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

BRIEF FOR PLAINTIFFS-APPELLANTS

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PRELIMINARY STATEMENT

Plaintiffs sued Shell Petroleum Development Company of Nigeria, Ltd. ("SPDC") for widespread violations of fundamental human rights, including extrajudicial killing, torture and crimes against humanity. This appeal seeks review of the final order dismissing the case in *Wiwa v. Shell Petroleum Development Co.*, No. 04-2665, issued by Chief Judge Kimba M. Wood, concluding that the District Court lacked personal jurisdiction over SPDC. Plaintiffs respectfully submit that decision was in error and the judgment should be reversed and remanded.

JURISDICTIONAL STATEMENT

The District Court had subject matter jurisdiction under 28 U.S.C. § 1331 and 28 U.S.C. § 1350, the Alien Tort Statute ("ATS"). On March 4, 2008, Chief Judge Wood issued a final opinion and order dismissing this case. Special Appendix (SPA) 002. Judgment was entered on March 18, 2008, Joint Appendix (JA) 00221, and Plaintiffs filed a timely Notice of Appeal on April 15, 2008. JA00222. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES PRESENTED

(1) The District Court erred as a matter of law and fact in ruling that Plaintiffs had an opportunity to conduct jurisdictional discovery, because this

ruling was based on the erroneous holding that discovery in three related cases had addressed SPDC's contacts with the United States, when, in fact, such discovery was beyond the scope of the discovery in the related cases and was not actually taken.

(2) The District Court erroneously used the legal standard applicable in cases where jurisdictional discovery has been taken, despite the lack of such discovery here, and erred in ruling that Plaintiffs' jurisdictional allegations and evidence submitted were insufficient to present a prima facie case of personal jurisdiction.

(3) The District Court abused its discretion in denying jurisdictional discovery where the Plaintiffs made sufficient showing to justify such discovery.

(4) The District Court erred in finding that, even under the post-discovery standard, Plaintiffs had failed to present evidence of a prima facie case of personal jurisdiction.

STATEMENT OF THE CASE

Plaintiffs brought this case against SPDC for its participation in human rights violations in the Ogoni region of Nigeria in 1993-1995. Plaintiffs alleged that SPDC, directly and in concert with Nigerian security forces, engaged in human rights abuses including extrajudicial executions, torture, crimes against humanity and other mistreatment of the Plaintiffs and/or their decedents. Plaintiffs filed their complaint under the ATS and 28 U.S.C. § 1331 and asserted personal

jurisdiction over SPDC based on Federal Rule of Civil Procedure (4)(k)(2). The District Court dismissed for lack of personal jurisdiction. That order is the subject of this appeal.

STATEMENT OF FACTS

A. The Underlying Human Rights Violations.

Plaintiffs, on their own behalf and/or on behalf of their deceased relatives, seek damages for the executions, torture and arbitrary detentions of ten Nigerian citizens. These abuses were committed by the Nigerian military junta with the knowledge and support of SPDC and its corporate parents, then known as Royal Dutch Petroleum Company and Shell Transport and Trading Company (collectively "Royal Dutch/Shell"). The violence Plaintiffs suffered was part of a pattern of intimidation used to silence opposition to Royal Dutch/Shell and SPDC's abusive activities in the Ogoni region of Nigeria, including the coercive appropriation of Ogoni land without adequate compensation and severe damage to the local environment and economy. Royal Dutch/Shell, operating directly and through SPDC, recruited the Nigerian police and military to suppress opposition to its business activities and provided logistical support, payments and transportation to Nigerian authorities to attack Ogoni villages and stifle opposition to Shell.

Ogoni residents, including Plaintiffs, were beaten, detained, shot, and/or killed during these raids. Six of those killed, Ken Saro-Wiwa, John Kpuinen,

Saturday Doobee, Felix Nuate, Daniel Gbokoo and Barinem Kiobel, were hanged on November 10, 1995, on trumped-up charges after a rigged military trial. SPDC and Royal Dutch/Shell bribed trial witnesses to testify falsely and conspired with Nigerian authorities to rig the proceedings. Michael Tema Vizor and Owens Wiwa were imprisoned and tortured, Karalolo Kogbara was shot and badly wounded and James B. N-Nah was shot and killed as part of the same campaign. *See* JA0015; JA00302; JA00336; JA00408.

B. The Procedural History of this Case.

This case, referred to as *Wiwa III* by the District Court, was filed on April 5, 2004. JA0015. It was accepted as a related case to *Wiwa v. Royal Dutch Petroleum Co. (Wiwa I)*, *Wiwa v. Anderson (Wiwa II)*, and *Kiobel v. Royal Dutch Petroleum Co.*[1] and assigned to Chief Judge Wood. JA0042. The three earlier cases involved the same underlying events, but did not name SPDC as a defendant.

On August 20, 2004, the District Court stayed all discovery in *Wiwa III*. Chief Judge Wood noted, however, that she had not resolved the discovery disputes in the related cases. She then stated:

> I believe . . . I have heard no special reason for separate discovery to go forward with respect to SPDC, *except on the jurisdictional issue.* I am going to stay discovery and all action with respect to the [SPDC] case until I have

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[1] An interlocutory appeal in *Kiobel* is currently before this Court. *See Kiobel v. Royal Dutch Petroleum Co.*, 456 F. Supp. 2d 457, 467-68, *appeal docketed*, No. 06-4876 (2d Cir.).

> decided the objections to the two R[eports] and R[ecommendation]s [in the related cases].

JA0057 (emphasis added). Despite her recognition that personal jurisdiction over SPDC in *Wiwa III* was distinct from the issues raised in the three earlier cases, Chief Judge Wood then explicitly confirmed that she was "staying jurisdictional discovery as well." JA0058.

On September 29, 2004, SPDC filed an answer asserting that the court lacked personal jurisdiction over it. JA0059.

On November 1, 2006, this case was referred to Magistrate Judge Henry Pitman, including matters relating to discovery and pre-trial motions. JA0076. SPDC filed a Motion to Dismiss for Lack of Jurisdiction, JA0011 (Dkt#12), and a Motion to Preclude Plaintiffs from Taking Further Jurisdictional Discovery, JA0011 (Dkt#14). Plaintiffs opposed the motion to preclude. JA0011 (Dkt#19). On February 26, 2007, Judge Pitman granted defendant's motion to preclude jurisdictional discovery and set a date for Plaintiffs to oppose the motion to dismiss. JA00183-184. Plaintiffs timely objected to the Magistrate Judge's Report and Recommendation precluding discovery, JA0012 (Dkt#22), and opposed the motion to dismiss. SPA0006.

On March 4, 2008, the District Court granted SPDC's motion to dismiss. SPA002. The Court found that there was no personal jurisdiction over SPDC and that Plaintiffs were not entitled to jurisdictional discovery. Final judgment was

entered March 18, 2008. JA00221. At no time was any discovery permitted into personal jurisdiction over SPDC in this case.

