



Freshfields Bruckhaus Deringer US LLP

BY ECF AND HAND

The Hon. William H. Pauley III
United States District Judge
Daniel Patrick Moynihan
United States Courthouse
500 Pearl St., Room 1920
New York, NY 10007-1312

DAVID LIVSHIZ

601 Lexington Avenue
31st Floor
New York, NY 10022
Tel +1 212 284 4979
Fax +1 646 521 5779
david.livshiz@freshfields.com

August 2, 2017

Re: Esso Exploration and Production Nigeria Limited and Shell Nigeria
Exploration and Production Company Limited v. Nigerian National
Petroleum Corporation, Case No. 14-cv-08445 (WHP)

Dear Judge Pauley:

We write briefly to reply to NNPC's July 31, 2017 Letter, ECF No. 123 (*NNPC's Letter*).

NNPC does not, and cannot, deny that today, more than two months after this Court's May 15, 2017 Order, ECF No. 111 (*Order*), NNPC still has not complied with Part IV of the Order, which requires NNPC to produce "a detailed explanation of the searches undertaken to identify responsive documents." See Order at 8-9. This information is critical for Petitioners to confirm that NNPC has complied fully with its discovery obligations with respect to the Bank Account Information. Faced with NNPC's continued non-compliance, Petitioners requested that the Court order NNPC to provide the information required by Part IV of the Order by a date-certain.

NNPC's response—that it has partially complied with other parts of the Order—is of no moment. NNPC cannot legitimately deny that its purposeful use of bank accounts in the United States is a basis for the Court's exercise of personal jurisdiction over NNPC. See Order at 4. Petitioners accordingly sought in discovery certain information concerning NNPC's interest in, and use of, US-based bank accounts. In response, NNPC has sought to obfuscate any connection it has to US-based bank accounts—admitting only to the use of those accounts that Petitioners themselves had identified. See Petitioners' July 27, 2017 Letter at 1-2, ECF No. 122 (*Petitioners' Letter*); Mar. 13, 2017 Joint Letter at 1-2, ECF No. 86. Even though NNPC has claimed that it is now in compliance with the Order, because NNPC has identified "all accounts at a financial institution or bank located in the United States that [NNPC] has used, maintained or controlled, or over which it has an interest," it appears that, once again, NNPC has omitted various accounts that it has used during the Relevant Time Period. See Ex. 1, July 28 Letter from D. Livshiz to C. Moss (identifying US-based bank accounts used by NNPC but not included in NNPC's disclosure).

Given NNPC's conduct in discovery to date, and to ensure that NNPC has conducted a proper search of its records, Petitioners requested that NNPC provide an explanation



Freshfields Bruckhaus Deringer US LLP

2|2

of its searches. On May 15, the Court agreed that such a description was necessary, ordering NNPC to provide “a detailed explanation of the searches undertaken to identify responsive documents including a description of the systems searched, the search terms or methods used, and what inquiries were made of NNPC personnel who may have knowledge of the accounts.” Order at 8-9.

Despite repeated follow-ups, NNPC has failed to comply with this part of the Order. See Petitioners’ Letter at 2. Now, NNPC is apparently asking this Court to reconsider Part IV of the Order, arguing that it is premature. See NNPC’s Letter at 2. However, NNPC offers no persuasive reason why it should be afforded still more time to comply with the Order. If NNPC has searched its various bank accounts to identify those responsive to the Order, as it was required to do and as it claims to have done, see id. at 1, then NNPC should have no difficulty providing the information required by Part IV of the Order. The fact that the parties continue to discuss the appropriate scope of alter ego discovery—a different category of discovery—is of no relevance here.

In any event, if NNPC believed that Part IV of the Order was “premature,” it had 14 days within which to seek the Order’s reconsideration. See S.D.N.Y. Local Civ. R. 6.3. NNPC chose not to do so, and it is now out of time.

Petitioners therefore respectfully request that this Court require NNPC to comply with its obligations under Part IV of the Order by August 3, or on such date as this Court deems appropriate.

Finally, Petitioners appreciate NNPC’s last-minute offer to provide information concerning NNPC’s document preservation efforts and, accordingly, are willing to hold that portion of the request in abeyance. Should NNPC fail to provide this information by August 4, however, Petitioners respectfully reserve their right to seek this Court’s assistance.

