08-1803-cv

United States Court of Appeals
for the
Second Circuit

KEN WIWA, individually and on behalf of his deceased father, KEN SARO-WIWA; OWENS WIWA, BLESSING KPUINEN, individually and on behalf of her late husband JOHN KPUINEN; KAROLOLO KOGBARA; MICHAEL TEMA VIZOR; LUCKY DOOBEE, individually and on behalf of his late brother SATURDAY DOOBEE; FRIDAY NUATE, individually and on behalf of her late husband FELIX NUATE; MONDAY GBOKOO, brother of the late DANIEL GBOKOO; DAVID KIOBEL, individually and on behalf of his siblings STELLA KIOBEL, LEESI KIOBEL and BARIDI KIOBEL, and on behalf of his minor siblings, ANGELA KIOBEL and GODWILL KIOBEL for harm suffered for the wrongful death of their father DR. BARINEM KIOBEL; JAMES B. N-NAH, individually and on behalf of his late brother UEBARI N-NAH,

Plaintiffs-Appellants,

– v. –

SHELL PETROLEUM DEVELOPMENT COMPANY OF NIGERIA, LIMITED,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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I. INTRODUCTION

The District Court's dismissal of Plaintiffs' claims against Defendant Shell Petroleum Development Corporation ("SPDC") without permitting jurisdictional discovery was unsupported by any relevant case law. The District Court erroneously determined that Plaintiffs had ample opportunity to take jurisdictional discovery because some SPDC documents and employees were part of discovery in other cases which involved different defendants and did not involve the issue of SPDC's contacts with the forum. Neither the District Court nor Defendant cited any case supporting the proposition that discovery in a different case to which the defendant is not a party provides sufficient opportunity to take discovery of the defendant's jurisdictional contacts. Thus, the District Court erred when it applied the post-discovery standard to its evaluation of the minimum contacts evidence presented by Plaintiffs.

No case cited by Defendant or by the District Court supports the conclusion at this stage in the proceeding, that Defendant's shipment of approximately 3,500,000 barrels of crude oil per month to the United States through a closely related affiliate, along with its public relations campaign admittedly directed at the U.S., its multi-million dollar contracts with U.S. entities (some of which were performed in the U.S.), its recruitment of employees in the U.S., and its employees'

regular visits and multiple training sessions in the U.S. are insufficient to allege or establish a *prima facie* case for jurisdiction.

II. STATEMENT OF FACTS

Two factual issues are presented in this appeal: whether jurisdictional discovery concerning SPDC was available in the related cases, and how evidence of SPDC's presence in the United States was treated by the District Court.

While Defendant relies heavily on discovery sought in three related cases, it fails to acknowledge that Plaintiffs had not received much of the discovery because the discovery disputes in the related cases was still pending when the case against SPDC was dismissed. *See,* SA00125-132; SA0071-99; A00496-505.[1] On the crucial issue of the connection between SPDC and Shell International Transport Company ("SITCO"), which imported SPDC's crude into the United States, Defendant does not and cannot assert that the contracts between them were produced despite Plaintiffs' efforts to obtain them. Two former managing directors of the parent corporations were queried about the connection between SPDC and SITCO: one, the former head of SPDC and the chair of the parent defendant could only answer that "to [his] knowledge, SITCO bought the crude...and became the

[1] References to the Joint Appendix are "A" for Volume 1, "SA" for Volume 2 (initially sealed), and "SPA" for Special Appendix.

owner." A00160:16-161:10. Although Defendant suggests that there is also deposition testimony regarding SITCO's interest in the memorandum of understanding between SPDC and the Nigerian government, Defendant cites no record evidence. Appellee's Brief ("Appellee"):13. Moreover, this is irrelevant to the issue of jurisdiction. Defendant asserts that "SPDC, like several other and distinct corporations around the world, is part of the Royal Dutch/Shell Group of Companies" and recites what it claims are indicia of its independence. The source for these assertions is the conclusory Declaration of Babatunde Aribido, SPDC's legal director. *See* Appellee:6; A0080-83. Defendant further asserts that the sale of crude oil to SITCO is an "arms' length transaction" although the cited Requests for Admission ("RFAs") do not support this assertion. *See* Appellee:7, citing A00139, A00141. Indeed, this Court has previously found inconsistencies between the formal relations among the Royal Dutch/Shell Group of Companies and their actual relationship. Thus in *Wiwa v. Royal Dutch,* 226 F.3d 88, 95 (2d Cir. 2000), this Court held that an individual *nominally* employed by a subsidiary was *actually* employed by the parent companies.

Despite Defendant's assertion that Plaintiffs took discovery in the related cases of facts relevant to jurisdiction over SPDC, the paucity of Defendant's citations reveals the weakness of its argument. Defendant cites to two RFAs

directed to the sale of SPDC crude to SITCO. Appellee:9, n.9, citing Requests for Admission Nos. 23 and 58. Other cited RFAs concern SPDC's internal governance, the relationship of companies within the Royal Dutch/Shell Group and the personnel practice of the parent company defendants. A00130-32; A00136-50. The additional discovery Defendant cites are also irrelevant to SPDC's contacts with the United States and instead deal with the identity of SPDC's Directors and owners (A0094-5), document requests concerning the relationship of companies with the Royal Dutch/Shell group, the identity of those group entities which provided services to SPDC and asset transfers within the group (A00100-07). Defendant further cites single pages from the depositions of two directors of Defendant's parent corporations, the defendants in the related cases, Appellee:11-12, and the fact that ten additional SPDC directors, officers and employees without a single reference to the content of the depositions. Appellee:9, n.8.