C. The Procedural History of the Three Related Cases.

The backdrop to the District Court's decision in *Wiwa III* was the discovery in related cases against different defendants: two of SPDC's parent corporations and an individual officer of SPDC. The claims in the related cases arise out of the same facts at issue in *Wiwa III.*

Wiwa I was filed in 1996, seeking damages from Royal Dutch/Shell for the extrajudicial execution and torture of Ken Saro-Wiwa and John Kpuinen, and the torture and detention of Owens Wiwa; subsequent amendments added claims for additional plaintiffs. *See* JA00302 (*Wiwa I* complaint); JA00260-301(Dkt## 1, 6, 58, 208 and 220).

Pretrial matters in *Wiwa I* were referred to Magistrate Judge Pitman. JA009 (Dkt#2). The defendants moved to dismiss on several grounds, including lack of personal jurisdiction and *forum non conveniens*. JA0010 (Dkt#7). Jurisdictional discovery explored the contacts between Royal Dutch/Shell and the Southern District of New York. Judge Pitman recommended that the matter be dismissed for lack of personal jurisdiction or, alternatively, based on *forum non conveniens*. JA0012 (Dkt#24). The District Court rejected the Magistrate Judge's recommendation regarding personal jurisdiction, but dismissed for *forum non*

conveniens. JA00270 (Dkt#32). This Court upheld the decision finding personal jurisdiction, reversed the *forum non conveniens* dismissal, and remanded. *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000).

Wiwa II, the second related case based on the same underlying incidents, was filed in 2001 against Brian Anderson, the former managing director of SPDC. Anderson was served while in New York.[2] *Wiwa I* and *Wiwa II* were consolidated for pre-trial purposes and the reference to a Magistrate Judge was withdrawn. JA00274. The third case, *Kiobel*, is a class action filed in September 2002, and was also considered related; discovery in *Kiobel* was coordinated with discovery for *Wiwa I* and *Wiwa II* on October 18, 2002. JA00370.

In 2003, the District Court allowed discovery from SPDC concerning issues in *Wiwa I*, *Wiwa II* and *Kiobel*, including SPDC's contractors, JA00446-48; SPDC employees with prior or subsequent military service, JA00449-51; other positions that SPDC board members had within the larger Shell organization, JA00451-53; ownership transfers of SPDC stock, JA00453-54; and information about officers and directors of Shell who went to Nigeria in order to establish the relationship between Royal Dutch/Shell and SPDC. JA00454-56. Because of the contentious

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[2] The differences between *Wiwa I* and *Wiwa II* are described in *Wiwa v. Royal Dutch Petroleum*, 2002 WL 319887, at *3 (S.D.N.Y. Feb. 28, 2002).

nature of discovery, Chief Judge Wood ordered weekly conferences on discovery disputes. JA00462.

At a subsequent status conference, Plaintiffs sought information concerning importation into the United States of crude oil produced by SPDC, in connection with a claim against Royal Dutch/Shell under the Racketeer Influenced and Corrupt Organizations Act ("RICO"). The District Court denied discovery on that issue at that time, stating: "As we know, this court has jurisdiction over this case, so . . . it would seem you don't need them . . . . [T]his seems pretty attenuated from what you need. Is this something you can put off and maybe never demand?" Sealed Appendix (SA) 0047.

On June 2, 2003, Chief Judge Wood once again referred the cases to Magistrate Judge Pitman. JA00277.

Early in 2004, depositions of SPDC officials in the related cases revealed that they came to the U.S. in connection with SPDC's business. One deponent testified about meetings with members of the Ogoni community and professional meetings here sponsored by SPDC he and other employees attended. SA00283-85. A second testified about annually attending security-related meetings in the United States. JA00165-69. Plaintiffs learned through these depositions that SPDC employees had contacts with the U.S. which, together with information on imports into the U.S. that Plaintiffs obtained in part from public sources, were sufficient to

assert personal jurisdiction over SPDC pursuant to Rule 4(k)(2). After the revelations in these two depositions, Plaintiffs filed this case, *Wiwa III,* alleging claims for the first time against SPDC. JA0015.[3] However, as described above, the District Court stayed all discovery in *Wiwa III.*

Discovery disputes in the related cases continued through the spring of 2004, focusing exclusively on the merits at issue in those cases. JA00467. During this period, Plaintiffs again sought discovery about SPDC imports into the U.S. in connection with their RICO claim against Royal Dutch/Shell, and presented the dispute to the Magistrate Judge. *See* JA00471; JA00484. On May 28, 2004, Plaintiffs requested a conference before Magistrate Judge Pitman to discuss this discovery. SA0075. The complete information was never produced, however, and neither Magistrate Judge Pitman nor the District Court addressed the issue. SA0096; JA00496.

On May 28, 2004, Plaintiffs sent two letters to Magistrate Judge Pitman listing the outstanding discovery in *Wiwa I, Wiwa II* and *Kiobel*, including the defendants' refusal to produce service contracts between SPDC and related companies, SPDC's knowledge of human rights abuses committed by the Nigerian military, SPDC's payments to the military, contracts between SPDC and Shell

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[3] At the same time, plaintiffs in the *Kiobel* action amended their complaint to include claims against SPDC. The District Court order dismissing *Wiwa III* also dismissed the *Kiobel* claims against SPDC. SPA0033.

International Trading Company ("SITCO"), documents on the movement of Shell employees from one entity to another, and records of SPDC management; these discovery requests were all relevant to issues in the related cases, such as the links between SPDC and Royal/Dutch Shell and oil imports related to Plaintiffs' RICO claim. SA0071-99.

The discovery cut-off date in *Wiwa I, Wiwa II* and *Kiobel* was May 31, 2004, JA00467, later extended for limited matters to July 19, 2004. JA0288 (Dkt#148). On July 19, 2004, Judge Pitman stayed all discovery in *Wiwa I, Wiwa II* and *Kiobel.* JA00482; JA00290 (Dkt#162, incorporating text of the order).

A single third-party witness, a former SPDC employee, was deposed after the close of discovery. In January 2005 he testified about training courses in the U.S. taken by him and other SPDC security employees. SA00291-94.

In a letter dated December 15, 2004, the *Wiwa* Plaintiffs detailed the bases for the discovery requests presented to Magistrate Judge Pitman in their letters of May 28, 2004, requesting a discovery conference in the three related cases. SA00125-132; *see also* SA0071-99. None of the discovery was directed at the question of personal jurisdiction over SPDC. Although some of the discovery in the related cases yielded information about SPDC's contacts with the United States, such as information about the importation of SPDC's crude oil, this was sought for purposes relevant to the related cases. Moreover, even that evidence

was incomplete and the stay on discovery prevented Plaintiffs from following up on the bits of information they had obtained. When discovery was stayed, Plaintiffs' discovery demands were still pending before the court for documents on the export of SPDC's crude oil as well as SPDC payments and logistical support to Nigerian security forces, and defendants' policies applicable and enforced through the Royal/Dutch Shell Group Companies. JA00485-93.

