

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

IN RE PETITION OF ESTHER KIOBEL,

Petitioner,

For an Order Granting Leave to Issue Subpoenas to
Cravath, Swaine & Moore LLP for Production of
Documents Pursuant to 28 U.S.C. § 1782

No. 1:16-cv-07992 (AKH)

**DECLARATION OF LAUREN A. MOSKOWITZ IN SUPPORT OF CRAVATH,
SWAINE & MOORE LLP'S MOTION TO STAY THE COURT'S ORDER
GRANTING PETITIONER ESTHER KIOBEL LEAVE TO ISSUE A SUBPOENA
PURSUANT TO 28 U.S.C. § 1782**

I, Lauren A. Moskowitz, declare as follows:

1. I am an attorney admitted to practice in the State of New York and in this Court. I am a member of the firm of Cravath, Swaine & Moore LLP ("Cravath"), which is the Respondent in this matter. I respectfully submit this declaration on behalf of Respondent Cravath in support of Cravath's motion to stay the Court's order granting Petitioner Esther Kiobel leave to issue a subpoena pursuant to 28 U.S.C. § 1782.

2. On January 27, 2017, I accepted service via email on behalf of Cravath of Petitioner's Request for Production, issued pursuant to the Court's January 24, 2017 Order.

3. Cravath will preserve documents belonging to Royal Dutch Shell plc and certain predecessors and non-U.S. affiliates of Royal Dutch Shell plc that are in its custody and that are subject to Petitioner's Request for Production pending Cravath's appeal of the Court's January 24, 2017 Order.

4. Attached hereto as Exhibit A is a true and correct copy of the transcript of the December 20, 2016 Oral Argument in this action.

5. Attached hereto as Exhibit B is a true and correct copy of Petitioner's Request for Production, dated January 27, 2017.

6. Attached hereto as Exhibit C is a true and correct copy of the transcript of the November 25, 2002 Conference in *Kiobel v. Royal Dutch Petroleum Co.*, No. 02-CV-7618 (KMW) (S.D.N.Y.).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 13, 2017.

/s/ Lauren A. Moskowitz

Lauren A. Moskowitz

EXHIBIT A

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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
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3 ESTHER KIOBEL,

4 Petitioner,

5 v.

16 Civ. 7992 (AKH)

6 CRAVATH, SWAINE & MOORE, LLP ,

7 Respondent.

8 -----x

9 New York, N.Y.
10 December 20, 2016
11 11:20 a.m.

11 Before:

12 HON. ALVIN K. HELLERSTEIN,

13 District Judge

14 APPEARANCES

15 EARTHRIGHTS INTERNATIONAL
Attorneys for Petitioner

16 BY: MARCO SIMONS
and

17 COLUMBIA LAW SCHOOL HUMAN RIGHTS CLINIC
Attorneys for Petitioner

18 BY: BENJAMIN HOFFMAN

19 CRAVATH SWAINE & MOORE
Attorneys for Defendant

20 BY: LAUREN MOSKOWITZ

21

22

23

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2

(Case called)

3

MR. SIMONS: Mark Simons, for petitioner Esther

4

Kiobel.

5

THE COURT: Introduce your colleagues.

6

MR. SIMONS: I am here with Benjamin Hoffman and

7

Alison Borochoff Porte.

8

THE COURT: You don't have to lean forward. Speak

9

loudly as if there were no mic. It will pick it up.

10

Who are your colleagues.

11

MR. SIMONS: Benjamin Hoffman and Alison Borochoff

12

Porte.

13

THE COURT: You may sit.

14

MS. MOSKOWITZ: Good morning, your Honor.

15

Lauren Moskowitz from Cravath Swaine & Moore, and with

16

me is one of our associates who is not yet admitted Nicole

17

Valenti.

18

THE COURT: You will be admitted.

19

Good morning.

20

MS. MOSKOWITZ: Good morning.

21

THE COURT: I will hear the petitioner, Ms. Kiobel.

22

MR. SIMONS: Where do you want me, your Honor?

23

Here or at the podium?

24

THE COURT: At the podium.

25

MR. SIMONS: OK.

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1 THE COURT: Mr. Simons.

2 MR. SIMONS: Good morning.

3 THE COURT: Good morning.

4 MR. SIMONS: So, just to clarify a few things before
5 going through the statutory and discretionary factors at issue
6 in this Section 1782 application, we are not seeking discovery
7 produced by the plaintiffs in the Kiobel or Wiwa cases or
8 deposition transcripts of the plaintiffs or plaintiffs'
9 witnesses. All we are seeking here is the defendant's
10 discovery that was managed and produced through Cravath.

11 As we stated in our papers --

12 THE COURT: I don't understand the distinction you are
13 making.

14 MR. SIMONS: In Cravath's papers they suggest that we
15 are seeking things like Ms. Kiobel's own deposition transcript
16 that we should have no need for because Ms. Kiobel should have
17 her own deposition transcript.

18 So just to clarify --

19 THE COURT: What you want is discovery previously
20 produced by Cravath?

21 MR. SIMONS: Yes.

22 THE COURT: On behalf of Shell.

23 MR. SIMONS: Yes.

24 THE COURT: Its client.

25 MR. SIMONS: On behalf of four Shell defendants.

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1 THE COURT: In four civil actions.

2 MR. SIMONS: Yes.

3 THE COURT: Filed in the Southern District of New
4 York.

5 MR. SIMONS: That's correct.

6 THE COURT: Pertaining to certain activities on the
7 part of Shell.

8 MR. SIMONS: Yes, your Honor.

9 Alleged human rights abuses in Nigeria.

10 THE COURT: In Nigeria.

11 MR. SIMONS: To clarify one other thing, Cravath
12 suggested none of this discovery ever should have been taken
13 because the Kiobel case itself was ultimately dismissed by the
14 Supreme Court.

15 We would disagree with that position, because this
16 discovery was taken, as you suggested, in four cases, three of
17 which were the Wiwa cases, one of which was the Kiobel case.

18 THE COURT: Let's assume it has the documents and
19 doesn't want to produce them. Why should this Court order
20 Cravath to produce the documents that it produced in four
21 aborted actions?

22 MR. SIMONS: For several reasons, your Honor.

23 First of all, the statutory requirements for discovery
24 are plainly satisfied. Cravath argues that the respondent is
25 not present in this district because the real respondent is

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1 Shell, not Cravath.

2 No case law supports that position. Two cases in this
3 court have specifically rejected that position, including a
4 previous case that Cravath participated in. So there's no
5 support for the notion that the respondent is not present in
6 the district simply because another party may also have an
7 interest in the documents at issue.

8 The other statutory requirement that Cravath takes
9 issue with is whether these documents are really for use in a
10 foreign proceeding because they suggested that we have not
11 submitted enough evidence that the foreign proceeding is within
12 reasonable contemplation.

13 The case law on this suggests that we only need to
14 show that it is more than merely speculative that the foreign
15 litigation will be filed. Here we have an affidavit from Dutch
16 counsel saying that they are preparing to file the case; that
17 they have a draft of the writ of summons prepared, which is the
18 initiating document in Dutch court; that they have sent what
19 are known as liability letters to the intended defendants in
20 this case; that they have obtained legal aid from the Dutch
21 government in order to assist with this lawsuit, which requires
22 them to demonstrate their progress in bringing a lawsuit, and
23 in fact the same counsel is currently engaged in litigation
24 against Shell over alleged environmental damage in Nigeria. So
25 the notion that they are preparing to sue Shell over these

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1 alleged human rights abuses is far from speculative.

2 Cravath makes some suggestion that it's simply
3 inappropriate to obtain documents from a law firm. There is,
4 again, no support for that notion. The Second Circuit in the
5 Ratliff v. Davis Polk case allowed a subpoena against a law
6 firm for client documents, finding no support for the notion
7 that simply because they were housed in a law firm they were
8 exempt from discovery.

9 In the Republic of Kazakhstan case, which is also in
10 the papers, discovery under Section 1782 was also granted
11 against a law firm. So there should be no question here that
12 the statutory prerequisites for Section 1782 discovery are
13 satisfied.

14 That leads into the discretionary factors under the
15 Supreme Court's decision in Intel. The first factor here, and
16 the one that is the subject of some considerable debate, hinges
17 on the foreign court's ability to order the discovery in
18 question. This is not merely a mechanical exercise in
19 identifying who the party is and who the respondent is. We
20 recognize that the Second Circuit has suggested that where the
21 target, where the respondent of the application is a law firm
22 representing the foreign party in the foreperson litigation,
23 that that foreign party's status may come into this particular
24 factor.

25 But there are also a number of cases where courts have

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1 ordered discovery under Section 1782 even where the respondent
2 is a party to the foreign action or has a similar level of
3 possession or control of the documents at issue. So in the
4 Malev Hungarian Airlines case, the Second Circuit ordered
5 Section 1782 discovery against the party in the foreign
6 litigation.