III. ARGUMENT

A. The District Court Applied the Wrong Standard in Evaluating Jurisdiction over SPDC.

Defendant concedes that a plaintiff who has not had jurisdictional discovery need only allege a *prima facie* case for jurisdiction. Appellee:18; Appellants' Opening Brief ("AOB"):24. To avoid this rule, however, SPDC mischaracterizes

both the law and the record. As a threshold matter, Defendant suggests this Court should not conduct *de novo* review. Appellee:19. Defendant elsewhere concedes, however, that dismissals for lack of personal jurisdiction are reviewed *de novo.* Appellee at 1; *accord* AOB:18. As part of that review, the subsidiary question of whether the District Court applied the correct legal standard must be reviewed *de novo.*

Defendant further misstates the law by asserting the pre-discovery standard applies "[i]n the absence of *any* discovery." Appellee:18 (emphasis added). But *Jazini*, upon which SPDC relies, holds only that the standard applies "prior to discovery." 148 F.3d at 184, *quoting Ball*, 902 F.2d at 197. Defendant's suggestion that "any" rather than full jurisdictional discovery is sufficient to trigger the post-discovery standard is unsupported.

Thus, the question is not, as SPDC argues, whether Plaintiffs received certain discovery that is "relevant to" jurisdiction in the course of conducting non-jurisdictional discovery in a case against other parties. Appellee:22. The question is whether Plaintiffs were denied the opportunity to receive the discovery to which they would have been entitled had they been afforded jurisdictional discovery; that is, whether Plaintiffs were afforded sufficient opportunity to conduct the discovery necessary to prove their allegations. Clearly, Plaintiffs were not. Incomplete

responses and fortuitous revelations in the context of other discovery do not substitute for targeted discovery into jurisdiction contacts. *See* AOB:6-11.

Regardless, the pre-discovery standard should apply even under Defendant's mistaken "any discovery" test. Plaintiffs demonstrated that they and the other *Wiwa I, Wiwa II* and *Kiobel* Plaintiffs could not have directed discovery toward SPDC's jurisdictional contacts because such discovery was not permitted by F.R.C.P. 26. AOB:19-20. Since the sufficiency of the responses to the only directly relevant discovery Plaintiffs propounded –that related to oil imports into the U.S.--was never resolved by the District Court, Plaintiffs did not have ample opportunity to conduct *any* jurisdictional discovery. AOB:21.

SPDC incomprehensibly responds that "Rule 26 governs the scope of the discovery to which parties are entitled—not what discovery they choose to take." Appellee: 20.[2] Plaintiffs, cannot "choose to take" discovery to which they are not entitled. Defendant essentially argues that Plaintiffs must abuse the discovery

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[2]Defendants' reliance on *APWU v. Potter* is misplaced; in that case, the plaintiffs apparently were granted some discovery but failed to show the relevance of the issue into which they sought further discovery. 343 F. 3d 619 (2d Cir. 2003). Moreover, *APWU* stressed that "a court should take care to 'give the plaintiff ample opportunity to secure and present evidence relevant to the existence of jurisdiction.'" *Id.* at 627, quoting *Phoenix Consulting, Inc. v. Republic of Angola,* 216 F.3d 36, 40 (D.C. Cir. 2000) (internal citations omitted). In this case, Plaintiffs were not given an "ample" opportunity to take jurisdictional discovery.

process in the related cases to take jurisdictional discovery of the non-party subsidiary. SPDC claims that Plaintiffs "had the opportunity to take jurisdictional discovery" which the federal rules precluded. Appellee:21. Defendant cites no case holding that discovery in a different case to which the defendant is not a party provides sufficient opportunity to take jurisdictional discovery of the defendant.

Even in those areas where Plaintiffs sought information in *Wiwa I* that is also relevant here, the *Wiwa I* defendants did not provide the information requested. Thus Plaintiffs sought information about crude oil imports into the United States, relevant to the RICO claims. SA0075. Defendants objected and Plaintiffs asked the court to require production.[3] *Id.* This case was dismissed before the discovery disputes in the related cases were resolved. AOB:8-11.

Although Plaintiffs could not and did not conduct discovery targeted at SPDC's jurisdictional contacts, Defendant nonetheless claims that Plaintiffs somehow got this discovery anyway. Appellee:20-22. Defendant is mistaken. Plaintiffs sought to obtain jurisdictional discovery in this case. In their memorandum submitted on February 14, 2007, Plaintiffs indicated the discovery

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[3]Magistrate Judge Pitman who oversaw the discovery in *Wiwa I*, *Wiwa II* and *Kiobel* required that the parties submit discovery disputes to the court before filing motions to compel. Indeed, Judge Pitman required that the parties seek the court's permission before filing motions to compel. *See, e.g.*, A00290 (Dkt #162).

to be sought included the issue of whether SITCO was acting as SPDC's agent when SPDC crude was imported into the U.S., SPDC's public relations efforts directed to the U.S., the contracts SPDC had with U.S. companies including where they were negotiated and where they were implemented, the training of SPDC employees in the U.S. and the recruitment of employees in the U.S., directly by Defendant or through an agent. A00214 (Dkt #19). The limited information obtained through the public record and in discovery in the related cases raises more questions than it answers. Plaintiffs never had an opportunity to do obvious follow-up discovery. For example, Plaintiffs had some evidence about the relationship between SPDC and the Shell entity which imported SPDC's product into the U.S. but did not obtain a copy of the contract between them. *See* SA0071, SA0075 (refusal to respond to Request No. 12). The public record revealed that SPDC had contracts in the United States. *See infra* at Section B2. Defendant contends and the District Court found that these were to be performed outside the United States. Appellee:39-40; SPA0028. However, Plaintiffs present evidence that a least some part of the work was to be performed in the United States. *See* AOB:37. *Boyo v. Boyo*, 196 S.W.3d 409, 414 (Tex. App. 2006). *See also, infra* at Section B2. Discovery would have provided Plaintiffs an opportunity to explore the negotiations and performance requirement for these and other contracts.