On September 27, 2007, the Court ordered a Joint Status Report on all four related cases. The Joint Status Report, filed on October 10, 2007, reviewed the outstanding discovery issues pending before Judge Pitman and Judge Wood. JA00503-04. There was no discovery reported for *Wiwa III*. No action was taken on any of the issues in the three related cases prior to the dismissal of this case.

D. The Basis for Personal Jurisdiction over SPDC.

SPDC has multiple contacts with the United States. Much of the evidence in support of Plaintiffs' allegations come from public sources; however, as described above, discovery in the related cases was also a source for some information.[4]

1. SPDC sold oil to the United States.

A substantial amount of SPDC's crude oil is imported into the United States. For the period January 1990-June 1996, on average, approximately 3.5 million

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[4] The evidence obtained from discovery is identified by Bates numbers in the October 10, 2007 Declaration of Jennifer M. Green filed in support of plaintiffs' opposition to SPDC's motion to dismiss. SA00133.

barrels of SPDC crude was imported into the U.S. each month. SA00161-65. That vast quantities of SPDC crude is continuously destined for the United States is evidenced in internal Shell memos concerning negotiations over SPDC's agreement with the Nigerian petroleum authority (NNPC). SA00146; SA00165; SA00227. These sales were enormously important to SPDC; approximately 50% of SPDC's oil is imported into the United States. SA0070.

SPDC crude is sold in the U.S. by its affiliate Shell entity, Shell International Trading Company ("SITCO"). SA00171. SITCO acts as SPDC's agent or partner rather than as an arms-length buyer. SA00169-227. For example, when SITCO sought reinstatement of its privilege of buying Nigerian oil, SPDC presented SITCO's request to the Nigerian government. SA00170. In the request, SITCO noted that although only "[u]pstream joint ventures partners" and "companies actively participating in exploration" were entitled to "lift Nigerian crude," SITCO should qualify because it was "an affiliate of SPDC" and therefore one of the "associates of operators of oil producing joint ventures." SA00171-72. Thus, SITCO and SPDC essentially told the Nigerian government that they were the same entity such that SITCO should gain the privileges of being an oil producer, which it was not.

Similarly, SPDC has also acted as if it has authority to speak for SITCO. In a memorandum to other Shell officials, the managing director of SPDC proposed

to present a plan to the Nigerian Minister of Petroleum in which SITCO would purchase crude from Nigeria and that SPDC would receive the payments. SA00174-78.

Moreover, negotiations between the SPDC and NNPC acknowledged that crude oil would be imported to the U.S. SA00146-65; SA00227. There is also evidence of SITCO's involvement in the negotiations between SPDC and NNPC and of SPDC's concern that the negotiations provide sufficient income for SITCO. *See* SA-00178; SA00182-202; SA00204; SA00214; SA00217; SA00174-80. In its negotiations with NNPC over oil production, SPDC considered whether a particular formulation of its agreement would provide SITCO a "structural advantage," SA00204; *see also* SA00214 (briefing for discussions between SPDC and the president of Nigeria expressing concern for provisions that would save SITCO money); SA-00217 (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). As SPDC admits, SITCO itself was losing money in its dealings with SPDC. SA00220.

2. SPDC's public relations campaign targeted the United States.

SPDC has a long running public relations campaign aimed at the United States by which it has attempted to influence both the government and private parties here. SA00274-323; SA00381; SA00393-461.

For example, SPDC, together with Royal Dutch/Shell's public relations organization, had an on-going public relations strategy for U.S. non-governmental organizations and media. SA00393-424; SA00434-36; SA00444; SA00257-68; SA00302-04; SA00310; SA00315; SA00393; SA00461. As part of this plan, SPDC attempted to influence U.S.-based groups such as Human Rights Watch. SA00393-403; SA00447-51. The public relations plan refers to the groups SPDC wanted to target, SA00394, and the positive relationships they already had with those groups. SA00395.[5] The plan also refers to SPDC's relationships with senior management of the international press corps, as well as briefings, spokespersons and film footage it supplies. SA00399. SPDC had and intended to continue to maintain its ongoing contacts with those who influence public opinion in the U.S.

This campaign was intimately connected to the U.S. SPDC communicated with U.S.-based entities, and SPDC employees were in the U.S. to influence opinion here about SPDC's operations in Nigeria. *See* SA00393-403; SA00423 (discussing visit with State Department and Congressional staff as well as the National Newspaper Association); SA00302-04 (discussing visit to Houston for

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5 *See also* SA00445 (events for briefing Paul Lewis of the New York Times (December 13-15)); SA0435 "Note for Discussion 'Working Behind Guns' in Nigeria" (January 14, 1999) (discussing need to counter Brian Anderson's statements on CNN that SPDC would "not... work behind a military shield" in Nigeria. Response would target Human Rights Watch and Amnesty International); SA00447-48 (Letter from SPDC to Human Rights Watch/Africa (July 6, 1995).

strategy session and "acknowledg[ing] the need to take note of internal US political developments when considering the timing of any public announcement.").

In addition, SPDC employees came to the U.S. specifically to meet with Ogoni leaders concerning their relations with Shell, which is the background to this litigation. SA00274; SA00304; SA00310-18; SA00257-68 (presentation at the Houston Summit of African Leaders; SPDC official invited to meeting in Houston with two Ogonis, because a Nigerian military officer "wanted a Senior SPDC rep to participate.").

3. SPDC recruits employees in the United States.

SPDC recruits employees in the United States through another affiliate, Shell People Services ("SPS"), based in Houston, Texas. SA00324-26; SA00331-37. Graduates from U.S. schools are encouraged to submit applications for positions with SPDC, directing inquiries to the SPS Houston office. *See id.* The SPS office in Houston is listed as one of the recruiting offices for job opportunities at Shell Nigeria. SA00331 (noting Shell Nigeria is "aggressively expanding [its] recruitment markets overseas").

4. SPDC employees are trained in the United States and are present here for business.

SPDC has regularly had personnel present in the United States for its business. SPDC employees have spent extended periods here receiving training.

See SA00291-94 (Victor Oteri, SPDC head of security and other SPDC employees traveled to the U.S. for security training); SA00381 (SPDC employees underwent training in the United States). Other employees of SPDC worked in Houston to assess Nigerian deep water blocks. SA00313; SA00317-18 (SPDC requesting assessment of work "since the review last August" on deep water blocks in Houston). Still others came on a regular basis to trade meetings in the United States. They presented papers at and attended conferences hosted by the American-based Society of Petroleum Engineers and the American Society for Industrial Security and came for training. SA00257-68; SA00273-300.