7 And in the Minatec case in the Northern District of
8 New York, the court -- again, the application was directly
9 against the party in the foreign litigation. There it wasn't
10 clear whether the foreign court had the ability to order
11 depositions of the U.S. employees whose depositions were sought
12 in the application, and, again, the court allowed that
13 discovery.

14 We would submit that that is somewhat similar, because
15 while Shell is the intended defendant in the foreign
16 litigation, that litigation, number one, has yet to be
17 commenced, so there is no foreign court that actually has the
18 ability to order these documents from Shell. And even if it
19 were commenced, there is no guarantee that the foreign court
20 would take it upon itself to order Shell to compel Cravath to
21 hand over these documents.

22 There is no evidence that Shell actually retains these
23 documents. In fact, in other Dutch litigation by the same
24 counsel, Shell has said that it did not retain documents from a
25 more recent period arising out of incidents in Nigeria.

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1 Now, there's a couple of other cases that have
2 addressed this factor in the context of the difficulty of
3 obtaining documents in the foreign jurisdiction from a party.
4 Again, that is not dissimilar from this case, where, as the
5 declarations submitted by Dutch counsel have shown, obtaining
6 documents in the Dutch courts is a cumbersome process because
7 the documents need to be specifically identified and
8 specifically related to the legal issues in the case.

9 That is not even available at this stage because the
10 legal issues are not defined. But later on in the case,
11 although these documents could potentially be obtained from the
12 Dutch court, that would be a very cumbersome process.

13 There are a couple of cases: First, the
14 Auto-Guadeloupe case in the Southern District, where, again,
15 the court was dealing with discovery against a party and the
16 court examined a foreign discovery system where documents
17 needed to be identified with specificity on a
18 document-by-document basis and concluded that it was not
19 realistic to obtain the discovery from the foreign
20 jurisdiction.

21 Again, in the Infineon Technologies case in the
22 District of D.C., that case was technically about modifying a
23 protective order, but it was modifying a protective order in
24 order to allow the use of the discovery in foreign litigation,
25 and so the Court looked to Section 1782 for guidance. Again,

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1 in that case, they examined this requirement that documents
2 would need to be identified with specificity in the foreign
3 jurisdiction. And that was a very cumbersome procedure.

4 THE COURT: You are saying that Section 1782 is used
5 to enable discovery to be obtained here for use in a foreign
6 tribunal even though it might not be easily available by direct
7 order of that foreign tribunal.

8 MR. SIMONS: I think Section 1782 is all about
9 efficiency, your Honor.

10 THE COURT: It's efficient to do it. It should be
11 done. That is your essential argument.

12 Let's see what Cravath has to say.

13 MR. SIMONS: Right. Thank you, your Honor.

14 THE COURT: Ms. Moskowitz.

15 MS. MOSKOWITZ: Thank you, your Honor.

16 Lauren Moskowitz on behalf of Cravath, your Honor.

17 Before I dive into the factors and the requirements, I
18 also would like to put this case in some context.

19 The underlying cases in which this discovery was
20 produced were filed in 1996, and the Kiobel case in 2002. But
21 there were four. The latest one was filed in 2004.

22 They all were the same, same facts, same alleged
23 allegations, all arising from the Alien Tort Statute. Shell
24 disputed jurisdiction in all of those cases all along.

25 One of those cases, however, went up on interlocutory

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1 appeal while the other cases proceeded in discovery, and Kiobel
2 while on interlocutory appeal did proceed with discovery. The
3 Supreme Court in 2013 said clearly that no jurisdiction ever
4 lied for those cases under the Alien Tort Statute, which was
5 the claims that the plaintiffs brought there.

6 So all of that discovery that was produced really
7 never should have been taken in the first place. Today, 20
8 years after the events and over three years after the Supreme
9 Court's decision, these lawyers, including Mr. Simons, who was
10 actually counsel for Wiwa in the underlying litigation, and one
11 new Dutch lawyer have come here asking for all of that
12 discovery again for use in a possible lawsuit that may be filed
13 in the Netherlands but has not yet been filed in the
14 Netherlands.

15 Petitioner doesn't ask Shell for these documents.

16 THE COURT: They do not what?

17 MS. MOSKOWITZ: They did not ask Shell for these
18 documents. They have asked Cravath. They have not brought any
19 proceedings against Shell to try to obtain these documents.
20 They've simply asked Cravath, presumably because we are in New
21 York.

22 THE COURT: And you have the documents?

23 MS. MOSKOWITZ: I believe we do have some of the
24 documents, your Honor.

25 THE COURT: Bundled up in Redwelds in a highly

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1 organized fashion.

2 MS. MOSKOWITZ: In a warehouse.

3 THE COURT: In a highly organized fashion that a
4 sophisticated law firm uses. It's very easy to understand why
5 they want to come after you. You have the documents, they're
6 organized, they are handy, and they would like them.

7 MS. MOSKOWITZ: Yes.

8 THE COURT: 1782 provides a very liberal standard for
9 getting them.

10 MS. MOSKOWITZ: Your Honor, it doesn't provide a
11 liberal standard for getting them. It provides a whole set of
12 requirements that petitioner must meet. The Supreme Court in
13 the Intel case did set forth a series of factors because the --
14 recognizing that the court has wide discretion whether to grant
15 or deny a petition even if the statutory requirements are met.

16 There is an overarching policy argument, your Honor,
17 here that I think informs the whole analysis, and that is that
18 this is a petition to a law firm. To allow a 1782 petition
19 against a law firm for its client's documents where that client
20 is the planned defendant in the foreign proceeding that the
21 foreign Court will have jurisdiction over and can decide
22 whether and to what extent to grant discovery against that
23 defendant, to ask the law firm for those documents possibly
24 could open the floodgates for 1782 petitions, especially in New
25 York, where many global law firms reside.

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1 Today many law firms represent international clients.
2 The idea that if an international client sends its documents to
3 a law firm that that could open up that client to U.S.-style
4 discovery through 1782 is going to provide a chilling effect on
5 the ability of New York and U.S. lawyers to represent
6 international companies.

7 THE COURT: That's hard to really believe. It is not
8 a floodgate. We are not dealing with depositions, which is
9 what most foreign people complain about. We are dealing with a
10 cache of documents that presumably exists and could be easily
11 produced.

12 MS. MOSKOWITZ: Your Honor, they exist. There are
13 depositions --

14 THE COURT: We are not dealing with your work product.

15 MS. MOSKOWITZ: That's correct.

16 THE COURT: We are not dealing with your notes. We
17 are not dealing with your legal analyses. We are dealing with
18 stuff you got from a client that were produced in other cases.
19 So it is not a floodgates issue.

20 MS. MOSKOWITZ: Your Honor, the Second Circuit in the
21 very case that petitioner cited, the Ratliff case, did describe
22 the dangers of this situation.

23 Now, the Court there did grant the discovery against
24 Davis Polk because the client, after sending the documents to
25 Davis Polk, voluntarily disclosed those documents to the SEC.

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1 So there was a bit of a sword-and-shield concern there, but the
2 Court did discuss a prior case that the Ratliff court
3 summarized as holding that "exposing documents not otherwise
4 subject to production to discovery demands after delivery to
5 one's attorney whose office was located within the sweep of a
6 subpoena would produce a curious and unacceptable result. The
7 price of an attorney's advice would be disclosure of previously
8 protected matters. That price would not only chill open and
9 frank communications between attorneys and their clients, it
10 would disenfranchise local counsel from representing foreign
11 entities."

12 THE COURT: But we don't have that.

13 MS. MOSKOWITZ: I'm sorry, your Honor?

14 THE COURT: We don't have that.

15 This is not attorney-client privileged documents.

16 These are documents that have already produced.

17 MS. MOSKOWITZ: That's right.

18 THE COURT: I think the language in *Ratliff v. Davis*
19 *Polk* is instructive: "Documents held by an attorney in the
20 United States on behalf of a foreign client, absent privilege,
21 are as susceptible to subpoena as those stored in a warehouse
22 within the district court's jurisdiction. Documents attain no
23 special protection because they are housed in a law firm. Any
24 other rule would permit a person to prevent disclosure of any
25 of any of his papers by the simple expedient of keeping them in

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1 the possession of his attorney."

2 MS. MOSKOWITZ: Certainly, your Honor.

3 The point of that is to say that you can't shield
4 documents that are otherwise discoverable by putting them in a
5 law firm's possession. Of course that's black letter law. The
6 black letter law is that the documents belong to the client,
7 and merely the fact that you have sent them to a law firm does
8 not expose them to discovery.

9 What the court was also saying earlier in that opinion
10 is that if they weren't otherwise subject to discovery, and
11 that much is true here, they are not otherwise subject to
12 discovery, Shell is not here --

13 THE COURT: But the court meant something in the way
14 of privilege. It was something about the documents that argued
15 for that protection. There are no such arguments here.

