-3 (1961); *Omole & Sons Ltd. v. Adeyemo*, [1994] 4 N.W.L.R. 48, 64-67 (S.C.) (noting that earnings of decedent must be "strictly" proven and dismissing wrongful death claim because plaintiffs could not prove dependence or earnings).

D. Intentional Infliction of Emotional Distress

Ken Wiwa, on behalf of Ken Saro-Wiwa, contends that Mr. Anderson is liable for intentional infliction of emotional distress against Ken Saro-Wiwa, Blessing Kpuinen, individually and on behalf of John Kpuinen, contends that Mr. Anderson is liable for intentional infliction of emotional distress against her and John Kpuinen, and Owens Wiwa contends that Mr. Anderson is liable for intentional infliction of emotional distress against him individually.

In order for you to find that Mr. Anderson intentionally inflicted emotional distress against Ken Saro-Wiwa, Blessing Kpuinen, John Kpuinen, and Owens Wiwa, plaintiffs must prove each of the following elements separately with respect to each individual plaintiff:

First, Mr. Anderson's conduct was extreme and outrageous. In order for you to find that Mr. Anderson's conduct was extreme and outrageous, it must have gone beyond all possible bounds of decency, and it must be regarded as atrocious, and utterly intolerable in a civilized community. Outrageous conduct does not include trivialities such as indignities, annoyances, hurt feelings, or bad manners that a reasonable person is expected to endure.

Second, Mr. Anderson intended to cause severe emotional distress, or acted with reckless disregard of the substantial probability that the above named persons would suffer severe emotional distress. For Mr. Anderson to have acted with reckless disregard, he must have been acting with knowledge that severe emotional distress would probably result from its actions, or he was acting while giving little or no thought to the probable effects of its conduct.

Third, the above named individuals actually suffered severe emotional distress. Emotional distress includes suffering, anguish, fright, horror, nervousness, grief, anxiety, worry, shock, humiliation, and shame. “Severe emotional distress” is not mild or brief; it must be so substantial or long lasting that no reasonable person in a civilized society should be expected to bear it. Plaintiffs must show that the alleged conduct caused mental or physical symptoms that indicate the presence of emotional distress.

Fourth, Mr. Anderson actually caused that severe emotional distress.

You may find that Mr. Anderson intentionally inflicted emotional distress against those individuals only if plaintiffs have proven all of the elements listed above. If they have not proven all of the elements of this claim, their claim for intentional infliction of emotional distress must fail and you must find in favor of Mr. Anderson.

Plaintiffs’ Objection to Defendants’ Proposed Instruction on Mr. Anderson’s Intentional Infliction of Emotional Distress

Plaintiffs incorporate by reference Plaintiffs’ Objection to Defendants’ Proposed Instruction on Intentional Infliction of Emotional Distress (I.D. and I.D.I)

SOURCES: *Simon v. Unum Group*, 07 Civ. 11426 (SAS), 2008 WL 2477471, at *4 (S.D.N.Y. June 18, 2008); *Sheila C. v. Povich*, 11 A.D.3d 120, 130-31 (2004); *Stuto v. Fleishman*, 164 F.3d 820, 827 (2d Cir. 1999); *Howell v. N.Y. Post Co.*, 81 N.Y.2d 115, 121 (N.Y. Ct. App. 1993); *Hanly v. Powell Goldstein, L.L.P.*, 290 Fed. Appx. 435, 440 (2d Cir. 2008) (noting that a claim for intentional infliction of emotional distress is “notoriously difficult” to satisfy under New York law); *Murphy v. Am. Home Prods. Corp.*, 58 N.Y.2d 293, 303 (N.Y. Ct. App. 1983); Restatement (Second) of Torts § 46 cmt. d (1965); Jury Instructions, *Bowoto v. Chevron Texaco Corp.*, No. C 99-02506 SI, Nov. 25, 2008, at 25; *Cronk v. Suffern Senior High School*, 10 Misc.3d 1061(A), at *3 (N.Y. Sup. Ct. 2005); *Elbogen v. Esikoff*, 266 A.D.2d 15, 15 (N.Y. App. Div. 1999)

E. Negligent Infliction of Emotional Distress

Ken Wiwa, on behalf of Ken Saro-Wiwa, contends that Mr. Anderson is liable for negligent infliction of emotional distress against Ken Saro-Wiwa, Blessing Kpuinen, individually and on behalf of John Kpuinen, contends that Mr. Anderson is liable for negligent infliction of emotional distress against her and John Kpuinen, Lucky Doobee, individually and on behalf of Saturday Doobee, contends that Mr. Anderson is liable for negligent infliction of emotional distress against him and Saturday Doobee, Monday Gbokoo, individually and on behalf of Daniel Gbokoo, contends that Mr. Anderson is liable for negligent infliction of emotional distress against him and Daniel Gbokoo, and Owens Wiwa, Michael Tema Vzor, Friday Nuate, and David Kiobel each contends that Mr. Anderson is liable for negligent infliction of emotional distress against them individually.

There are two alternative tests for determining whether Mr. Anderson negligently inflicted emotional distress against Ken Saro-Wiwa, Blessing Kpuinen, John Kpuinen, Lucky Doobee, Saturday Doobee, Monday Gbokoo, Daniel Gbokoo, Owens Wiwa, Michael Tema Vzor, Friday Nuate, and David Kiobel. I will instruct you on each test.