5. SPDC contracts for services in the U.S. and benefits from U.S. Federal aid.

SPDC has entered into significant contracts with U.S.-based companies for services, including services to be performed in the U.S. In 1998, SPDC contracted with the U.S.-based company Baker Hughes to construct a barge in New Orleans for later use in Nigeria. *Boyo v. Boyo,* 196 S.W.3d 409, 416 (Tex. App. 2006); SA00340-41; SA00348-77.

SPDC also hired U.S. companies Western Atlas International, Halliburton, and Pecten. *See* SA00364 (naming Western Atlas International as "a major overseas supplier"); SA00230-38 (Halliburton); SA00379 (Pecten). At least some of these contracts, too, appeared to be performed in the U.S. *See* SA00379 (discussing "a major evaluation effort with Pecten in Houston," Texas).

Moreover, SPDC partners with the U.S. Agency for International Development (USAID) and participates in projects receiving significant financial assistance from USAID. SA00384-86; SA00388-90; SA00520-56. SPDC participates in a gas-marketing cooperative slated to receive $1.55 million in technical aid from USAID. SA00384-86. In September 2003, SPDC and USAID signed a $20 million Memorandum of Understanding for the development of cassava in Nigeria, wherein SPDC contributed $15 million and USAID contributed $5 million. SA00388-90. During that year SPDC signed agreements with USAID and Africare. SA00545-46.[6]

SUMMARY OF THE ARGUMENT

The District Court erred as a matter of law and fact in finding that Plaintiffs had an opportunity to conduct jurisdictional discovery. Before the claims against SPDC were filed, the issue of SPDC's general business contacts with the U.S. was beyond the scope of discovery in the related cases, which involved events in Nigeria, the relationships of the various Royal Dutch/Shell entities to each other, and jurisdictional contacts between Royal Dutch/Shell and the United States. Within two months of the filing of this case against SPDC, discovery in the related cases was closed and discovery in this case was stayed.

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[6] Because there has been no jurisdictional discovery, plaintiffs do not know if SPDC or its representative applied for the grants, or where negotiations over the nature and conditions of the grants took place.

The District Court erroneously used the legal standard applicable in cases where jurisdictional discovery has been taken, despite the lack of such discovery here. Because Plaintiffs had no opportunity to conduct discovery in this case, they needed only to present legally sufficient allegations of jurisdiction, and the allegations and evidence presented were more than sufficient to present a prima facie case of jurisdiction.

The District Court further erred in finding that Plaintiffs had not made a sufficient showing to justify jurisdictional discovery. The District Court abused its discretion in denying such discovery, because it relied on legal and factual errors: that Plaintiffs had "ample opportunity for discovery" (SPA0032); that discovery in this case was "coordinated" with discovery in prior related cases (SPA005); and that Plaintiffs' allegations were "vague and conclusory." SPA0031.

Finally, even if the District Court had been correct to apply the post-discovery standard, it erred in concluding that Plaintiffs had not made a showing sufficient to justify the assertion of personal jurisdiction over SPDC.

STANDARD OF REVIEW

The grant of a Rule 12(b) motion is reviewed *de novo*. *Allaire Corp. v. Okumus,* 433 F.3d 248, 249-50 (2d Cir. 2006). The denial of discovery is reviewed for abuse of discretion; to the extent that the motion for discovery was not properly considered, it is subject to *de novo* review. *First City, Texas-Houston, N.A. v.*

Rafidain Bank, 150 F.3d 172, 175-76 (2d Cir. 1998).

ARGUMENT

I. THE DISTRICT COURT ERRED AS A MATTER OF LAW AND FACT IN FINDING THAT PLAINTIFFS HAD HAD "AMPLE OPPORTUNITY" TO CONDUCT JURISDICTIONAL DISCOVERY.

The District Court erred in concluding that Plaintiffs had "ample opportunity to obtain and present evidence with respect to SPDC's general business contacts with the United States" as part of the discovery process in three prior related cases. SPA0032. While Plaintiffs did "have access to the extensive discovery taken in *Wiwa I* and *Wiwa II*," as the Court stated (SPA005), SPDC's contacts with the United States—the only facts relevant to determine personal jurisdiction over SPDC—were beyond the scope of discovery in those cases. In this case, in which SPDC was the sole defendant, the District Court explicitly blocked *all* discovery, *including* jurisdictional discovery.

A. The District Court's Finding that Plaintiffs had an Opportunity to Take Jurisdictional Discovery was Based on an Error of Law, Because Such Discovery was Barred by Rule 26.

According to Rule 26(b)(1) of the Federal Rules of Civil Procedure, "Parties may obtain discovery regarding any nonprivileged matter that is *relevant* to any party's claim or defense." (Emphasis added.) "[D]iscovery, like all matters of procedure, has ultimate and necessary boundaries." *Hickman v. Taylor*, 329 U.S. 495, 507 (1947); *see also Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351-

352 (1978) ("Discovery of matter not 'reasonably calculated to lead to the discovery of admissible evidence' is not within the scope of Rule 26(b)(1)."). Thus, "parties should not be permitted to roam in shadow zones of relevancy and to explore matter which does not presently appear germane on the theory that it might conceivably become so." *In re Surety Ass'n of Am.*, 388 F.2d 412, 414 (2d Cir. 1967) (internal quotation marks omitted).

In this case, discovery over SPDC's jurisdictional contacts with the U.S. was irrelevant to any claim against Royal Dutch/Shell presented in either *Wiwa I* or the unamended *Kiobel* case, or to any claim in *Wiwa II*, in which personal jurisdiction was based on personal service of the individual defendant. Thus, SPDC's contacts in the United States were beyond the scope of discovery permitted by Rule 26. Accordingly, the District Court erred as a matter of law in concluding that Plaintiffs had an "opportunity" to take discovery on this issue in the earlier cases.

B. The District Court's Finding that Plaintiffs had an Opportunity to Take Jurisdictional Discovery was Based on an Error of Fact.

The District Court clearly erred in finding that the discovery in *Wiwa I*, *Wiwa II*, and *Kiobel* provided Plaintiffs "ample opportunity" to conduct jurisdictional discovery because discovery in the those cases was "coordinated" with discovery in this case. SPA0032. Discovery in the *three prior cases* was coordinated, but the discovery cut-off was May 31, 2004, JA00470, less than two months after this case was filed and four months before SPDC filed its answer

asserting the Court lacked personal jurisdiction. JA009; JA00059.

Discovery in those cases did address SPDC's activities in Nigeria and its relationship to Royal Dutch/Shell, the defendants in *Wiwa I* and *Kiobel*. Plaintiffs also sought information on crude oil imports into the U.S. for their RICO claim, including the related contracts, but received limited responses. Even with respect to these limited areas of discovery, the issue of the sufficiency of the responses was still pending before the District Court at the time of the dismissal, and was never resolved. SA0067; SA0096. Given that the issue of SPDC's general business contacts with the United States was not relevant to any of the three earlier cases, and that issues relating to oil imports into the United States were before the court and not resolved, Plaintiffs did not have an "ample" opportunity to conduct *any* discovery directed to personal jurisdiction over SPDC. SPA0032.