16 MS. MOSKOWITZ: The only reason we have those
17 documents, your Honor, is in the context of our representing
18 Shell in multi-year litigation involving these same
19 allegations, and we continue to represent Shell today to the
20 extent of those issues continue to arise.

21 The fact of the matter is, though, the petitioner has
22 not established that this is even for use in a foreign
23 proceeding.

24 THE COURT: Let's take care of the first argument, the
25 first argument, the argument of location, and the location is

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1 here, Cravath is here, so the person from whom discovery is
2 sought resides in this district.

3 That prong is satisfied.

4 The second prong is whether these documents are being
5 sought for use in a foreign proceeding. We are given three
6 reasons, I think, why this is so.

7 A summons was issued.

8 Legal aid was obtained.

9 And there is a third reason. I can't remember. What
10 is it?

11 MS. MOSKOWITZ: Your Honor, first, the summons was not
12 yet issued. It's only been drafted according to petitioner's
13 counsel's declaration.

14 The third reason --

15 THE COURT: What is a summons in the Netherlands?

16 Is it something like you have in the New York Supreme
17 Court, or is it something more elaborate?

18 MS. MOSKOWITZ: Your Honor, I have no idea about the
19 Dutch procedure on that. It's described as something that
20 would be akin to an initiating document like a summons in New
21 York court. That is the best of my understanding.

22 THE COURT: It is not much of a document to draft?

23 MS. MOSKOWITZ: I am not sure, your Honor. But I
24 haven't seen it, and it has not been presented to the Court as
25 evidence.

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1 THE COURT: Do you know, Mr. Simons?

2 MR. SIMONS: Yes, your Honor.

3 I think there's some guidance on this in the Second
4 Circuit's decision in Mees, where they talk about what the
5 content of an initiating --

6 THE COURT: Just tell me what a summons is.

7 MR. SIMONS: It is the initiating document akin to a
8 complaint, but it has a higher level of evidentiary requirement
9 than U.S. procedure would require because the plaintiff is
10 required to put forth essentially a prima facie case on the
11 evidence.

12 THE COURT: So you are looking for the documents in
13 order to draft the summons.

14 MR. SIMONS: That's correct, your Honor.

15 MS. MOSKOWITZ: With respect to the other fact that
16 counsel points to, your Honor, which is the liability letters
17 that they sent in 2013 to Shell, I don't understand how letters
18 and threats three and a half years ago shows that a lawsuit is
19 in reasonable contemplation.

20 THE COURT: What is the legal aid argument,
21 Mr. Simons?

22 Sorry to interrupt you, Mr. Moskowitz.

23 Stand up, Mr. Simons.

24 MR. SIMONS: Sorry.

25 The legal aid argument, your Honor, is that the Dutch

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1 government has a legal aid program. In order to qualify for
2 legal aid support, counsel for the plaintiff needs to
3 demonstrate that they have made progress on their case. This
4 is in, I believe, the reply declaration of our Dutch counsel.

5 THE COURT: I'll tell you what bothers me, Mr. Simons.
6 I don't want these documents used for publicity purposes. If
7 you are going to use them in drafting legal papers, that's one
8 thing. But if are going to use them to malign Shell or anyone
9 else in the press, that is something that I don't want to use
10 the court facilities to help you do.

11 MR. SIMONS: Certainly, your Honor.

12 THE COURT: How can I be assured of that?

13 MR. SIMONS: I don't know if you want to keep going
14 back and forth here. That is up to you.

15 THE COURT: I do. I am asking a question.

16 MR. SIMONS: Sure. I'm happy to address the
17 confidentiality concerns at issue here.

18 THE COURT: Address them.

19 MR. SIMONS: The Dutch counsel has said they are
20 perfectly willing to sign on to essentially the same
21 confidentiality orders in the underlying litigation here.

22 THE COURT: Would that satisfy you, Ms. Moskowitz?

23 MS. MOSKOWITZ: No, your Honor.

24 The issue about the documents is that there are over
25 100,000 pages of documents and dozens of deposition

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1 transcripts. They were produced 15 years ago, 10 to 15 years
2 ago. At this point I personally don't remember what is in
3 there.

4 THE COURT: Let's suppose we get a solemn
5 representation by anyone seeing these documents that they are
6 not going to use them for publicity; they are going to be used
7 only for drafting court papers and for use in proceedings after
8 that.

9 MS. MOSKOWITZ: My understanding of the way the Dutch
10 procedure works is that there is no way to insure the
11 confidentiality of those documents when they are used in the
12 Dutch proceeding. So it would be akin to publicly --

13 THE COURT: That is something different. They are
14 used in the proceedings.

15 MR. SIMONS: We would respectfully disagree, your
16 Honor. And I think --

17 THE COURT: About what?

18 MR. SIMONS: About whether the documents are in fact
19 publicly available once submitted in Dutch court.

20 THE COURT: I don't care about that. I want a solemn
21 representation by you, because you are going to get the
22 documents, that you are not going to hand them over to anybody
23 without getting a solemn representation from that other party
24 that it promises to use the documents only for court
25 proceedings.

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1 MR. SIMONS: We are happy to make those
2 representations, your Honor.

3 THE COURT: I want Ms. Moskowitz to have an
4 opportunity to participate in the drafting of the
5 representation.

6 MR. SIMONS: That is fine, your Honor.

7 THE COURT: I think that should help you a great deal,
8 Ms. Moskowitz, and assure that they are going to be used in the
9 proper proceeding.

10 MS. MOSKOWITZ: Your Honor, that would --

11 THE COURT: Thank you, Mr. Simons. You may sit.

12 MS. MOSKOWITZ: That would certainly help.

13 I think the other issue, though, is how overbroad the
14 request is. They have had those documents. Mr. Simon has seen
15 every single one of these documents. They were destroyed by
16 the plaintiff here, the petitioner here in 2013, presumably
17 even though they were contemplating suit.

18 THE COURT: Maybe it was a big mistake, but he wants
19 yours. That is the issue.

20 MS. MOSKOWITZ: Yes, it is. But I am not sure why he
21 needs every single page of them. He knows what he needs for
22 the summons.

23 THE COURT: You know how burdensome it is to go
24 through the whole thing to figure out what I might have and
25 what I don't have. Maybe the records are not kept so clearly

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1 and neatly.

2 The question is, it is going to cost you more to start
3 making distinctions between which document to give and which
4 not. You are going to hold back the stuff you hold back in an
5 American court. You are not going to give work product. You
6 are not going to give attorney-client privilege.

7 As long as you are protected in doing that, you can
8 give over the whole thing. That would be the cheapest and
9 easiest to do. They're probably already numbered, Bates
10 stamped, they're organized. You can control it. You know what
11 you give. That is the easiest. That's the best.

12 MS. MOSKOWITZ: Your Honor, I think that would be
13 perhaps in some ways less burdensome, but in some ways more
14 burdensome. Because we don't know what is in there, we can't
15 be sure that we are not running afoul of any other privileges
16 or laws under the Netherlands law on --

17 THE COURT: It's stuff you already produced.

18 MS. MOSKOWITZ: Yes, a very long time ago, your Honor.
19 They were produced pursuant to a protective order that
20 was entered by Judge Wood that petitioners never sought to
21 modify, and those were presumed confidential.

22 THE COURT: Mr. Simons, can you use the same
23 protective order?

24 MR. SIMONS: An analogous one, your Honor. Obviously
25 it would need to allow use of the documents for a different

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1 litigation, but I think in substance, yes. The confidentiality
2 order is fine as far as it goes.

3 THE COURT: Why don't I postpone this decision until
4 you work something out that is suitable with Ms. Moskowitz, the
5 order of protection that she legitimately needs?

6 All right. That is the prong for use.

7 MS. MOSKOWITZ: Yes, your Honor.

8 THE COURT: I find that you are here. I find that
9 it's for use in the foreign proceeding.

10 MS. MOSKOWITZ: Your Honor, may I address the second
11 requirement about the person resides within the district?

12 THE COURT: Yes, sure.

13 MS. MOSKOWITZ: Thank you.

14 THE COURT: I thought we already resolved it, though.

15 MS. MOSKOWITZ: The petitioner said that there is no
16 case that has gone our way on this but that is not right. The
17 Bank of Cyprus case in the Southern District in 2011 did go our
18 way on this issue.

19 There were actually two 1782 petitions filed there.
20 There was one in New York against the law firm, and there was
21 one in New Jersey against the law firm's client, the actual
22 owner of the documents.

23 The Court in New York denied the 1782 petition against
24 the law firm so that the true parties in interest could
25 litigate the discovery application over their own documents.

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1 The Court specifically said that that made sense because of the
2 law's recognition that documents in the possession of a party's
3 attorney are in the party's possession, custody, or control.