Respectfully,

A handwritten signature in black ink, appearing to read "David I. Lyshitz". Below the signature, the name "David I. Lyshitz" is printed in a smaller font.

Cc: All Counsel of Record (via ECF)

Exhibit 1



Freshfields Bruckhaus Deringer US LLP

By Email

Cecilia Moss, Esq.
Chaffetz Lindsey LLP
1700 Broadway, 33rd Floor
New York, NY 10019

DAVID LIVSHIZ
601 Lexington Avenue
31st Floor
New York, NY 10022
Tel +1 212 284 4979
Fax +1 646 521 5779
david.livshiz@freshfields.com

July 28, 2017

Re: Esso Exploration and Production Nigeria Limited and Shell Nigeria Exploration and Production Company Limited v. Nigerian National Petroleum Corporation, Case No. 14-cv-08445-WHP

Dear Cia:

We write in response to your June 29 letter and to raise additional deficiencies in NNPC's production of Bank Account Information.

As an initial matter, further to our previous letters, we have identified additional deficiencies in NNPC's production. Specifically:

- NNPC still has not identified all correspondent bank accounts it used during the Relevant Time Period, including correspondent accounts it may have used during the Relevant Time Period but no longer uses. The list NNPC provided six weeks after the Court ordered NNPC to provide a complete inventory of US-based accounts, including correspondent accounts, omitted accounts to which NNPC regularly and routinely transferred funds—such as correspondent bank account 36055521 at Citibank New York—as evidenced by the Bank Account Information NNPC has produced to date. See, e.g., NNPC_0003788. Please supplement the list of correspondent bank accounts that NNPC has used in the US to include all such accounts during the Relevant Time Period, as NNPC is required to do by the Court's May 15 Order, ECF No. 111 (**Order**).
- NNPC also has not “satisfied its obligation”—nor has it even tried to satisfy its obligation—to produce documents associated with these correspondent accounts. Your position that NNPC “conducts transactions—some of which are routed through correspondent accounts” but that NNPC “does not possess instructions to transfer funds to or from those accounts” defies logic and is disproven by the record. See June 29 Letter from Moss to Livshiz; see also July 18, 2017 Letter from Moss to Leitner. If NNPC directs transfers to correspondent accounts, it would have generated transfer instructions for those transfers. See Exhibit A



Freshfields Bruckhaus Deringer US LLP

213

(directing payment to a correspondent account). As the Court held, in order for Petitioners to ascertain whether the use of the correspondent account was purposeful, Petitioners must be able to examine the transfers NNPC directed and received from these accounts. See Order at 4. Therefore, please produce transfer instructions associated with NNPC's use of any correspondent bank accounts in the United States, including instructions to deposit money into a given correspondent bank account.¹

Further, your claim in your June 29 letter that NNPC only uses the three accounts at JPMorgan listed in your interrogatory responses—all of which Petitioners previously identified—appears, yet again, to be incomplete. Following a review of the documents NNPC produced, Petitioners have once again identified additional bank accounts in New York bearing NNPC's name: accounts 30607161 and 40726148 at Citibank NY. See, e.g., NNPC_0003994, NNPC_0003706. Both of these accounts should have been identified as they receive numerous transfers from the CBN/NNPC JV Cash Call Account at JPMorgan. Please immediately confirm NNPC's relationship to these accounts and provide a complete and accurate list of all accounts in the United States which NNPC has used, maintained, or controlled, or over which it has an interest, as required by the Order.

Finally, your assertion that “because NNPC is not a bank...it cannot ‘use’ a correspondent account in any jurisdictionally relevant sense,” see June 29 Letter from Moss to Livshiz, is incorrect as a matter of law. In fact, the Court specifically rejected this statement in the Order, instead following Second Circuit case law in holding that:

[T]he most compelling [ground for jurisdiction] is that a party's use of a US-based bank account through which funds are routed constitutes a basis for jurisdiction. Although NNPC counters that a “U.S. correspondent bank (allegedly) maintained by a Nigerian bank with which NNPC (allegedly) maintains an account in Nigeria cannot be deemed a US based account that NNPC ‘uses’,” the law in this Circuit provides that “the use of a New York correspondent bank account, standing alone, may be considered a ‘transaction of business’ under the long-arm statute if the defendant's use of the correspondent account was purposeful.” Licci ex el. Licci v. Lebanese Canadian Bank, SAL, 732 F.3d 161, 168 (2d Cir. 2013).