Plaintiffs took jurisdictional discovery over the contacts of Royal Dutch/Shell in *Wiwa I*. Again, however, this discovery was not an opportunity to obtain discovery into the U.S. contacts of SPDC, which was not a defendant in that action. Discovery into one corporation does not open discovery into other related corporations. *See, e.g., Scales v. J.C. Bradford & Co.*, 925 F.2d 901, 907 (6th Cir. 1991); *Earley v. Champion Int'l Corp.*, 907 F.2d 1077, 1084 (11th Cir. 1990); *Mack v. Great Atlantic & Pacific Tea Co., Inc.*, 871 F.2d 179, 187 (1st Cir. 1989).

In response to a second motion to dismiss in *Wiwa I* and *Wiwa II*, Plaintiffs

argued that the defendants, SPDC's corporate parents, had knowledge of the actions of SPDC (referred to as Shell Nigeria), taken in cooperation with the Nigerian government, that violated Plaintiffs' rights. *Wiwa,* 2002 WL 319887, *13. In *Wiwa II*, Plaintiffs also argued that defendant Anderson, an SPDC official, was liable for human rights violations that occurred in Nigeria. *Id.* at *15. Discovery in those cases therefore focused on SPDC's conduct in Nigeria and its relationship to Royal Dutch/Shell. Disputes relating to the incomplete discovery on those issues have been pending before the court since 2004. *See supra* Statement of Facts (SOF) (C) (discussing, *inter alia*, Plaintiffs' letters of May 28, 2004, & December 15, 2004).

The *Kiobel* Plaintiffs' claims against the corporate parents generally paralleled those asserted in *Wiwa I* and the coordinated discovery focused on the same issues. *See, e.g.,* SA0088-98. Indeed, the District Court's own description of the prior discovery reflects that fact that that discovery did not reach the issue of SPDC's U.S. contacts. SPA0032 (identifying two areas of inquiry, SPDC's corporate structure and business).[7]

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[7] While plaintiffs did not seek discovery in the related cases on SPDC's general business contacts with the U.S., some documents produced in discovery relevant to the issues in those cases did provide evidence of those contacts. As noted above, it was the inadvertent discovery of these contacts that precipitated the current suit. *See* Declaration of Jennifer M. Green in Support of Plaintiffs' Opposition to Motion to Dismiss, which includes documents obtained in discovery in the three

As noted above, in early 2004, SPDC officials revealed in deposition that they and other SPDC employees had come to the United States for various meetings and professional events. *See supra* SOF(C). *Wiwa III* and the amendment to *Kiobel* followed. No discovery was permitted in *Wiwa III* or in the amended *Kiobel* case. Despite its recognition that personal jurisdiction over SPDC in *Wiwa III* was distinct from the issues raised in the three earlier cases, the District Court in August 2004 stated explicitly that the stay extended to all discovery in *Wiwa III*, including jurisdictional discovery. JA0058.

Thus, the District Court's finding that the discovery in all four cases was coordinated and that Plaintiffs had "ample" opportunity to take discovery about SPDC's contacts in the U.S., was erroneous.

II. THE DISTRICT COURT ERRED AS A MATTER OF LAW IN DISMISSING THE COMPLAINT BY FAILING TO APPLY THE PROPER STANDARD TO PLAINTIFFS' SHOWING OF SPDC'S CONTACTS WITH THE FORUM.

A. The Correct Standard to Dismiss Is Whether Plaintiffs Made Allegations Sufficient to Make a Prima Facie Showing of Personal Jurisdiction.

Because Plaintiffs had no opportunity to take jurisdictional discovery, the District Court erred as a matter of law in concluding that Plaintiffs were required to present a prima facie case, supported by factual averments, in order to survive a

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related cases. SA00133. The stay on discovery in this case prevented plaintiffs from following up any of this information.

Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction.

"Prior to discovery, a plaintiff may defeat a motion to dismiss based on legally sufficient allegations of jurisdiction." *In re Magnetic Audiotape Antitrust Litig.*, 334 F.3d 204, 206 (2d Cir. 2003). Since Plaintiffs had no opportunity to take discovery directed to SPDC's jurisdictional contacts with the forum, Plaintiffs' only burden was to establish a prima facie case of jurisdiction by allegation. *Ball v. Metallurgie Hoboken-Overpelt,* S.A., 902 F.2d 194, 197 (2d Cir. 1990). Plaintiffs were also entitled to rely on their "own affidavits and supporting materials." *Marine Midland Bank, N.A. v. Miller,* 664 F.2d 899, 904 (2d Cir. 1981); *see also A.I. Trade Finance, Inc. v. Petra Bank,* 989 F.2d 76, 79-80 (2d Cir.1993) ("[W]here the issue is addressed on affidavits, all allegations are construed in the light most favorable to the plaintiff and doubts are resolved in the plaintiff's favor[.]").

A plaintiff must support its jurisdictional allegations with averments of fact only after jurisdictional discovery. *Id.* The District Court consistently applied the wrong standard by requiring Plaintiffs to prove their prima facie case. It did so, at least in part, because it erroneously found that the post-discovery standard applies. SPA0014; SPA0022-23; SPA0030-32.

The District Court dismissed based on its conclusion that Plaintiffs had not established a prima facie case for jurisdiction. As described more fully below,

Plaintiffs presented, through the complaint and declarations, allegations and evidence that could give rise to personal jurisdiction, *i.e.* that was "legally sufficient." *Magnetic Audiotape*, 334 F.3d at 206. The materials sufficiently alleged specific general business contacts in the United States. *See infra* Section II(B).

The misapplication of the post-discovery standard in the context of a pre-discovery analysis is reflected in the District Court's analysis of *Turbana Corp. v. M/V "Summer Meadows"*, No. 03 Civ.2099, 2003 WL 22852742 (S.D.N.Y. Dec. 2, 2003). The third-party plaintiff in *Turbana* alleged that the third-party defendant imported substantial amounts of bananas into the U.S. through a related company. Although the third-party defendant claimed that a separate entity was responsible for the imports, the *Turbana* court held that such claims could not override the third-party plaintiff's allegations in the absence of further information and discovery. *Id.* at *5. Thus, the court found that the third-party plaintiff had "made a sufficient showing to meet the threshold necessary to establish a *prima facie* case of jurisdiction under Rule 4(k)(2)." *Id.* In criticizing the decision, the District Court here stated, "to the extent that *Turbana* held that a prima facie case of jurisdiction exists where there is uncertainty regarding the corporate relationship between a foreign defendant and its in-forum affiliate, *Turbana* is not consistent with Second Circuit precedent." JA00208. This reflects the District Court's

unwillingness to credit Plaintiffs' allegations in the present case; *Turbana* simply held that such allegations are sufficient at this stage, which is fully consistent with this Court's case law. *E.g.*, *Magnetic Audiotape*, 334 F.3d at 206.