4 THE COURT: They are under their control. Cravath has
5 custody subject to the control of Shell. It is not a situation
6 where Shell has been subpoenaed in one court and Cravath in a
7 second court and proceedings would be duplicative. Shell has
8 not been subpoenaed. Cravath has. I don't see the
9 applicability of that case. There's a lot of other cases as
10 well.

11 MS. MOSKOWITZ: I think it's applicable, your Honor,
12 because they made the choice not to ask Shell for these
13 documents. They have made an end run around the proper party
14 who should have received the subpoena.

15 THE COURT: You have the.
16 Documents. I think we went through that.

17 MS. MOSKOWITZ: OK.

18 THE COURT: The Davis Polk case is right on point.

19 MS. MOSKOWITZ: So, moving to the Intel factors, your
20 Honor.

21 THE COURT: Yes. We will go to that. Before we leave
22 it, there is a very good decision by Judge Stein in The
23 Application of Schmitz, 259 F.Supp.2d 294, (S.D.N.Y. 2003), a
24 case involving the Cravath firm, where it argued that it is not
25 the proper target of a petition because it merely was the

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1 custodian of a foreign client's documents.

2 Judge Stein held that the argument was creative but
3 sails far wide of the mark. Application of Section 1782 does
4 not involve an analysis of why a respondent has the documents.
5 It's sufficient that respondents resided in this district, as
6 they concededly do.

7 The Second Circuit denied the petition on
8 discretionary grounds, but did not disturb that finding.

9 Let's go to the discretionary factors of Intel.

10 MS. MOSKOWITZ: Yes, your Honor.

11 I think Schmitz is a great place to go on that
12 because, as your Honor just noted, the court, both Judge Stein
13 and the Second Circuit, denied the 1782 petition based on those
14 discretionary factors, and many of those overlap here.

15 Cravath was the target of a subpoena, but the court in
16 looking at the first Intel factor said that for all intents and
17 purposes the recipient of the subpoena really was the client.
18 They were looking for the client's documents there. It was DT,
19 Deutsche Telekom.

20 THE COURT: I am sure that Cravath will make every
21 argument that Shell wants it to make, so I don't see that as
22 much of a point.

23 MS. MOSKOWITZ: The reason it was relevant is that DT
24 was a participant in the foreign proceeding and subject to the
25 jurisdiction of a foreign court.

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1 Your Honor, the twin aims of 1782, the whole guiding
2 principle of 1782 is to ensure that foreign jurisdictions can
3 get their evidence and to ensure reciprocity when U.S. courts
4 need foreign evidence. Those aims are completely irrelevant if
5 the foreign jurisdiction already has control and jurisdiction
6 over the party that has and owns the documents.

7 The same way here, your Honor. If your Honor had a
8 case where the defendant was right before you, you wouldn't
9 need to get that defendant's documents by going to the
10 Netherlands or any other country to get help.

11 THE COURT: There are four different entities for whom
12 Cravath acted.

13 If each of those entities would become the respondent
14 in a discovery proceeding. I think it would create a lot of
15 complexity that is needless. You have the custodianship. You
16 have the documents. It is an easy place to go. It is a
17 logical place to subpoena.

18 I hold that there is very good reason to go after
19 Cravath here.

20 The first factor is whether the person from whom the
21 discovery is sought is a party in the foreign proceeding. It's
22 not, although the proceedings may be aimed at one or another of
23 Shell's companies. We don't know who it is and when it is and
24 under what circumstances it is. It is not that that is a good
25 factor here.

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1 The second discretionary factor is the nature of the
2 foreign tribunal, the character of the foreign proceedings, and
3 the receptivity of the foreign tribunal to federal court
4 assistance.

5 There is no indication the Netherlands court does not
6 want the help of American discovery rules. The Netherlands is
7 an advanced civilized society. It will give proper process to
8 all the parties before it. Its judiciary is a vital and
9 important and independent part of the government. I think it's
10 the kind of proceeding that we would be very comfortable with.
11 That factor goes towards requiring production.

12 And third is whether the request conceals an attempt
13 to circumvent foreign proof-gathering restrictions or other
14 policies of a foreign country to the United States. There is
15 no indication that any of that is happening.

16 The fourth is whether the request is unduly intrusive
17 or burdensome.

18 It doesn't appear to be, because what one would expect
19 the documents are neatly bound, numbered, and kept in the
20 extraordinary capabilities of one of the major firms in the
21 United States.

22 So I think everything goes for enforcing the subpoena.

23 MS. MOSKOWITZ: May I address two of those factors?

24 THE COURT: Yes.

25 MS. MOSKOWITZ: Thank you, your Honor.

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1 With respect to the receptivity of the Dutch courts,
2 your Honor, I would point your Honor to the government of the
3 Netherlands amicus brief that was filed to the Supreme Court in
4 this Kiobel appeal.

5 The court there said a few things of note with respect
6 to U.S. courts and the ability of the government of the
7 Netherlands to want to have control over its own rules and
8 proceedings.

9 The court there said a few things. It said that U.S.
10 courts operating within the Alien Tort Statute context
11 "interferes with the rights of a nation to prescribe rules for
12 and adjudicate disputes."

13 It also talked about the objecting to the efforts of
14 U.S. litigators and judges to bypass legal systems of other
15 sovereigns, and it also talked about the risks of improper
16 interference with the rights of foreign sovereigns because the
17 U.S. has chosen to adopt plaintiff-favoring rules and remedies
18 that other nations do not accept.

19 One of the main rules that they were talking about
20 there, which is what we quoted in our brief was the "generally
21 broader discovery available to plaintiffs in the U.S."

22 So what the plaintiff is trying to do is take
23 wholesale U.S.-style discovery that was produced in a U.S.
24 litigation and transport it all the way over to a Dutch
25 proceeding that has its own rules and has told the United

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1 States that it wants to use its own rules to adjudicate its
2 disputes.

3 THE COURT: But in the final analysis these documents
4 that are subpoenaed do not constitute evidence. They do not
5 constitute evidence because they haven't been admitted and they
6 may not be admissible in a Dutch court. They are asked for use
7 in connection with the Dutch court, and only the plaintiff can
8 figure out how to use this in a way that is consistent with
9 Dutch rules of practice.

10 I don't see that as being a factor that is relevant
11 here. I am not determining the substantive rules in the
12 Netherlands or in Nigeria. That is for the Dutch court to
13 decide. I am not determining whether it is appropriate for a
14 Dutch court in the Netherlands to make rules of conduct that
15 apply to a nation, a sovereign nation in Africa.

16 I am just simply saying that we have a cache of
17 documents here that it's easy to get to and it's appropriate to
18 subpoena them. That's as far as I am going.

19 MS. MOSKOWITZ: Would you like to hear on the last
20 factor?

21 THE COURT: I love hearing from you, Ms. Moskowitz.

22 MS. MOSKOWITZ: Thank you.

23 THE COURT: You are a very good advocate.

24 MS. MOSKOWITZ: Thank you, your Honor.

25 With respect to the circumvention of foreign

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1 proof-gathering restrictions, petitioner recited --

2 THE COURT: Yes. I should say that, too, because we
3 don't have a case where there's a need for much discovery
4 against Ms. Kiobel. She is advancing an agenda of
5 environmentalism. Whether it's applicable or not the Dutch
6 court can decide and the Nigerian court may have to decide. It
7 is not for me to decide. It doesn't play any part in what I
8 have to do.

9 Mutuality is another issue. I don't think it's
10 invoked in the kind of case we have here.

11 MS. MOSKOWITZ: That's right, your Honor.

12 In the Kreke case, Judge Buchwald did face a similar
13 situation where a petitioner refused to engage with the German
14 rules on gathering evidence precomplaint and came to the United
15 States, to the Southern District to seek 1782 discovery against
16 one of the entities that would have been a defendant in the
17 German proceeding.

18 Judge Buchwald said that 1782 was not designed to
19 encourage foreign litigants to come to the U.S. courts to
20 preempt discovery rulings from a foreign tribunal that had
21 clear jurisdictional authority, and that petitioner here is
22 doing just that.

23 There is a procedure. It's Rule 843(a). They cited
24 it to your Honor. They said it might be hard, but the two
25 requirements Dutch counsel provides, and we've refrained and

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1 resisted the temptation to put in competing foreign law
2 affidavits, listening to the Second Circuit and Supreme Court
3 on that, but what she herself says is all she needs to do is be
4 aware of the existence of the substance of the documents -- the
5 petitioner clearly does, they have seen all these documents.
6 They litigated this case for years -- and, two, must be able to
7 show how those documents will allow her to discharge her burden
8 of proof.

9 The idea that the legal issues are unclear here is a
10 non sequitur. This is going to be an exact replica. Everyone
11 has said that to your Honor. Dutch counsel and petitioner's
12 counsel here have said we are going to do exactly what we did
13 in the United States and bring it in the Netherlands. So the
14 idea that they can't meet the 843 procedure, and they haven't
15 even tried to, in the proper jurisdiction looks like an end run
16 and forum shopping to avoid a possible negative result in the
17 Netherlands.