Plaintiffs have never received information responsive to any of these categories of discovery. Such discovery would have been critical, since it is abundantly clear that the contacts Plaintiffs have cited are not the sum total of SPDC's contacts with the United States.

Indeed, the recent case of *Spell v. Willbros, USA, Inc.* confirms that SPDC had contacts with the United States not revealed in discovery in the related cases or in SPDC's declaration in support of its motion to dismiss. 2008 WL 2627718 (S.D. Tex. June 30, 2008). *Spell* indicates that SPDC conducted negotiations with a Willbros representative in Texas, *id.* at *1; came to Houston, Texas, to meet with Willbros and eventually contracted for their services; directly hired personnel through Spell and Spell, a Texas company; and during the course of performing its contractual obligations, contacted the Willbros offices in Houston, Texas, by telephone and e-mail, *id.* at *3. There is no way to know what else discovery would reveal. In a proper jurisdictional analysis, all of these contacts would be aggregated with those that Plaintiffs have already shown.[4] *Spell* found there was

[4]Defendant's claim that the limited information Plaintiffs obtained demonstrates that SPDC has only sporadic contacts with the U.S., Appellee:22-23, is specious. AOB:11-48; Section B *infra.* Its further suggestion that the assessment of the contacts reflected in the current record could somehow justify the denial of discovery defies logic. Appellee:22-23. The Declaration of Babatunde Aribido, submitted in support of Defendant's motion makes no mention of the contracts Defendant has to obtain goods or services from U.S. corporations, the training of

no personal jurisdiction over Defendant. However, *Spell* considered only whether there were sufficient contacts with Texas, a question distinct from the issue of Defendant's contacts with the United States. Moreover, there is no indication the *Spell* plaintiffs provided evidence of other contacts in Texas. *See* SA00379. SA00340-41; SA00348-57. Obviously, *Spell* never considered contacts outside of Texas.

SPDC misstates the record when it claims that Plaintiffs actually received "a large amount of evidence related to jurisdictional facts." Appellee:20. SPDC does not cite any actual discovery into jurisdiction, and it conflates all discovery of SPDC documents and employees with jurisdictional discovery of SPDC without regard to the subject matter of the discovery or sufficiency of the responses.

Much of what Defendant lists as evidence that there was ample opportunity for discovery is clearly irrelevant. Discovery "directed at showing that the corporate veil between SPDC and its parents should be pierced," Appellee:20, has

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its employees here or its recruiting efforts in the U.S. *See* A0080-83. Nothing in this record suggests that Plaintiffs would not have found additional contacts, as revealed by *Spell* had they been afforded jurisdictional discovery. A district court may not apply the post-discovery standard to a record from another case where discovery is incomplete to determine whether further discovery is warranted. *Trammell v. Keane's* holding that the denial of discovery did not require vacatur "given the well-developed record" in the previous action. has no application here. 338 F.3d 155, 161 n.2 (2d Cir. 2003).

nothing to do with SPDC's U.S. contacts; SPDC's parents are headquartered in Europe.[5] *Wiwa*, 226 F.3d at 92. Although Plaintiffs in the related cases did propound certain discovery which might have been relevant to jurisdiction over SPDC as well as issues in the related cases, SPDC refused to provide the requested information, and Plaintiffs' request to the court to require production in the related cases were still pending when this case was dismissed. *See* AOB:8-11. Discovery into the amount of oil SPDC produced which was imported into the United States and the relationship with the importer (SITCO) is clearly relevant, but as noted, the information was not provided and the discovery dispute is still pending. Similarly, SPDC fails to note that much of the FRE Rule 1006 Summary submitted by the *Wiwa* plaintiffs was taken from public sources (*see* A00194 n.5). As to the documents obtained from SPDC files, because of the absence of discovery in this case, their significance in establishing such basic facts as the relationship between SPDC and SITCO is unclear and further discovery is warranted. *See infra* Section B1. Similarly, the fact that there were depositions of 13 SPDC employees on issues relevant to the related cases does not indicate that there was discovery

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[5]SPDC asserts that Plaintiffs admitted that facts concerning the relationship between SPDC and Royal Dutch Shell are all relevant to jurisdiction, Appellee:21-22, *citing* A0052:4-11, but the cited passage says no such thing. Plaintiffs assert that facts concerning the relationship between SPDC, SITCO and SPS would be relevant if they had been produced.

directed at SPDC's jurisdictional contact. Indeed, the fact that Defendant can only point to two pages of transcript that relate to SPDC's oil sales belies its claim that there was ample discovery. Appellee:12.

Defendant's assertion that the "district court was intimately familiar with the nature and scope of discovery" (Appellee:8-9) is misleading. On June 2, 2003, Judge Wood referred the cases to Magistrate Judge Pitman. A00277. Thereafter, with the exception of the Defendant's attempts to obtain discovery into what they claimed was perjured testimony, discovery disputes in the related cases were presented solely to Judge Pitman and were pending before him when the case was dismissed.