The District Court's dismissal was legal and factual error.

B. The District Court Erred in Dismissing the Complaint Because, Evaluated under the Proper Standard, Plaintiffs' Allegations Were Sufficient to Establish Personal Jurisdiction.

The District Court further erred in dismissing because the complaint's statement of SPDC's contacts with the United States, supplemented by Plaintiffs' additional factual assertions, satisfied the pre-discovery standard by setting forth prima facie allegations of minimum contacts. Regardless of whether any one factor, standing alone, would confer jurisdiction, in the aggregate these contacts do meet the constitutional minimum. The District Court improperly ignored the significance of SPDC's substantial sales to the United States through an affiliate company and failed to consider that numerous other contacts, taken together, provide the necessary presence in the United States.

1. The minimum contacts test is satisfied when the defendant's contacts with the forum, taken as a whole, are continuous and systematic.

As the District Court noted, the personal jurisdiction inquiry has both a "minimum contacts" analysis and a "reasonableness" requirement. However, the District Court did not reach the reasonableness inquiry, finding that Plaintiffs

failed to satisfy minimum contacts. JA00215. Thus, Plaintiffs will focus on the minimum contacts test.

Plaintiffs assert general jurisdiction, which "is based on the defendant's general business contacts with the forum state and permits a court to exercise its power in a case where the subject matter of the suit is unrelated to those contacts." *Metro. Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 568 (2d Cir. 1996) (citing *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414-416 (1984)). Plaintiffs are proceeding under Federal Rule of Civil Procedure 4(k)(2), which allows consideration of the defendant's general contacts with the United States as a whole, rather than with any one state. *Dardana Ltd. v. A.O. Yuganskneftegaz*, 317 F.3d 202, 207 (2d Cir. 2003).

The minimum contacts requirement is met by a showing of "continuous and systematic" contacts with the United States. *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 445 (1952). This "a fact-sensitive determination requiring a balancing of all relevant factual circumstances." *Landoil Resources Corp. v. Alexander & Alexander Servs., Inc.*, 918 F.2d 1039, 1044 (2d Cir. 1990); *accord Magnetic Audiotape*, 334 F.3d at 208 (noting that question of whether a corporation's contacts should be imputed to defendant "involves a multi-factor test that is very fact-specific").

In *Metropolitan Life*, this Court rejected the notion that any particular set of

contacts, on its own, would need to be "continuous and systematic," concluding that the analysis must be done in the aggregate: "[The defendant's] various contacts with the forum state should not be examined separately or in isolation. There 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 570-71.

While "continuous and systematic" obviously entails a number of contacts with the forum, it does not necessary require a significant presence on a daily basis. For example, in *Metropolitan Life*, this Court found that it was improper to limit the minimum contacts inquiry to a single year. "[C]ontacts are commonly assessed over a period of years prior to the plaintiff's filing of the complaint. . . . [T]he phrase 'continuous and systematic' necessarily requires that courts evaluate the defendant's contact with the forum state over time." *Id.* at 569. Thus, contacts that are spread out over a period of years can still meet the minimum contacts requirement; this Court found that examining a period of seven years was appropriate in *Metropolitan Life*. *Id.*

Thus, a proper analysis of the allegations of SPDC's contacts should not look at whether any one of them, standing alone, or at a single point in time, would be sufficient. Instead, the question is whether as a whole and over a number of years, the contacts constitute a continuous and systematic presence in the United

States.

2. The District Court erroneously discounted numerous contacts between SPDC and the United States.

a. The District Court erroneously found that SITCO's substantial and continuous sales of oil in the United States were "not attributable" to SPDC.

Substantial sales to the forum are often an important factor in determining minimum contacts. For example, in *Metropolitan Life*, this Court found that $4 million in sales to the forum over the course of six years, far less than the value of SPDC's sales, weighed in favor of finding minimum contacts. *Id.* at 573.

Here, there is little question that SPDC regularly derives substantial income from a large quantity of oil sales in the United States. Nonetheless, the District Court ignored these sales completely. This was error; the Court's finding that the oil sales were "not attributable" to SPDC because they were made through another company failed to recognize that that company was an affiliate under common ownership and an agent of SPDC.

As noted above, *see supra* SOF(D)(1), SPDC imported an average of 3.5 million barrels of crude oil per month during 1990-1996 through its affiliate SITCO; this works out to approximately 42 million barrels of oil annually. While the dollar value of these shipments is not in the record, there is little doubt that 42 million barrels of oil was worth many millions of dollars in the early 1990s.

Sales made in the forum may be considered less significant if they are made

"through an independent agency." *McShan v. Omega Louis Brandt et Frere, S.A.*, 536 F.2d 516, 517-518 (2d Cir. 1976). Here, although SITCO is a separate corporation on paper, its operations are so closely intertwined with SPDC's that the two cannot be considered independent entities or an unaffiliated seller and distributor. As the District Court accepted, SPDC considers SITCO an "affiliate." SPA0021. The District Court also noted that "SPDC expressed 'concern' for SITCO's income," *id.*, and that, significantly, "SITCO was losing money in its relationship with SPDC," SPA0022. Indeed, as noted above, SITCO and SPDC cooperated in an effort to reinstate SITCO's privilege of buying Nigerian crude oil by emphasizing the close relationship between the companies; without this relationship SITCO, having no exploration or production activities of its own, would not have been entitled to buy Nigerian oil. *See supra* SOF(D)(1). Separate corporations engaged in arms-length transactions typically do not continue business relationships that lose them money, nor do they claim another's oil production activities as their own for the purpose of gaining legal privileges. And, as noted above, *see supra* SOF(D)(1), SPDC acted as if it had authority to speak for SITCO. Given these facts, a reasonable conclusion is that SITCO and SDPC were part of an integrated sales and distribution process, in which SITCO was selling SPDC's oil on SPDC's behalf. Thus, all of these sales to the U.S. should be considered in the minimum contacts analysis.

The District Court erred in discounting these sales for three reasons. First, it erroneously found that Plaintiffs' allegations were "conclusory" and insufficient to rebut a self-serving declaration submitted by SPDC. Second, the District Court applied the wrong rule to determine whether SITCO's sales could be attributed to SPDC, instead invoking the agency rule used to determine whether a subsidiary's entire contacts can be attributed to a parent. Third, even applying this agency standard, the District Court erroneously found that SITCO was not SPDC's agent.

First, the District Court failed to credit the evidence demonstrating that SPDC was involved in SITCO's sales of its oil in the United States. Thus, the court held:

> With respect to SPDC-produced crude oil, SPDC states that these sales were conducted exclusively by Shell International Trading Company ("SITCO"), a separate legal entity, "without any input from SPDC." Plaintiffs contest this assertion, but fail to make specific factual allegations contradicting SPDC's claim. *The Court will not accept Plaintiffs conclusory allegations as true, and therefore adopts SPDC's characterization of the sale structure of these crude oil sales*.