18 THE COURT: Tell me what 843 means.

19 MS. MOSKOWITZ: Me, your Honor?

20 843 is the Dutch civil code of procedure provision
21 that petitioner's counsel cited as allowing in certain
22 circumstances for precomplaint discovery from the defendant.

23 The two requirements that the Netherlands counsel
24 here, Dutch counsel cited was, first, that the petitioner must
25 be aware of the existence and substance of the documents; and,

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1 second, they must be able to show how those documents, if they
2 obtain them, would allow them to discharge the burden of proof.

3 I don't see how they can satisfy that, or at least
4 make a good-faith effort to satisfy that given that they know
5 exactly what these documents say. They had them in their
6 possession. They destroyed them, but they did have them. They
7 know what they say. And they know what legal theories they are
8 going to bring this case under, especially if there is a draft
9 writ of summons sitting on her desk, that she should be able to
10 seek this discovery from the Dutch court from Shell under
11 843(a).

12 That is, of course, without prejudice to needing to
13 renew in front of your Honor down the road, but it just seems
14 like this is the wrong mechanism given that there is a
15 mechanism in the Netherlands.

16 The Second Circuit in -- I am going to mess up the
17 pronouncement but -- Metallgesellschaft did talk about the fact
18 of foreign discoverability is a useful tool where the discovery
19 would be equally available in the U.S. and foreign
20 jurisdictions, which would render the 1782 request duplicative.

21 So we would urge your Honor to deny the petition here
22 now so that the petitioner can proceed in the proper forum
23 under 843(a) and attempt to get the discovery from Shell there.

24 THE COURT: Answer that, Mr. Simons.

25 MR. SIMONS: Certainly, your Honor.

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1 So with respect to Section 843(a) of the Dutch civil
2 code of civil procedure, we would respectfully disagree with
3 Ms. Moskowitz on a couple of points.

4 First, even if it were possible to obtain these
5 documents at this stage, it would be extremely cumbersome,
6 because it does require a specific identification of each
7 document and description of it in order to order a document by
8 document production.

9 Second, I hate to disabuse Ms. Moskowitz of her
10 confidence in my memory, but I do not recall every single
11 confidential document that Shell produced over the course of
12 this litigation. Even if I did, I could not tell or Dutch
13 counsel what was in those documents because the confidentiality
14 order prohibits me from could go so.

15 So it is not an answer to say that we can use the
16 knowledge that we obtained under that confidentiality order to
17 request those documents because that order specifically
18 restricts that knowledge to use in the Wiwa and Kiobel cases in
19 this court.

20 THE COURT: Hold it. It is part of the scope of
21 Section 1782 to make a production and to enforce subpoenas in
22 actions that have not yet been brought and that could be
23 brought in the Netherlands.

24 It's not limiting to Section 1782 that there has to be
25 the same technical bases to get discovery as exists in the

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1 foreign court. If it's for use in a foreign tribunal, the
2 statute is satisfied, and there's nothing in the discretionary
3 factors that causes me to limit production.

4 So I'm holding that, subject to working out an
5 application of the old protective order to the new situation,
6 proper representation of confidentiality from those using the
7 documents, that they can be subpoenaed for use in the foreign
8 proceeding.

9 That's my holding. Thank you very much.

10 MS. MOSKOWITZ: Thank you, your Honor.

11 THE COURT: How much time do you need, Ms. Moskowitz?

12 MS. MOSKOWITZ: It is a great question.

13 Perhaps when I work out the --

14 THE COURT: It's the end of the year, and you have
15 other things to do. I don't know what the time pressures are
16 on plaintiffs. Let's go off the record for a moment and
17 discuss this.

18 (Discussion off the record)

19 THE COURT: The order is subject to working out the
20 proper protective order and said representations by counsel
21 using these documents. The same is to be submitted by the
22 close of business on January 6, 2017.

23 Thank you very much.

24 MS. MOSKOWITZ: Thank you, your Honor.

25 (Adjourned)

EXHIBIT B

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

IN RE PETITION OF ESTHER KIOBEL,

Applicant,

For an Order Granting Leave to Issue
Subpoenas to Cravath, Swaine & Moore LLP
for Production of Documents Pursuant to 28
U.S.C. § 1782

Civil Action No. 1:16-cv-07992

Request for Production of Documents

PLEASE TAKE NOTICE that, pursuant to 28 U.S.C. § 1782, the hearing on December 20, 2016, and this Court's January 24, 2017, Opinion and Order Granting Petition, Cravath, Swaine & Moore LLP ("Cravath") is commanded to respond to this Request for Production of Documents and produce and permit Petitioner to inspect and copy all responsive documents by February 27, 2017. Cravath is advised that the rules of discovery under Rules 26 and 34 of the Federal Rules of Civil Procedure are applicable to requests made pursuant to 28 U.S.C. § 1782, and of their obligations under Rule 26(e) to supplement responses. All documents shall be produced at the offices of the Columbia Law School Human Rights Clinic, 435 West 116th Street, New York, NY 10027, or at such other location as the parties may agree, and shall be produced in the manner agreed to in the Stipulation and Order Regarding Confidentiality of Discovery Materials dated January 13, 2017.

DEFINITIONS

Please note that all words herein have their meaning in ordinary English usage. If there is any difficulty in understanding the scope or meaning of any word, please feel free to contact Applicant's attorneys for an explanation.

Unless a contrary meaning appears in the text, the following definitions apply:

And includes the word **or** and vice-versa.

Any includes the word **all** and vice-versa.

Communication(s) as used herein shall refer to any oral, written, in person, or any other form of relay, transmission, or transference of information by any means whatsoever including but not limited to by way of mail, computer, telephone, cellular or mobile phone, voice mail, electronic mail, radio, video, sound recordings, television, telefax, telex, social media, or any other medium.

Confidential Material as used herein shall be used to describe all documents and other materials (including deposition transcripts) that the parties in the *Kiobel* and the *Wiva* cases previously designated as confidential and produced pursuant to the Stipulations and Orders Regarding Confidentiality of Discovery Materials that were so-ordered by Judge Kimba Wood in those actions.

Cravath or **You** shall refer to law firm Cravath, Swaine & Moore LLP, as well as any attorneys from the firm that served as counsel to Shell in the *Kiobel* and *Wiva* cases at any point during their litigation and/or represented Shell in subsequent proceedings.

Document as used herein is a broadly inclusive term, referring to any and all written or other graphic matter, however produced, generated, or reproduced, of every kind and description, and to anything upon which sounds, pictures or electronic images are recorded, transferred, imprinted or depicted by photography, video, typewriting, handwriting, sound recording, or otherwise. Such terms refer to originals, copies where originals are unavailable, copies of originals which differ in any manner from the originals, and all drafts prepared in connection with such matter, including but not limited to the following: contracts, agreements, memoranda of understanding, charts, graphs, inventories, accounts, lists, transcripts, abstracts, tape recordings, video recordings, sound reproductions, summaries, files, pleadings, depositions, answers to requests for admissions, answers to interrogatories, file jackets, file covers, records, books, papers,

correspondence, notes, electronic mail messages, agreements, statements, photographs, motion pictures, objects, microfilm, telegrams, telegraphs, telexes, telefaxes, facsimiles, copies, letters, memoranda, notations, interrogatory responses, scratch paper, minutes of directors or committee meetings, minutes of interviews, minutes of in-person or telephonic conversations or communications, interoffice communications, shareholder reports, press releases, reports, studies, audits, reviews, assessments, statistics, stenographic notebooks, calendars, appointment books, diaries, time sheets, logs, computer disks, computer programs, databases, computer printouts, data processing cards, data processing tapes, or papers similar to any of the foregoing however denominated by the responding party, regardless of whether it was prepared in whole or in part by Cravath or Shell.

Defendants shall refer to **Shell** (*see* corresponding definition below) in addition to Brian Anderson, a named defendant in one of the *Wiva* cases (No. 01 Civ. 1909) who served as the head of Shell's Nigerian operations.

Deposition transcripts shall refer to written or printed versions of sworn out-of-court testimonies delivered by any witnesses, including digitized versions.

Including shall mean "including but not limited to."

Kiobel shall refer to the action *Kiobel v. Royal Dutch Petroleum Co.*, 456 F. Supp. 2d 457 (S.D.N.Y. 2006), which was first filed and litigated in this court under the case number 02 Civ. 7618.

Non-Confidential Material shall be used to describe all documents and other materials (including deposition transcripts) that were not designated as "Confidential" by the parties in during *Kiobel* and the *Wiva* cases during production in those actions.

Shell shall refer to Royal Dutch Shell, its predecessor Shell Transport & Trading Company Ltd., its successor Shell Petroleum N.V., and its Nigerian subsidiary Shell Petroleum Development Company of Nigeria.