Defendant also errs when it claims that "[d]istrict courts are afforded 'wide latitude' in making determinations about discovery." Appellee:22, quoting *Em Ltd. v. Republic of Argentina*, 473 F.3d 463, 486 (2d Cir. 2007). First, *Em Ltd* is a case implicating the Foreign Sovereign Immunities Act where discovery must be very circumspect and only "verify allegations of specific facts crucial to an immunity determination" and involve a "delicate balancing 'between permitting discovery to substantiate exceptions to statutory foreign sovereign immunity and protecting a sovereign's or sovereign agency's legitimate claim to immunity from discovery.'" *Id.* (Internal citations omitted).

EM Ltd. does not support SPDC's argument that a district court in a case between private parties has latitude in determining the proper legal standard or in applying the post-discovery standard where no discovery has been permitted. *See* AOB:23-26 (discussing the applicable standard).

In sum, Plaintiffs had no discovery targeted at jurisdiction, and received very little relevant information through non-jurisdictional discovery in the related cases. In this context, it was error for the District Court to hold Plaintiffs to the post-jurisdictional discovery legal standard.[6]

B. SPDC's Contacts with the United States are Continuous and Systematic or, at a Minimum, Meet the "Threshold Showing" for Jurisdictional Discovery.

Defendant, through SITCO, shipped 3,500,000 barrels of its crude oil per month to the United States, directed a public relations campaign at the U.S., had multi-million dollar contracts with U.S. entities (some of which were performed in the U.S.), recruited employees in the U.S., and sent its employees for regular visits and multiple training sessions in the United States. These are not the actions of a

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[6]SPDC's analysis of *Turbana Corp. v. M/V "Summer Meadows"*, 2003 WL 22852742 (S.D.N.Y. Dec. 2, 2003) again misconstrues the issue. *Turbana* supports Plaintiffs' claim that a district court may err by denying discovery as the District Court did in this case.

corporation that has studiously avoided benefitting from the U.S. marketplace.

The lack of any "office, employees, agents, mailing address, or telephone number" in the forum is not dispositive. *Provident Nat'l Bank v. Cal. Fed. Sav. & Loan Ass'n*, 819 F.2d 434, 436-438 (3d Cir. 1987). Instead, minimum contacts are satisfied where the United States is "central to the conduct of [SPDC's] business." *Id.* at 438. SDPC's aggregate contacts with the United States and the U.S. market clearly demonstrate that the U.S. is central to SPDC's business.

1. SPDC's sales of oil in the United States were accomplished by an agent or close affiliate, not an independent distributor.

Defendant's argument and the District Court's ruling depend largely on discounting the indisputably substantial sales of SPDC's oil to the United States. Defendant does not dispute that if the sales of oil are attributable to SPDC, the minimum contacts test has been met. Instead, Defendant argues that Plaintiffs' allegations are insufficient to disregard SPDC's and SITCO's corporate separateness. Appellee:24–32. Defendant's arguments about SITCO as SPDC's alter ego is a strawman. Instead, Plaintiffs argue that SITCO is SPDC's agent for the purposes of selling oil, and that, even if there is no formal agency relationship, SITCO is so closely intertwined with SPDC that its sales of SPDC's oil to the United States can be attributed to SPDC. Each of these is a distinct argument.

a. Plaintiffs have made a prima facie *case that SITCO is SPDC's agent.*

The contacts of an agent may be attributed to the principal. *See, e.g.*, *Bellomo v. Pennsylvania Life Co.*, 488 F. Supp. 744, 745–47 (S.D.N.Y. 1980) (finding agency in the absence of alter ego or the local corporation acting as a "mere department" of the defendant). In selling SPDC's oil to the United States, SITCO was acting as SPDC's agent.

Defendant complains that Plaintiffs have not met the formal requirements of agency: that the agent agree to act on behalf of the principal, subject to the principal's control over that specific task. Appellee:33–34. Plaintiffs argue that SITCO is SPDC's agent for selling SPDC's oil, and the SPDC has the right to control this task. Of course Plaintiffs do not allege "that SITCO has the power to bind SPDC" or that "SPDC consented to be bound by SITCO's acts," Appellee:33; these are legal conclusions that *flow from* the agency relationship, not factual prerequisites.[7] The evidence cited by Plaintiffs provides sufficient direct and

[7]The Restatement(Third) of Agency §1.01 (2006), cited by Defendant, defines an agency as "relationship that arises when one person (a "principal") manifests assent to another person (an "agent") that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act." Despite Defendant's demand for evidence of the right to bind, Appellee:33, nothing in the Restatement requires that such proof is necessary to establish agency. *Minskoff v. American Express Travel*

circumstantial evidence of this agency relationship to make a *prima facie* case.