SPA0013 (emphasis added) (internal citations omitted). The District Court erred by accepting defendant's assertions as true, despite Plaintiffs' assertions and evidence that SITCO was not acting independently. SPDC's evidence was based on a self-serving declaration, (JA0080-83) which has never been subjected to cross examination and may not provide a basis for rejecting any of the allegations or evidence submitted by Plaintiffs. *See Magnetic Audiotape*, 334 F.3d at 206; *see*

also Seetransport Wiking Trader Schiffarhtsgesellschaft MBH & Co., Kommanditgesellschaft v. Navimpex Centrala Navala, 989 F.2d 572 (2d Cir. 1993) (if the parties present conflicting affidavits, all factual disputes are resolved in the plaintiff's favor, and the plaintiff's prima facie showing is sufficient notwithstanding the contrary presentation by the moving party). As in *Turbana*, before discovery a court cannot credit self-serving evidence in the face of Plaintiffs' allegations. 2003 WL 22852742 at *5.

The allegations presented here are far more specific than those presented in *Jazini v. Nissan Motor Co.*, 148 F.3d 181 (2d Cir. 1998), on which the District Court relied in labeling them "conclusory." The *Jazini* Plaintiffs argued, "It is more than *likely* that [defendant] has enjoyed substantial profits and earnings derived from the United States market, a portion of which *likely* involves sales of [defendant's] vehicles and other products in the State of New York." Brief for Plaintiffs-Appellants (June 23, 1997), 1997 WL 33633326, at *9 (emphasis added). The *Jazini* plaintiffs could only allege that the defendant's subsidiary "is able" to act as would its parent in the forum. This Court found these allegations to be mere conclusion without foundation. 148 F.3d at 183-84. But Plaintiffs' allegations and evidence here are based on what was done, not on what was merely possible. Plaintiffs presented hard evidence of SPDC's crude sold in the United States, as well as the intimate relationship between SPDC and SITCO. A simple untested

declaration stating that SITCO sells SPDC's crude independently is insufficient to counter this evidence.

Second, in relying on *Jazini*, the District Court erroneously applied the wrong rule to determine whether SITCO's sales could be attributed to SPDC. In *Jazini*, this Court considered an argument that the defendant parent corporation was present in the forum through "the activities there of its subsidiary." *Id.* at 184. That case invoked the general rule that jurisdiction may be found over a foreign parent company if its local subsidiary is its "'agent' or a 'mere department.'" *Id.* The Court in *Jazini* was considering whether the subsidiary's *entire business* could be attributed to the parent. *See id.* at 184-85 (discussing the allegations of the relationship between the parent and subsidiary, without any mention of the subsidiary selling the parent's products). Here, by contrast, Plaintiffs are not arguing that all of SITCO's contacts with the United States can be attributed to SPDC. Plaintiffs are only contending that the multimillion dollar sales of SPDC's products in the United States, done through SITCO, can be included in the minimum contacts analysis. *Jazini* is inapposite.[8] The cases that do reject sales in

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[8] This is also the case for *Stutts v. De Dietrich Group*, 465 F. Supp. 2d 156 (E.D.N.Y. 2006), on which the District Court relied. *Stutts*, like *Jazini*, primarily concerned whether the subsidiary was an "agent" or "mere department" of the parent for the purpose of attributing all of the agent's contacts to the parent. *Id.* at 162-65. Although the court cursorily examined an argument that the parent sold its products in the forum through the subsidiary, *id.* at 165, this was clearly distinct

the forum based on the independence of the distributor involve far less dependent relationships than shown here. In *McShan*, for example, the distributor was a wholly independent company that bought the defendant's watches "f.o.b. Switzerland" and subsequently sold them in the United States. 536 F.2d at 517.[9]

Finally, even if the District Court was correct to apply the "agent" or "mere department" rule in considering the oil sales, it erred in failing to conclude that SITCO acted as SPDC's agent. A prima facie case of agency may be established when an affiliate, "does all the business that the foreign parent could do were it in the U.S. through its own officials." *Stutts v. De Dietrich Group*, 465 F. Supp. 2d 156, 162 (E.D.N.Y. 2006) (internal quotation marks omitted). Courts in New York have interpreted this to mean that the activities of an agent 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." *Id.* The District Court recognized that "[a]n agency relationship exists between a foreign corporation and an affiliate where the affiliate

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from the former discussion; to the extent that the *Stutts* court required the same agency showing in order to attribute the sales to the parent, it made the same error as the District Court below.

[9] The District Court also relied on *Bearry v. Beech Aircraft Corp.*, 818 F.2d 370 (5th Cir. 1987), in holding that sales made through "third-party entities" can be ignored. In *Bearry*, however, like in *McShan*, the retailers that sold the product in the forum were "independent dealers" with no corporate relationship to the defendant. *Id.* at 375.

'renders services on behalf of the foreign corporation that go beyond mere solicitation and are sufficiently important to the foreign entity that the corporation itself would perform equivalent services if no agent were available.'" SPA0021.

However, the District Court found that "the only 'service" Plaintiffs allege SITCO performed 'on behalf of' SPDC in the United States is the 'sale of substantial amounts of crude oil." SPA0021. The District Court's conclusion that the allegations were insufficient to establish an agency relationship was error. The sale of SPDC's crude oil in the U.S. is sufficiently important to SPDC that SPDC would perform the equivalent service if that service could not be delegated to SITCO or others: SPDC is the largest producer of oil and gas in Nigeria. SA00144. Approximately 50% of SPDC's oil is imported into the United States. SA0070. Moreover, SPDC and SITCO participated together in negotiations over their contract with NNPC, and there is evidence that SPDC had authority to speak for SITCO. *See supra* SOF(D)(1). The fact that SITCO sold SPDC's crude oil while losing money in the process strongly suggests that it was performing this service as SPDC's agent. This is ample evidence that SITCO's sale of vast quantities of SPDC-produced crude oil to the U.S. were "sufficiently important" to SPDC that it would have itself sold its crude in the U.S. if SITCO were unavailable to perform that function.

The cases cited by the District Court are inapposite. In *Stutts,* the plaintiffs

alleged that the New York-based subsidiary was financially dependent on the parent because without its parent's product, the subsidiary would be without products to sell. 456 F.Supp.2d at 164. The *Stutts* court concluded that "courts require more than merely that a subsidiary derives income from its parent's business to show that the subsidiary is a mere department of the parent for jurisdictional purposes." *Id.* This is the opposite of the allegations in this case. Here, agency is based on the fact that the activities of the U.S.-based affiliate were essential to the foreign defendant, not, as in *Stutts*, that the foreign defendants' activities were essential to the domestic entity. In *Jazini*, the foreign defendant was alleged by plaintiffs to maintain a presence through the actions and presence of two New York distributors of its U.S. subsidiary. *Jazini*, 148 F.3d at 183. As noted above, in *Jazini,* the plaintiff argued about "likely" profits to the foreign corporation from the "likely sales" by the dealer in New York, rather than evidence about substantial sales as is evidenced here. The speculations in *Jazini* were an insufficient basis for plaintiff to allege that these distributors did business so essential to the defendant that without the subsidiary the defendant would do that business by its own officials. *Id.* at 184. Unlike the "likely" services provided by two local distributors in *Jazini*, the irreplaceable nature of the services provided to SPDC by SITCO—*all* of its U.S. oil sales, averaging 42 million barrels per year according to early 1990s estimates and about 50% of SPDC's output—is beyond

any doubt. Plaintiffs sufficiently alleged an agency relationship between SPDC and SITCO.