The **Wiwa cases** shall refer to three lawsuits that were filed in this court and litigated until their conclusion by settlement in 2009: *Wiwa v. Royal Dutch Petroleum Co.*, No. 96 Civ. 8386; *Wiwa v. Brian Anderson*, No. 01 Civ. 1909; and *Wiwa v. Shell Petroleum Development Corp. of Nigeria*, No. 04 Civ. 2665.

REQUEST FOR PRODUCTION OF DOCUMENTS

Please produce the following documents in Your possession, custody, or control:

1. All deposition transcripts of Defendants' witnesses from *Kiobel* and the *Wiwa* cases, including Confidential Material and Non-Confidential Material.
2. All discovery documents and communications produced to the Plaintiffs by Shell and other Defendants in *Kiobel* and the *Wiwa* cases, including Confidential Material and Non-Confidential Material.

RESPECTFULLY SUBMITTED this 27th day of January 2017.

s/ MARCO SIMONS

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EXHIBIT C

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3
4 KEN WIWA, individually and
5 as Executor of the Estate of
6 his deceased father Ken
7 Saro-Wiwa, et al.,

8
9 Plaintiffs

10
11 -vs-

12
13 ROYAL DUTCH PETROLEUM and
14 SHELL TRANSPORT AND TRADING,
15 P.L.C., et al.,

16
17 Defendants
18

DOCKET NO.: CV-96-8386 (KMW)
CV-01-1909 (KMW)
CV-02-7618 (KMW)

New York, New York
November 25, 2002

19 TRANSCRIPT OF CIVIL CAUSE FOR CONFERENCE

20 BEFORE THE HONORABLE KIMBA M. WOOD
21 UNITED STATES DISTRICT JUDGE

22 A P P E A R A N C E S:

23 For the Plaintiffs:

THOMAS H. GOLDEN, ESQ.
Willkie Farr & Gallagher
787 Seventh Avenue
New York, NY 10019

27 JENNIFER M. GREEN, ESQ.
28 JOHN M. SPIRE, ESQ.
29 Center for Constitutional Rights
30 666 Broadway, 7th Floor
31 New York, NY 10012

32 Audio Operator:

33 Proceedings Recorded by Electronic Sound Recording
34 Transcript Produced by Transcription Service
35

36 KRISTIN M RUSIN
37 328 Flatbush Avenue, Suite 251
38 Brooklyn, New York 11238
39 (718) 789-0620

1 THE CLERK: Your Honor, this is the matter of Ken
2 Wiwa versus Royal Dutch Petroleum. Counsel, this matter is
3 being taped. Please state your appearances before you speak.
4 I need you to please state your appearances now for the record.

5 MR. GOLDEN: Your Honor, Tom Golden from Willkie Farr
6 for the plaintiffs in the Wiwa action.

7 MS. GREEN: Jennifer Green, Center for Constitutional
8 Rights, Wiwa action.

9 MR. DiCAPRIO: Good afternoon, Your Honor. Anthony
10 DiCaprio in the Wiwa Action, Ratner DiCaprio & Chomsky.

11 MR. SPIRE: John M. Spire. Good afternoon, Your
12 Honor — for the Center for Constitution Rights.

13 THE COURT: Good afternoon.

14 MR. WHINSTON: Good afternoon, Your Honor. Stephen
15 Whinston for plaintiffs in the Kiobel action.

16 MR. D'AVINO: Good afternoon, Your Honor. Carey
17 D'Avino of Berger & Montague for the plaintiffs in the Kiobel
18 action.

19 MR. RAFFERTY: Good afternoon, Your Honor. Tom
20 Rafferty from the Cravath firm for the defendants, along with
21 Rory Millson and Adrienne Wheatley.

22 THE COURT: Okay. Thank you. Each — this is Judge
23 Wood. Each time you speak you'll need to repeat your name for
24 the sake of the transcript.

25 Could counsel for Wiwa give me an update with respect

1 to what has happened in discovery so far?

2 MR. GOLDEN: Certainly, Your Honor. Again, Tom
3 Golden. Your Honor, the plaintiffs in the Wiwa action are
4 ready to begin deposition discovery, and we have proposed a
5 number of names for depositions to be held, at our suggestion,
6 in December in London, including of Brian Anderson, who is a
7 party in our case.

8 THE COURT: Does that mean that no depositions were
9 held —

10 MR. GOLDEN: That's correct, —

11 THE COURT: — in June and —

12 MR. GOLDEN: — Your Honor.

13 THE COURT: — so on?

14 MR. GOLDEN: There have been no depositions.

15 THE COURT: And that's because —?

16 MR. GOLDEN: We had been operating with the
17 understanding that counsel in the Kiobel case would be ready to
18 begin deposition discovery in December. It is now their view
19 that that's not the case, and that they will not be able to
20 begin deposition discovery next month.

21 They have outstanding document issues, I understand,
22 with the defendants that need to be resolved. And Shell,
23 understandably, takes the position that they would like to
24 produce these deponents just once. And so we find ourselves at
25 a bit of an impasse. The Wiwa plaintiffs obviously would like

1 to begin deposition discovery as soon as possible, including
2 with the proposed depositions in London next month.

3 If the Kiobel plaintiffs would be in position to
4 participate in those depositions with a short delay, meaning
5 thirty days or so, I think we would be willing to agree to that
6 as an accommodation.

7 If the Kiobel plaintiffs think they would need more
8 time than that, it would be our view that the Wiwa discovery
9 should not be delayed any further, and we would either propose
10 that — the Kiobel plaintiffs joining the depositions now with
11 the understanding that they would have the right to seek to
12 reopen them if later produced discovery warrants that, or we
13 would certainly make transcripts of the depositions available
14 to the Kiobel plaintiffs so that they would not have to cover
15 ground that's already been covered in our case.

16 But we would be concerned about an undue further
17 delay in — in the Wiwa case as a result of the — Kiobel's
18 need for additional document discovery.

19 THE COURT: All right. Now, could you remind me who
20 Jane Doe is in your caption?

21 MR. GOLDEN: If I could defer to my colleague, Ms.
22 Green.

23 THE COURT: I'm just wondering if there's overlap
24 between Kiobel and Wiwa.

25 MS. GREEN: There is not, Your Honor. Her name is

1 Karalolo Korgbara, K A R A —

2 THE COURT: I'm sorry, you need to state your name
3 again.

4 MS. GREEN: I'm sorry. I'm Jennifer Green.

5 THE COURT: Could you spell the name for the
6 transcript?

7 MS. GREEN: Sure, K A R A L O L O, Korgbara, K O R G
8 B A R A.

9 THE COURT: All right, thank you. Could I hear from
10 counsel for plaintiffs in Kiobel?

11 MR. WHINSTON: Yes, Your Honor, Stephen Whinston.
12 When we were here last, we held out the possibility that we
13 could participate in discovery and deposition discovery in
14 London in December, depending upon our review of the documents
15 that had been produced by Shell to the Wiwa plaintiffs.

16 Upon reviewing those documents, we felt that — and
17 while it may or may not be adequate production in the Wiwa
18 case, it does not represent sufficient production for our
19 purposes in the Kiobel case, which of course is a class action
20 as opposed to an individual action.

21 THE COURT: Can you — could you pause just for a
22 minute and tell me when you started reviewing the Wiwa
23 documents in earnest?

24 MR. WHINSTON: I don't have those dates in front of
25 me. This — the —

1 THE COURT: Approximately.

2 MR. WHINSTON: I would say perhaps a month ago, maybe
3 a little bit more than a month ago. Maybe my colleague can
4 help.

5 MR. RAFFERTY: Your Honor, Tom Rafferty on behalf of
6 the defendants. I believe that within — over the weekend
7 after we last met, they signed the protective order, and that
8 following week we produced the boxes of documents to them, so
9 it has been approximately a month or so.

10 THE COURT: Okay, thank you.

11 MR. WHINSTON: Stephen Whinston again. That is
12 correct, Your Honor. That comports with my recollection as
13 well.

14 THE COURT: Let me also ask you this. What
15 percentage of your working time have you been devoting to this
16 case?

17 MR. WHINSTON: I have a hard time estimating that.
18 But let — how — I — let me tell you what we have done.

19 THE COURT: Just a very rough estimate.

20 MR. WHINSTON: Well, I'd say it's — on a
21 consolidated basis between my colleague, Mr. D'Avino, and
22 myself, I'd say it's about twenty to twenty five percent.

23 THE COURT: I'm sorry, you're saying it's twenty to
24 twenty five percent of each of your time, or —

25 MR. WHINSTON: On an average.

1 THE COURT: — ten percent of each of your time?

2 MR. WHINSTON: About — less than twenty percent of
3 my time, more than twenty percent of Mr. D'Avino's time.

4 THE COURT: Okay.

5 MR. WHINSTON: In addition to reviewing the boxes of
6 documents that were produced, we analyzed them, determined what
7 we felt were missing, and issued both interrogatories and
8 document requests to Shell, and I believe that was about two
9 weeks ago, —

10 THE COURT: Do you have a copy —

11 MR. WHINSTON: — approximately.

12 THE COURT: — of that?

13 MR. WHINSTON: I do.

14 THE COURT: May I look at that?

15 MR. WHINSTON: Sure.

16 (Off the record discussion)

17 THE COURT: I'll bring it back to you. I'm just
18 going to take a quick look. [Pause] All right. These
19 document requests were served when?