Defendant charges that Plaintiffs have not alleged "that SPDC receives the proceeds of SITCO's sales." Appellee:33–34. But the record suggests just that: a letter from SPDC outlines a plan under which SITCO would take SPDC's crude "with payments on sales *going to SPDC* as a contribution to our regular cash calls." SA00178 (emphasis added). Similarly, while Defendant claims that Plaintiffs have shown no evidence that SDPC could control SITCO's actions, the record shows otherwise. For example, after a meeting with a Nigerian Minister in which SPDC's Anderson negotiated over SITCO's role in buying Nigerian oil, Anderson effectively gave direction to SITCO to "develop[] a proposal" on the issue and to "check in the market to see which players have s[h]ort term deals here at present. From this we might see how much volume may be potentially considered for reallocation." SA00176. At another meeting at which no one from SITCO was apparently present, SPDC discussed whether to remedy its concerns over "significant losses to SITCO" through "SPDC and SITCO jointly renegotiating the terms of the MOU [Memorandum of Understanding] with the Government" or through "SITCO renegotiating the Offtake Agreement with

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Related Servs. Co., 98 F.3d 703 (2d Cir. 1996), cited by Defendant, Appellee:33, discusses the scope of an agents' authority to bind a principal. It does not suggest that an agency relationship requires evidence of that power.

SPDC." SA00186. The result was a resolution to meet with the Nigerian government to renegotiate the MOU—indicating that, without SITCO's involvement, SPDC was deciding how SITCO's contracts would be negotiated. Furthermore, SPDC's own contracts also controlled SITCO's prices; the MOU between "the Government and SPDC . . . Effectively . . . set the realisable prices for all volumes lifted under the MOU." SA00188. Another memo discussing the MOU described "discussions between NNPC and SPDC/SITCO," indicating the interchangeability of these entities. SA00194.

Perhaps the clearest evidence of the close relationship between SPDC and SITCO is SITCO's use of SPDC's mantle to obtain the privilege of buying Nigerian oil. AOB:11-13. While Defendant characterizes this as "SPDC presented SITCO's request," Appellee:29, the most important feature of these documents is not who presented them but how the relationship between SPDC and SITCO is described by Defendant and relied upon. SPDC and SITCO had to act when SITCO's privilege of buying Nigerian oil was discontinued. Three categories of companies were entitled to purchase Nigerian oil; SITCO admittedly did not qualify for one of them, and claimed that it met the other two—"joint ventures partners" and "companies actively participating in exploration"—due to its relationship with SPDC. SA00171. SPDC's cover letter indicates that SITCO did

so with SPDC's blessing. SA00170. As a trading company SITCO plainly was not involved in joint ventures or exploration; it therefore had to present itself as falling under the aegis of SPDC in order to gain the privilege of buying Nigerian oil. SA00171.

Furthermore, there is little doubt that SITCO performed services that SPDC otherwise would have had to perform itself. *Stutts v. De Dietrich Group*, 465 F. Supp. 2d 156, 162 (E.D.N.Y. 2006).[8] SITCO bought all of SPDC's crude oil; and even if the analysis is limited to SITCO's activities in relation to the United States, this was not simply "important" to SPDC, *Stutts*, 465 F. Supp. 2d at 162; it was represented possibly as much as half of SPDC's sales.[9] *See, e.g.*, *Bowoto v.*

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[8]Plaintiffs do not maintain, as Defendant suggest that "SITCO is SPDC's agent because a large percent of oil extracted by SPDC is sold in the United States by SITCO. Appellee:34. This amount of SPDC crude imported is relevant to the issue of jurisdiction; to subject a foreign corporation to personal jurisdiction, the conduct of the representative must be "'sufficiently important to the foreign corporation that if it did not have a representative to perform them, the corporation's own officials would undertake to perform substantially similar services.'" *Stutts*, 465 F. Supp. 2d at 162, quoting *Schenker v. Assicurazioni Genereali S.P.A. Consol.*, No. 98-cv-9186 (MBM), 2002 WL 1560788, at *6 (S.D.N.Y. July 15, 2002) (quoting *Gelfand v. Tanner Motor Tours, Ltd.*, 385 F.2d 116, 121 (2d Cir.1967)).

[9]Oil exports account for 90% of Nigeria's foreign revenue comes from the export of oil, nearly 50% of the exported crude goes to the United States, most of it by SPDC. Deposition of Sir John Jennings, Feb. 26, 2004, at 105:15-18, summarized at SA0075.

ChevonTexaco Corp., 312 F. Supp. 2d 1229, 1245 (N.D. Cal. 2004) (finding that the fact that "[m]ore than 20 percent of defendants' earnings were accounted for by [a subsidiary's] production" militated in favor of an agency finding). There is no evidence the SPDC could have obtained the same or similar services of marketing its crude oil through independent, unaffiliated third parties.

Finally, if there is any deficiency in Plaintiffs' agency allegations or evidence, this is due to the fact that Plaintiffs still have not received even the most basic discovery over the SPDC-SITCO relationship. For example, this relationship is governed in part by a 1971 SDPC-SITCO Offtake Agreement. SA00186. But Plaintiffs never received this Agreement in discovery. *See* SA0071 & SA0075 (refusal to respond to Request No. 12).[10] At the very least, the evidence cited establishes the need for further discovery, beginning with the completion of discovery that Plaintiffs have already requested.

b. *Regardless of whether SITCO is SPDC's agent, it is not "independent."*

Even if the evidence cited above does not establish a *prima facie* case of formal agency between SPDC and SITCO, it is more than sufficient to establish that SITCO was not an independent distributor. Based on prior case law, this is the

[10]Discovery disputes in the related cases were presented to the Magistrate Judge Pitman. SA0071-99 and were still pending when this case was dismissed.

appropriate test for determining whether sales of a defendant's products in the forum can be counted as the defendant's contacts.