See Order at 3-4 (emphasis added). This is consistent with other precedent in this District—and the case law recognized by the Court—where courts have held that the intentional directing of money to a correspondent bank account, alone, can be sufficient for jurisdiction. See Official Comm. of Unsecured Creditors of Arcapita v. Bahrain Islamic Bank, 549 B.R. 56, 68 (S.D.N.Y.

¹ As you know, during our recent Meet & Confer, we suggested that NNPC could satisfy its burden in producing these documents by way of a representation to be mutually agreed by the parties. That offer remains open.



Freshfields Bruckhaus Deringer US LLP

3|3

2016) (finding that the act of directing funds into the correspondent accounts constituted a “transaction of business”); see also Al Rushaid v. Pictet & Cie, 28 N.Y.3d 316, 338 (2016) (same). Accordingly, your continued assertion that NNPC cannot “use” correspondent bank accounts, and your refusal to be forthcoming with the information regarding NNPC’s use of them, is in direct contravention of the Court’s Order. See Order at 4 (“[T]he law in this Circuit provides that the use of a New York correspondent bank account, standing alone, may be considered a transaction of business under the long-arm statute if the defendant’s use of the correspondent account was purposeful.”). As the Court held, the jurisdictionally relevant question is whether NNPC purposefully avails itself of the benefit of doing business in New York by purposefully using a correspondent bank account in New York, such as by directing payments to a US-based bank account. The documents we seek are clearly relevant to this question and are proportional to the needs of the case.

* * *

NNPC’s deficient and incomplete productions continue to delay the discovery process, which is currently due to close in 14 days. Please provide a date by when NNPC will be able to provide these documents and information.

Very truly yours,

A handwritten signature in black ink, appearing to read 'David Livshitz', written over a large, stylized flourish or underline.

David Livshitz

Exhibit A



NIG. NAT. PET. CORP.
(NNPC)
RECEIVED
21 JAN 2015
TIME _____
DGMD/GED, F&A OFFICE

NIG. NAT. PET. CORP.
(NNPC)
RECEIVED
22 JAN 2015
TIME _____
DGMD/GED, F&A OFFICE

NNPC

INTERNAL MEMORANDUM

To: Coordinator, Legal Services Ref: FAD/GMGT/01.01
From: GM, Group Treasury Date: 21 January 2015

ACCOUNT DETAILS FOR PAYMENT OF NNPC LEGAL FEES UNDER THE SETTLEMENT AGREEMENT IN RESPECT OF DISPUTE BETWEEN CONTRACTING PARTIES ON OML 139

We have been directed by the DGMD/GED, F&A to forward to you the following bank details for the above transaction:

BENEFICIARY: NIGERIAN NATIONAL PETROLEUM CORPORATION (NNPC)
ADDRESS: NNPC TOWERS, HERBERT MACAULAY WAY, CENTRAL BUSINESS DISTRICT, GARKI, ABUJA.

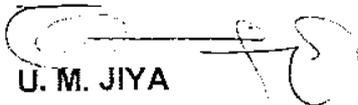
BANK: CITIBANK N. A.
ADDRESS: 111 WALL STREET, NEWYORK, NEWYORK 10043, USA
SWIFT CODE: CITIUS33 ABA NUMBER: 021000089

FOR THE CREDIT OF: FIDELITY BANK PLC
SWIFT CODE: FIDTNGLA
ACCOUNT NUMBER: 36115264

FOR FINAL CREDIT TO: NNPC (ABUJA) PETROLEUM PRODUCTS EXPORT SALES ACCOUNT
ACCOUNT NUMBER: 5090515927

Kindly advice us as soon as payment is made into the account to enable us track with our bank

Best regards.


U. M. JIYA

Cc: DGMD/GED, F&A

NIGERIAN NATIONAL PETROLEUM CORPORATION
SECRETARY GENERAL'S OFFICE
RECEIVED

21 JAN 2015

TIME _____
DGMD/GED, F&A OFFICE