20 MR. WHINSTON: Approximately two weeks ago.

21 THE COURT: Okay.

22 MR. WHINSTON: I have had a discussion with Mr.
23 Rafferty about them and the procedure that would be undertaken
24 to respond to them. We have concluded that we will meet and
25 confer regarding any concerns that Shell has regarding the

1 scope of the document production prior to defendant's counsel
2 undertaking the process of searching for the documents, so that
3 if a trip to Nigeria is involved, which appears it might be or
4 would be, that they would only have to go there once rather
5 than twice.

6 So we are going to follow up on that and have our
7 meet and confer, and then hopefully the documents will be
8 produced as soon as they possibly can.

9 THE COURT: When do you plan to first meet on this?

10 MR. WHINSTON: We haven't set a specific date, but it
11 will be sooner rather than later, within the next week or two,
12 I hope.

13 THE COURT: Mr. Rafferty?

14 MR. RAFFERTY: Yes, Your Honor. Tom Rafferty for the
15 defendants. Your Honor, we obviously have some concern with
16 this document request. I have been to Nigeria not once but
17 three times to collect the documents that were produced in
18 Wiwa. We don't believe that some of the categories of
19 documents that they're asking for — that there actually are
20 responsive documents that exist to produce to them.

21 But before we —

22 THE COURT: Could you give me an example of the —

23 MR. RAFFERTY: Well, they've asked us for flight logs
24 for Shell helicopters in one of the requests. Shell doesn't
25 have any helicopters. They contract with a third party who

1 provides the air service in Nigeria.

2 What records we had with respect to Shell helicopters
3 — the use of helicopters by SPDC, which is the Shell
4 subsidiary in Nigeria relating to Ogoni or to any of the
5 matters at issue in the complaint we included in the last
6 production. So I'm not certain there's anything else that we
7 have that will be responsive to that.

8 And by we, we did not make any argument that either
9 Royal Dutch or Shell Transport would not seek to have SPDC,
10 which is a separate legal entity, produce documents from its
11 files, and we have done that.

12 But I need to confirm that there are, in fact,
13 documents in a number of categories, because I've said to Mr.
14 Whinston there's no point in our fighting over something that
15 even if he insists on getting it that we simply can't give him
16 because it doesn't exist. So we hope to do that within a
17 relatively short period of time.

18 Just —

19 THE COURT: But it's — the — your situation with
20 the client is that you personally have to go to Nigeria to
21 ascertain what there is that's responsive before you can have a
22 serious discussion about what you're going to give?

23 MR. RAFFERTY: No, Your Honor. I've been talking to
24 Nigerian lawyers who work for SPDC, and we have been trying to
25 figure out whether there is anything in addition to what we've

1 | already produced that could be turned over that's responsive to
2 | these things, and that process is ongoing.

3 | Not surprisingly, our discovery methods are not
4 | universal, so there is at least initially some explaining you
5 | have to do about how you go about this, which is why I went to
6 | Nigeria this summer to make sure that what we were bringing
7 | back in Wiwa was, in fact, what was there.

8 | THE COURT: I appreciate that our system is very
9 | different from any other and that it's a good idea to have you
10 | go through the production and make sure that it's all inclusive
11 | of what you maintain that you're producing. I'm just wondering
12 | how to — I'm trying to get a handle for how the timing is
13 | going to work out here.

14 | It would seem that there may be very few documents in
15 | Nigeria responsive to this request concerning matters that are
16 | likely to come up in depositions in Nigeria. Does that sound
17 | right?

18 | MR. RAFFERTY: Right. Well, I should —

19 | THE COURT: It's Mr. Rafferty.

20 | MR. RAFFERTY: I'm sorry, Your Honor. I should back
21 | up and say that we have agreed with the Wiwa plaintiffs that we
22 | will bring a reasonable number of Nigerian SPDC employees to
23 | either London or The Hague to be deposed, as opposed to having
24 | us all have to go to Nigeria.

25 | Nigeria is not a signatory to The Hague Convention,

1 and there are some interesting questions as to how and if you
2 could conduct an American style deposition within the
3 jurisdiction of Nigeria, so rather than have that fight, we
4 have previously told them we would have them come to London or
5 The Hague, as appropriate.

6 We are anxious to get going. We — we, for the
7 record, believe that the fundamental premise of these cases is
8 simply wrong and are anxious to get to the merits. On the
9 other hand, we don't want to do it twice.

10 THE COURT: All I'm asking is what — I've said I'm
11 trying to get a handle on what the likely timing is going to
12 be. Am I right that there are probably relatively few
13 documents in Nigeria that need to be produced in order for all
14 plaintiffs' counsel to begin the depositions?

15 MR. RAFFERTY: Yes, Your Honor. Mr. Whinston and I
16 had talked about — and he can correct me if he's changed his
17 view or if I've gotten it wrong — that perhaps the depositions
18 could begin as early as the first week of February if we were
19 to expeditiously come to an agreement on the scope of his
20 demand, give him any additional documents, and then try to get
21 these people scheduled to go.

22 And the Wiwa plaintiffs have said that they're not so
23 happy with that, but I believe that, you know, we're not going
24 to get it done much sooner than February in terms of getting
25 them the documents, making sure we've done an adequate search,

1 and then getting these people scheduled.

2 THE COURT: How big are the files of — that you'd be
3 searching in Nigeria?

4 MR. RAFFERTY: Well, files in Nigeria, Your Honor,
5 are — is an interesting concept. The files are in some
6 respects big, and in some respects less than what you would see
7 in an American style corporation. They're also sort of spread
8 out. They are — last I went to Nigeria, I looked at files in
9 the headquarters of SPDC in Lagos, in Port Harcourt, and in a
10 town called Warri, which are two operational divisions, and so
11 they're kind of spread out.

12 The helicopter records — the example we used before
13 — I did my best in all three locations to find any responsive
14 and relevant records relating to the use of helicopters in the
15 Ogoni region during the relevant time period. I don't know
16 that I have to do that again, because I don't think there are
17 any more, but I have been asking for people to double check
18 what was shown to me.

19 So I don't believe that it's going to be an enormous
20 process, but if I have to go back to Nigeria, it's not like you
21 get on a plane and go. You have to get a visa. It takes a
22 while to get a visa. You have to be invited by SPDC in writing
23 in order to get the visa. So it — I would not be able to get
24 back to Nigeria if that is necessary any time before the first
25 of the year. I just don't see that as a possibility.

1 THE COURT: Now, what would obviate the need for you
2 to go to Nigeria?

3 MR. RAFFERTY: Well, I'm hoping that these
4 conversations that I'm having by telephone with the Nigerian
5 lawyers might narrow some of the areas where they can tell me
6 that there is nothing else.

7 There is an example that I can give you. In the Wiwa
8 case, both the plaintiffs and the defendants agreed that the
9 scope of the document production stopped at the filing of the
10 lawsuit back in November of '96, so there is clearly going to
11 be some incremental documents in the same categories that post-
12 date that — November of '96 that the Kiobel plaintiffs are
13 seeking because their putative class period extends through
14 1999.

15 So I know that there may well be some additional
16 documents that have to be collected and produced to them, not
17 only in Nigeria but also from London and The Hague, because the
18 two parent — the defendants in this case are headquartered in
19 London and The Hague, respectively. It is only the Nigerian
20 sub, SPDC, that poses the Nigerian question.

21 THE COURT: Do you have any feeling for how many
22 files would have to be checked in order to search for documents
23 responsive to the Kiobel document request?

24 MR. RAFFERTY: I would say we're going to be looking
25 at archive collections generally, and probably the files of

1 | thirty five or forty employees of the defendants as well as
2 | probably a similar number of employees of SPDC.

3 | THE COURT: All right, and are they all in Lagos, or
4 | —

5 | MR. RAFFERTY: No, the Nigerian — the SPDC employees
6 | are spread out. The two other locations, Warri and Port
7 | Hawcourt, are the other two headquarters for the Eastern and
8 | the Western Division of SPDC, so there are people spread across
9 | the Niger Delta.

10 | THE COURT: I don't have a feeling for how voluminous
11 | the documents are in each of these places.

12 | MR. RAFFERTY: I probably looked through several
13 | hundred boxes of documents over the summer, and I'm confident
14 | that I know what I was looking at, and that I know where to go
15 | back for some of the post-'96 documents to those files. I
16 | tried to be careful so that if I had to come back, I could get
17 | back through it.