SPDC, like the District Court, relies heavily on *Jazini v. Nissan Motor Co.*, 148 F.3d 181 (2d Cir. 1998). But, as Plaintiffs pointed out, *Jazini* is not a case about determining whether a defendant's sales to the forum through another entity can be counted as contacts, but a case about whether a defendant who is *admittedly not present in the forum* can be sued because its local subsidiary a "mere department" of the parent. *Id.* at 184. The opinion in *Jazini* lists the pertinent allegations relating to jurisdiction, none of which mentioned that the defendant's own products were sold in the forum. *Id.* at 183. The district court opinion in the same case listed six factors, again without any mention of sales to the forum. *Jazini v. Nissan Motor Co.*, 1997 U.S. Dist. LEXIS 4146, at *2–3 (S.D.N.Y. Apr. 7, 1997). In fact, it suggests the opposite—that the U.S. subsidiary was engaged in its own "manufacturing operations," not that the subsidiary was selling the parent's products. *Id.*

Jazini is inapposite. Plaintiffs allege that SPDC sells oil to the forum through SITCO. While SPDC suggests that Plaintiffs, like the *Jazini* plaintiffs, are attempting to attribute SITCO's entire business to SPDC, Appellee:27, this misconstrues Plaintiffs' argument. The only activity of SITCO that Plaintiffs seek

to attribute to SPDC is SITCO's sales *of SPDC's oil.* SITCO's other sales of oil, or other contacts with the United States, are beside the point.

Thus, the relevant cases are those suggesting when sales of a defendant's products to the forum may be *excluded* from consideration. In *McShan v. Omega Louis Brandt Et Frere, S.A.*, 536 F.2d 516 (2d Cir. 1976), this Court excluded such sales when they were made through "an independent corporate entity which buys Omega's watches f.o.b. Switzerland," and thus was "an independent agency." *Id.* at 517. The only cases cited by Defendant or the District Court that refuse to consider sales of the defendant's products in the forum as contacts do so because these sales were done by unrelated, independent, unaffiliated third parties—not by closely related sister corporations. *See, e.g., id.*; *Bearry v. Beech Aircraft Corp.*, 818 F.2d 370, 375 (5th Cir. 1987) (discounting sales in the forum made through unaffiliated "independent dealers"); *D'Jamoos v. Pilatus Aircraft Ltd.*, 2008 WL 1902193,*7 (E.D.Pa., April 30, 2008) (final sales by independent contractor, many steps removed from defendant so not provide basis for jurisdiction); *Dearwater v. Bond Mfg. Co.,* Slip Copy, 2007 WL 2745321(D.Vt. September 19, 2007).

Whatever the relationship between SPDC and SITCO, it was certainly not one of independent buyers and sellers engaging in arms' length transactions. These companies were so intimately connected that they represented to Nigerian

officials that one of them should gain the privileges conferred by the activities of the other. SA00171. They conducted joint negotiations and the contracts of one determined the price for the other. SA00188, SA00194. SPDC expressed concerns over SITCO's income, and negotiated with the Nigerian government to address these concerns. *See* SA00178; SA00182-202; SA00204; SA00214; SA00217; SA00174-80; SA00204; SA00214; SA00217 (account of meeting between Shell personnel in Nigeria and NNPC expressing concern about losses suffered by SITCO as a result of the SPDC and NNPC agreement structure). Defendant has cited no cases establishing that sales made through such a closely-tied corporation can be excluded from the minimum contacts analysis.

2. SPDC's contracts with U.S. entities are contacts with the U.S.

Defendant argues that SPDC's admittedly substantial contracts with U.S. entities can be ignored because some of the contracts *may have* been performed in Nigeria, or were with Nigerian subsidiaries. But Defendant submits little evidence to substantiate these claims; indeed, there can be no doubt that the contracts with USAID were with a U.S. entity, not a Nigerian entity.

SPDC had a $70 million contract with Texas-based Baker Hughes. *See* SA00340–41. Although Defendant claims that this contract was with Baker Hughes's Nigerian subsidiary, Appellee:39, there is no evidence of this and the

record suggests otherwise; an employee of the Baker Hughes unit that contracted with SPDC subsequently sued Baker Hughes *in Texas*, indicating that his employment was with the U.S. entity. SA00340-41. Indeed, while Baker Hughes certainly had some contracts relating to Nigeria, the record does not disclose any Baker Hughes operations or entities *in* Nigeria. Furthermore, while Defendant intimates that this contract was performed in Nigeria, Defendant has submitted no evidence of this and, in the absence of any evidence of Baker Hughes operations in Nigeria, a reasonable assumption is that the contract was performed in the U.S. From 1998–2001, SPDC also had another major contract with Baker Hughes "to construct a barge *in New Orleans*," *Boyo v. Boyo*, 196 S.W.3d 409, 414 (Tex. App. 2006) (emphasis added); the value of this contract is not disclosed but a similar subsequent contract, later canceled, was apparently for $34 million. *Id.*[11]

Defendant argues that SPDC's contacts with Pecten cannot "contribute meaningfully" to the minimum contacts analysis, Appellee:40, but this ignores the fact that SPDC itself described this project as "a major evaluation effort . . . in

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[11] Additional evidence suggests that SPDC has continued to contract for the construction of major barges in the United States. *See, e.g.*, Acergy Concrete Products, "News & Publications," at http://www.concretebarges.com/news.php ("17-June-2005: Stolt Offshore Inc. - Concrete Products delivers ABNL / Shell Petroleum Development Corporation concrete barge to Grand Isle Shipyards in Lafitte, LA for outfitting.").