Under the first test, in order for you to find that Mr. Anderson negligently inflicted emotional distress against plaintiffs, plaintiffs must prove each of the following elements separately with respect to each individual plaintiff:

First, Mr. Anderson was negligent.

Second, the plaintiff him or herself was threatened with physical harm as a result of Mr. Anderson's negligence.

Third, plaintiff suffered actual emotional injury from witnessing the death or bodily injury of a member of their immediate family. Plaintiffs must establish that Mr. Anderson caused serious physical harm or death to a member of their immediate family in their presence. If plaintiffs cannot establish that they were present at the time of the serious injury or death, you cannot find in favor of plaintiffs and you must rule in favor of Mr. Anderson.

Under the second test, in order for you to find that Mr. Anderson negligently inflicted emotional distress against plaintiffs, plaintiffs must prove each of the following elements separately with respect to each individual plaintiff:

First, Mr. Anderson breached a duty owed to plaintiff. In order to prove a duty, plaintiff must show that there was a special relationship between plaintiffs and Mr. Anderson. In other words, the duty must be specific to the plaintiffs, not a generalized duty of care. If plaintiffs cannot show that Mr. Anderson had a specific duty to plaintiffs, you must find in favor of Mr. Anderson.

Second, that breach unreasonably endangered their physical safety.

Third, plaintiff suffered an actual emotional injury from Mr. Anderson's breach of duty that endangered their physical safety.

Plaintiffs' Objection to Defendants' Proposed Instruction on Mr. Anderson's Negligent Infliction of Emotional Distress

Plaintiffs incorporate by reference Plaintiffs' Objection to Defendants' Proposed Instruction on Intentional Infliction of Emotional Distress (I.E. and I.E.I).

* * *

You may find that Mr. Anderson negligently inflicted emotional distress only if plaintiffs have proven all of the elements listed above for one of the two tests. If they have not proven all of the elements of this claim, their claim for negligent infliction of emotional distress must fail and you must find in favor of Mr. Anderson.

Plaintiffs' Objections to Defendants' Proposed "Wrap-up" Instruction (Below *)**
Plaintiffs incorporate by reference Plaintiffs' Objections to Defendants' Proposed "Wrap-up" Instruction (Below ***) (Summary Execution)

SOURCES: *Baker v. Dorfman*, 239 F.3d 415, 421 (2d Cir. 2000); *Mortise v. United States*, 102 F.3d 693, 696 (2d Cir. 1996); *Bovsun v. Sanperi*, 61 N.Y.2d 219 (1984); *Johnson v. Jamaica Hosp.*, 62 N.Y.2d 523, 526-27 (1984).

F. Negligence

Ken Wiwa, individually and on behalf of Ken Saro-Wiwa, contends that Mr. Anderson is liable for negligence against him and Ken Saro-Wiwa, Blessing Kpuinen, individually and on behalf of John Kpuinen, contends that Mr. Anderson is liable for negligence against her and John Kpuinen, Lucky Doobee, individually and on behalf of Saturday Doobee, contends that Mr. Anderson is liable for negligence against him and Saturday Doobee, Monday Gbokoo, individually and on behalf of Daniel Gbokoo, contends that Mr. Anderson is liable for negligence against him and Daniel Gbokoo, and Owens Wiwa, Michael Tema Vizer, Friday Nuate, and David Kiobel each contends that Mr. Anderson is liable for negligence against them individually.

In order for you to find that Mr. Anderson was negligent against Ken Wiwa, Ken Saro-Wiwa, Blessing Kpuinen, John Kpuinen, Lucky Doobee, Saturday Doobee, Monday Gbokoo, Daniel Gbokoo, Owens Wiwa, Michael Tema Vizer, Friday Nuate, and David Kiobel, plaintiffs must prove each of the following elements separately with respect to each individual plaintiff:

First, Mr. Anderson owed a duty of care to plaintiffs.

Second, Mr. Anderson breached that duty.

Third, Mr. Anderson's breach of that duty proximately caused plaintiffs' injury. An injury is proximately caused by an act or a failure to act whenever it appears from the evidence that the act or failure to act played a substantial part in bringing about or actually causing the injury, and that the injury was either a direct result or a reasonably probable consequence of the act or omission.

Negligence is the breach of a duty to take care imposed by common law or statute that results in damage to the plaintiff. Negligence means more than heedless or careless conduct. Mr. Anderson's conduct must be tied to a duty owed to the plaintiffs.

You may find that Mr. Anderson was negligent only if plaintiffs have proven all of the elements listed above. If they have not proven all of the elements of this claim, their claim for negligence must fail and you must find in favor of Mr. Anderson.

Plaintiffs' Objection to Defendants' Proposed Instruction on Mr. Anderson's Negligence

Plaintiffs incorporate by reference Plaintiffs' Objection to Defendants' Proposed Instruction on Negligence (I.F.1).

SOURCES: *Makwe v. Nwukor*, [2001] 14 N.W.L.R. 356, 361 (S.C.); O'Malley et al., Federal Jury Practice and Instructions § 120.60.