18 | THE COURT: When you say these are archives, what
19 | does that mean?

20 | MR. RAFFERTY: Well, I mean, some of the documents
21 | the Wiwa plaintiffs were asking for were from the period '90,
22 | '91, '92. Those documents are — and from Mr. Anderson's
23 | files, for example — Mr. Anderson is no longer an employee.
24 | He was the managing director of SPDC. He's not there anymore,
25 | so his files at SPDC were in an archive. They were stored in a

1 | warehouse in boxes, and one had to simply collect them and open
2 | them up and see what was in them.

3 | THE COURT: Okay. Have you considered having the
4 | archived boxes sent to the U.S. so that you could examine them
5 | here?

6 | MR. RAFFERTY: Would that it were so easy, Your
7 | Honor. The structure of this Nigerian operation is SPDC is the
8 | operator of a joint venture with a government entity called
9 | NNNPC [sic], the — and NNNPC is the actual owner of the
10 | documents. These are the joint venture's documents, and so —
11 | we hadn't troubled Your Honor with this before, but we had
12 | extensive conversations with the Wiwa plaintiffs about Plan B
13 | in the event that the Nigerian government took the view that we
14 | could not take those documents out of the country.

15 | Now, they have allowed us to copy the documents. I'm
16 | not certain that we'd simply be allowed to take the files and
17 | remove them from Nigeria, and I think that if we tried to go
18 | that route the issues of going through the Nigerian government
19 | might well make it more time consuming rather than less. It's
20 | probably — and I concluded, having no great desire to spend
21 | part of my summer in Nigeria, that the most expeditious way to
22 | get this done was to simply go and —

23 | THE COURT: All right. Can you commit to making a
24 | search within the first week in — first full week in January,
25 | or some particular time, so that we'll know what we have to

1 work with?

2 MR. RAFFERTY: Your Honor, I had hoped to produce any
3 incremental documents by the second week in January, and I say
4 that with just the hesitation that I once before was unable to
5 secure a visa on an application and had to re-do it, and so I
6 had to go back through the whole routine of having an
7 invitation letter sent which could then be incorporated into an
8 application and taken to the consulate in New York, so our hope
9 had been that whatever additional needed to be produced would
10 be done by the second week in January, and that —

11 THE COURT: Does that mean by the 10th?

12 MR. RAFFERTY: If Your Honor is going to hold me to
13 that, yes, the 10th would be fine.

14 THE COURT: Okay. So you think that all documents
15 that the Kiobel plaintiffs have asked for can be in this
16 country by January 10; at least that's what I would want, so
17 that if I rule on them you don't have to go back to Nigeria for
18 a further search.

19 MR. RAFFERTY: Well, I had hoped that we could make
20 my life somewhat easier by Mr. Whinston and I sitting down and
21 talking through some of the categories of documents and trying
22 to get them somewhat more focused.

23 THE COURT: I certainly have no objection to that.
24 All I'm asking is that by the 10th all documents that the
25 Kiobel plaintiffs want be in this country, so that if I rule

1 that they have to be produced, they can be produced right away.

2 MR. RAFFERTY: Your Honor, I think — that makes it
3 far more difficult for me to assure you that I will be done by
4 the 10th. I think the alternative that I at least —

5 THE COURT: Take —

6 MR. RAFFERTY: — had in mind was that we would talk.
7 If there was a category or categories that we were in
8 disagreement on, we would bring that to Your Honor's attention
9 immediately.

10 THE COURT: Well, that's — there's nothing wrong
11 with having that process go on before you go to Nigeria.

12 MR. RAFFERTY: That's what I would prefer, Your
13 Honor, rather than —

14 THE COURT: Well, then it's — they're not
15 alternatives to one another, as I see it. We can work out any
16 disagreements that you think of before you go to Nigeria, but I
17 suspect when you get on the site there will be documents that
18 fall into — you know, maybe into discoverable, maybe not
19 discoverable, and I'd like anything as to which there's any
20 question in this country by the 10th.

21 MR. RAFFERTY: That I could do, Your Honor.

22 THE COURT: Okay. Okay, so in light of that, when —
23 I've got about five minutes before I need to bring my jury back
24 in, so let's do whatever you think important. Shall we set
25 deposition dates, or would you rather have me leave you to do

1 the — to propose scheduling in writing? Mr. Rafferty?

2 MR. RAFFERTY: Your Honor, Tom Rafferty again. The
3 deposition dates, I believe, we should be able to work out
4 ourselves. In part, it's a function — some of the people that
5 are on the plaintiff's deponent list are no longer employees.
6 We believe that they will make themselves available, but it has
7 to be on a reasonable basis, and we need to try to schedule
8 people's travel to make some sense.

9 We had already set Mr. Anderson's deposition for
10 December 17th. We're going to have to go back to him and find
11 out when he will next be in Europe. He currently lives in Hong
12 Kong and Beijing and travels quite frequently.

13 THE COURT: Well, if he travels quite frequently, he
14 could probably be deposed by the Wiwa lawyers on December 17,
15 and then he'll be back at some point. Is that what the Wiwa
16 counsel would like?

17 MR. GOLDEN: That would certainly be our preference,
18 Your Honor.

19 THE COURT: Okay.

20 MR. GOLDEN: I'm sorry, Tom Golden.

21 THE COURT: Doesn't that make sense, Mr. Rafferty?

22 MR. RAFFERTY: Your Honor, I —

23 THE COURT: I know that means preparing him twice,
24 but it's a lot easier than waiting until many, many months from
25 now.

1 MR. RAFFERTY: Well, I don't — Your Honor, I don't
2 see — if we're going — if we're not going to get the other
3 depositions until thereafter why it is that we should do Mr.
4 Anderson's deposition twice. The cases are very similar.

5 THE COURT: I understand. I understand all the —
6 all the — I —

7 MR. RAFFERTY: And —

8 THE COURT: — fully understand what you're saying.
9 I just need —

10 MR. RAFFERTY: We would now then be —

11 THE COURT: — to get the case going.

12 MR. RAFFERTY: Well, we were prepared to get going —
13 we're prepared to get going starting in the beginning of
14 February —

15 THE COURT: Okay.

16 MR. RAFFERTY: — with Mr. Anderson and the others,
17 but for us to travel to Europe to prepare Mr. Anderson, and
18 then to take a single deposition in Europe, to come home, while
19 at the same time I've got, you know, a new trip to Nigeria to
20 look forward to, I just think that it — just for economy and
21 efficiency, it makes more sense for us to do it all at once
22 after the documents are produced.

23 And, you know, we've been told that the Wiwa
24 plaintiffs expect that any incremental documents that we
25 produce to Kiobel in the Kiobel case — that they will get

1 | copies of them.

2 | THE COURT: All right. Let me ask this. You don't
3 | know when Anderson can be produced other than December 17.

4 | MR. RAFFERTY: No, Mr. Anderson is generally
5 | available and makes — will make himself available. December
6 | 17th was their — they asked for December, and Mr. Anderson
7 | said fine, I'll come to London for December.

8 | THE COURT: Okay, I've got two minutes left, so let's
9 | use it as best we can. With respect to Anderson, the Wiwa
10 | counsel should try to work it out with defendants in a way that
11 | makes sense. If you can't work it out, please come back.

12 | Is there anything else you want me to rule on right
13 | now? Obviously a discovery deadline is going to be extended
14 | somewhat. We haven't decided how much. I think we ought to
15 | wait a month or two to decide how much.

16 | Would anyone like to raise anything else?

17 | MR. GOLDEN: Tom Golden. Nothing for Wiwa, Your
18 | Honor.

19 | MR. WHINSTON: Stephen Whinston. Nothing for the
20 | Kiobel plaintiffs, Your Honor.

21 | THE COURT: Okay. At what point in the deposition
22 | process or discovery process will you be moving for class
23 | certification?

24 | MR. WHINSTON: Stephen Whinston again, Your Honor.
25 | It was our intention to wait and see what — how the defendants

1 | would answer the complaint, and if they filed a motion, once
2 | the motion was resolved, and we would have a more clear idea
3 | about which claims were going to move forward, defendants
4 | having indicated that they might file a pointed motion; that
5 | is, a motion directed to some claims, and that they would
6 | answer other claims.

7 | THE COURT: Okay. How many class members do you
8 | think there are, just an approximation?

9 | MR. WHINSTON: We believe there are several thousand
10 | class members.

11 | THE COURT: Okay. Mr. Rafferty, do you wish to raise
12 | anything?

13 | MR. RAFFERTY: No, Your Honor, not at this stage.
14 | Thank you.

15 | THE COURT: Okay. Thank you, counsel.

16 | * * * * *

17 | I, KRISTIN M. RUSIN, court approved transcriber, certify that the foregoing
18 | is a correct transcript from the official electronic sound recording of the proceedings in the
19 | above-entitled matter.

20 | Transcript is certified original only if signed in green ink.

21 | 12/4/02 