Houston." SA00379. Obviously, this is a "major" contact with the U.S. Additionally, SPDC's annual report lists only four major suppliers, one of which is Texas's Western Atlas International, SA00364; far from being "merely" an "overseas supplier," Appellee:40, this document suggests a major ongoing relationship with Western Atlas. With respect to the Halliburton contract, there is no evidence that SPDC's $200 million contract with Dresser Kellogg Brown & Root, SA00357, or its $50 million contract with Halliburton Energy Services, was with a Nigerian entity, SA00350; while those contracts were likely performed in Nigeria, a $300 million contract with Brown & Root Energy Services to build a "vessel" for use in Nigeria may well have been performed in the United States (like SPDC's barge). *Id.* Defendant's speculations about where these contracts were performed or how important they are cannot be credited, without additional discovery; indeed, Defendant looks *outside the record* to make its argument, strongly suggesting that further discovery is warranted. Appellee:40 n.24.

Spell v. Willbros USA, 2008 WL 2627718 (S.D. Tex. June 30, 2008), reveals additional SPDC contracts with U.S. companies. Indeed, that opinion indicates that contract negotiations occurred here, *id.* at *1; SPDC directly hired personnel through Spell and Spell, a Texas company; and during the course of performing its contractual obligations communicated with the Texas-based

contractor by telephone and e-mail to Texas. *Id. at *3.*

While Plaintiffs do not contend that these contracts, standing alone, are sufficient to establish jurisdiction, there is no question that they can be considered in the analysis. *Savin v. Ranier*, cited by Defendant, holds only that such contracts "*alone* cannot *automatically* establish sufficient minimum contacts." 898 F.2d 304, 307 (2d Cir. 1990) (emphasis added).

3. The record discloses substantial, regular presence of SDPC employees in the U.S.

Defendant largely admits that Plaintiffs have correctly identified the presence of SPDC employees in the U.S. Defendant admits that at least three SPDC employees regularly participated in conferences in the U.S. over a multi-year period. Appellee:43–44. Defendant also admits that at least one of these employees attended a training program in the U.S. *Id.* at 44.

Defendant only contests Plaintiffs' allegation that SPDC employees spent 36 months in training in the United States. The record evidence indicates that Shell's "Nigerian crew" on the Bonga project underwent "training in the UK and the United States for about 36 months," and that the "Managing Director of SPDC

started the Bonga" project. SA00381.[12] This is sufficient to create the inference that the employees undergoing training were SPDC employees; Defendant's assertion to the contrary relies on evidence outside the record that was not before the District Court. Appellee:44 n.28. Again, such disputes, if they are credited at all, only signal the need for further discovery.

Plaintiffs' Opening Brief already established that these contacts can be counted in the minimum contacts analysis, regardless of whether they are sufficient by themselves. AOB: 48-52. *E.g.*, *Metro. Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 573 (2d Cir. 1996); *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300, 314 (2d Cir. 1981). While Defendant attempts to distinguish *Metropolitan Life* on the basis that the defendant there also had an office in the forum, Appellee:46, nothing in that case suggests that an office is a prerequisite to consideration of such visits. As for *Texas Trading*, Defendant's criticism that the analysis in this case is "akin to an examination of specific jurisdiction, not general jurisdiction," Appellee:47, is completely without authority or support in the case itself. *See* 647 F.2d at 314 (discussing whether defendants had "'purposefully avail(ed themselves)' of the privilege of conducting activities in

[12] *See also In re Royal Dutch/Shell Transp. Sec. Litig.*, 380 F. Supp. 2d 509, 534–35 (D.N.J. 2005) ("The Bonga field is the first deepwater project for the Shell Petroleum Development Company of Nigeria, Ltd. ('SPDC') and for Nigeria.").

the United States"). Nor does Defendant's authority establish the contrary; Plaintiffs have already explained that *Helicopteros*, does not hold that the visits to the U.S. did not "count," Appellee:45, but merely that when made in connection with sales they were not considered *additional* contacts to those sales. 466 U.S. 408, 418 (1984). Contrary to Defendant's suggestion, because the visits and training here are distinct from sales or other contacts analyzed elsewhere, they do "count" separately. No case holds that such visits and training are not contacts.

4. SPDC's recruitment in the United States can be considered.

Defendant argues that SPDC's recruiting activities in the United States cannot be considered "contacts," because Shell People Services ("SPS") is not SPDC's agent. Appellee:48-49. This is contradicted by the record evidence. SPDC states that applications may be submitted by "surface mail or fax to any of *our recruitment offices*," including SPS in Houston. SA00331 (emphasis added). The fact that SPDC refers to SPS as its own recruitment office is sufficient to establish a *prima facie* case that SPS was acting on SPDC's behalf. *See also id.* (stating that applications would be "screened by one of *our consultants*" (emphasis added)); SA00332 (stating that applicants can "contact any of *our offices* by phone, fax or email" (emphasis added)).

Although Defendant claims that this recruitment was not "continuous and systematic," it is difficult to see how it could be otherwise. While Plaintiffs' access to the relevant information has been limited by the lack of discovery, and the extent of SPDC's recruiting in the U.S. is not known, the available documents indicate that SPDC continuously recruits in the United States. SA0331–37. Defendant's suggestion that this means no more than that "applicants . . . can mail, fax or email an application" to SPS, Appellee:50, is contradicted by SPDC's references to *its office* in the U.S. These contacts cannot be ignored.

5. SPDC's public relations activities constitute contacts.

Defendant cites no case rejecting public relations and lobbying activities in the forum as a relevant contact for jurisdictional purposes, and does not distinguish those relied on by Plaintiffs. Defendant simply claims that these contacts are insignificant because "SPDC has no public relations office in the U.S.," Appellee:51. No case law suggests that public relations or lobbying activities must be conducted through a local office. For example, in *Estates of Ungar and Ungar ex rel. Strachman v. Palestinian Authority*, 325 F. Supp.2d 15 (D.R.I. 2004), the relevant contacts included engagement of U.S. lobbying and public relations firms. *Id.* at 50. In *National Association of Home Inspectors v. National Association of Certified Home Inspectors*, No. 06-CV-11957, 2006 WL 3104574 (E.D. Mich. Oct.

31, 2006), the defendant had no office in the forum, *id.* at *6, but lobbying activities were still significant, *id.* at *9.

Defendant's claim that SPDC's media campaign and lobbying activities are irrelevant because they are less significant than a cease-and-desist letter is a strange one, but even the case Defendant cites does not help them. It states:

> [A] single "cease and desist" letter sent to a New York resident in an attempt to settle legal claims will not be sufficient to invoke personal jurisdiction. A cease-and-desist letter *and* subsequent communications used to secure further New York investments (and not merely to settle legal claims), by contrast, was held to be sufficient to find personal jurisdiction . . . .

Ehrenfeld v. Mahfouz, 489 F.3d 542, 548 (2d Cir. 2007); *see also Nicholas v. Buchanan*, 806 F.2d 305, 307 (1st Cit. 1986) (rejecting argument that mere communications with parties in the forum, "*without more*, is sufficient to satisfy due process requirements" (emphasis added)). Even if Defendant's comparison between public relations and cease-and-desist letters is correct, the clear implication of *Ehrenfeld* is that contacts, not sufficient on their own, can still be considered in the aggregate to establish jurisdiction. Defendant's media strategy should be aggregated with other contacts.

C. The District Court Improperly Relied on a Set List of Factors for Minimum Contacts, Rather than Aggregating the Relevant Contacts Here.

Defendant suggests that the District Court aggregated SPDC's contacts with the United States in analyzing minimum contacts. Appellee:53. But the Opinion itself states that certain contacts are "irrelevant" or cannot be considered. *E.g.*, SPA0023, SPA0027–28. The District Court's "aggregation" discussion fails to indicate which contacts were considered.

Defendant also defends the District Court's reliance on a set list of factors in rejecting jurisdiction. *See* SPA0029. Defendant errs as did the District Court by calling this list "classic indicia of continuous and systematic business contacts." Appellee:55. The phrase "classic indicia" appears only in the dissent in one Second Circuit case. *Scanapico v. Richmond, F. & P. R. Co.*, 439 F.2d 17 (2d Cir. 1970) (C.J. Lumbard, dissenting). There, the dissent criticized the majority's determination "that the classic indicia of corporate presence must yield to the realities of significant and purposeful economic presence" in the forum. *Id.* at 22. More recently, consistent with the majority holding in *Scanapico*, this Court has emphasized that "[t]here is no talismanic significance to any one contact or set of contacts that a defendant may have with a forum state; courts should assess the defendant's contacts *as a whole*." *Metro. Life*, 84 F.3d at 570.

Defendant is correct, however, that the ultimate question is whether SPDC has made "an attempt at purposeful availment of a forum." Appellee:52. There should be little doubt that when SPDC monthly sells approximately 3,500,000 barrels of its product in the U.S. through an agent or closely affiliated company, makes multi-million dollar contracts for construction of barges in the U.S. and other services, has a regular employee presence in the U.S. including long-term training, recruits employees from an office in the U.S., and engages in a public relations and lobbying campaign targeted toward the U.S., it is purposefully availing itself of this forum.

IV. CONCLUSION

Plaintiffs respectfully request that the Court reverse the dismissal of this case and find that Plaintiffs have made a *prima facie* case of personal jurisdiction or, in the alternative, remand for further jurisdictional discovery.

DATED: September 9, 2008

Respectfully submitted,

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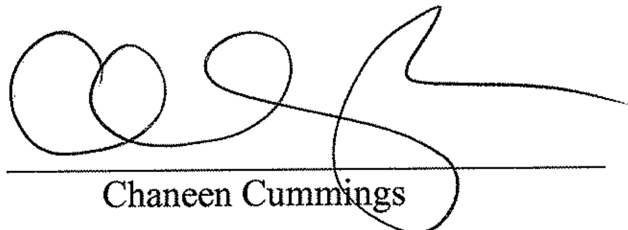

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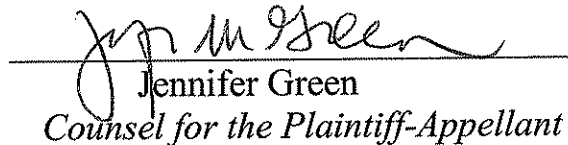

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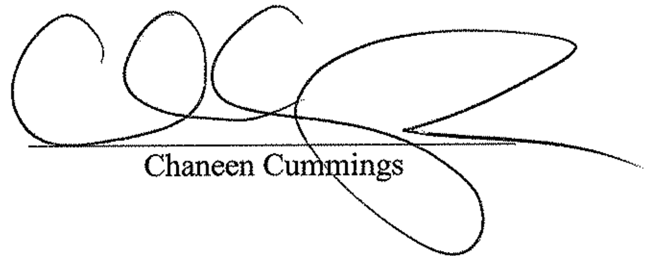

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