The above allegations and evidence establish that sales by SITCO to the United States should have been attributed to SPDC as contacts with this forum.

b. The District Court erred in its analysis of SPDC's contracts with U.S.-based companies and governmental agencies, because it only considered whether these contacts by themselves were sufficient to establish jurisdiction.

As discussed above, *see supra* SOF(D)(5), SPDC has also engaged in several substantial contracts in the United States and projects with a U.S. government agency, the United States Agency for International Development (USAID). Nonetheless, the District Court failed to consider these allegations, finding them to be "irrelevant to the jurisdictional analysis." SPA0028. This was error.

SPDC has purposefully conducted business within the United States, entering into several major contracts with U.S.-based companies, including for services to be performed in the U.S. *See supra* SOF(D)(5). In 1998, SPDC entered into a $70 million contract with the U.S.-based Baker Hughes to construct a barge in New Orleans for exploration work in Nigeria. SA00340-41; SA00388-90; SA00393-461. SPDC has also entered into projects with USAID; SPDC participates in the West African Gas Pipeline Project, a gas marketing cooperative

which received a $1.5 million grant from USAID, and signed a $20 million Memorandum of Understanding with USAID for the development of cassava in Nigeria. SA00388; SA00540-45.

In any analysis of SPDC's "general business contacts with the forum," these allegations of major business transactions in the United States and with U.S. entities should be considered. *Metro. Life*, 84 F.3d at 568. The District Court's finding that they are "irrelevant," SPA0028, was based on a misperception that, if these contacts were insufficient *alone* to meet the constitutional minimum, they cannot be considered. *See id.* (stating that these contracts "do not establish 'continuous and systematic business contacts' with the United States"). But, as noted, *see supra* Section II(B)(1), SPDC's contacts should be considered in the aggregate, even if they are insufficient by themselves.

The District Court relied on *Helicopteros*, in which the Supreme Court held that a foreign company's purchases in the United States, along with associated travel to the United States, were not sufficient on their own to establish jurisdiction over the company. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 418 (1984). However, *Helicopteros* does not suggest that these purchases were irrelevant, only that they were insufficient by themselves. *Id.* The transactions in *Helicopteros* were much less substantial than here; they comprised $4 million in purchases over 8 years, *id.* at 411, while just one of SPDC's

transactions was for a $70 million barge. Another case cited by the District Court similarly held that where contracts with U.S. entities were the *only* basis for jurisdiction, they were insufficient. *Frontera Res. Azer. Corp. v. State Oil Co. of Azer. Rep.*, 479 F.Supp.2d 376, 386-87 (S.D.N.Y. 2007) (noting that the only contacts asserted were contracts with U.S. entities and a conclusory assertion about use of U.S. banks).

Finally, the District Court also erred in ignoring these transactions based on the justification that they involve projects outside the United States. As noted above, at least one major contract, the $70 million contract with Baker Hughes, involved construction in the United States, and another may have involved evaluation in Texas. *See supra* SOF(D)(5). Payments were made for the construction of barge during 1999-2001 and SPDC then contracted with Baker Hughes again in 2003 to build another barge (which was later cancelled). *Boyo v. Boyo,* 196 S.W.3d at 414. As for the other contracts, Plaintiffs, of course, never had discovery into the location of their negotiation and execution. But even if they primarily concerned projects outside the United States, this does not mean, as the District Court asserted, that they have no "connection to the United States." SPA0029. Indeed, the very participation of U.S. entities establishes such a connection; asserting that projects funded by USAID, for example, are unrelated to the U.S. seems to ignore the very nature of the project. Although the District Court

relied on *BP Chemicals Ltd. v. Formosa Chemical & Fibre Corp.*, 229 F.3d 254 (3d Cir. 2000), that case is inapposite. The part of *BP Chemicals* cited by the District Court analyzed specific, not general jurisdiction, which uses a different test. *Id.* at 259-62; *see also* SPA0029. When the *BP Chemicals* court proceeded to consider general jurisdiction, it *did* include contracts with U.S. entities in the analysis, but simply found that "the cumulative effect of these various contacts together" was insufficient. *Id.* at 263. *BP Chemicals* provides no support for the District Court's conclusion that these contacts are irrelevant.

Thus, SPDC's substantial, multi-million dollar contracts with U.S. companies and government agencies should have been included in the aggregate minimum contacts analysis.

c. The District Court erred in discounting the significant presence in the United States of SPDC personnel.

The District Court also erred in concluding that the presence in the United States of SPDC personnel "cannot support a finding of continuous and systematic general business contacts." SPA0027. Once again, the District Court erred in assessing whether these contacts, standing alone, would be sufficient, when in fact they must be aggregated in the overall analysis. There should be no question that the presence of SPDC personnel in the U.S. should weigh in favor of minimum contacts.

As noted above, SPDC employees regularly attended trade meetings in the

United States, a number of employees attended trainings in the United States over a period of 36 months, and SPDC employees worked in Houston assessing Nigerian deep water blocks. *See supra* SOF(D)(4). Frequent visits to the forum by employees are among the contacts that support a finding of general jurisdiction. *Metro. Life*, 84 F.3d at 573. Where a foreign company's employees regularly attend training sessions in the United States, these training sessions weigh in favor of satisfying minimum contacts. *Tex. Trading & Milling Corp. v. Fed. Rep. of Nig.*, 647 F.2d 300, 314 (2d Cir. 1981).

The District Court cited a number of cases to conclude that these employees' presence was not sufficient to establish minimum contacts. *See* SPA0027-28. But Plaintiffs do not contend that these visits alone were enough, only that they should have weighed in favor of jurisdiction. Each of the cases cited by the District Court is distinguishable. *Helicopteros* held that trainings associated with purchase agreements do not enhance contacts if they are "part of the package of goods and services" that the defendant purchased. *Helicopteros*, 466 U.S. at 418. Here, there is no evidence that the presence of SPDC employees in United States for trainings was incidental to other contacts such as purchases so this case does not fall into the exception noted in *Helicopteros*. In *Landoil Resources* there were a number of short trips made by different employees, not the substantial training that occurred here. 918 F.2d at 1045. Furthermore, *Landoil Resources*, *id.* at 1043, as well as

Estate of Ungar v. Palestinian Auth., 400 F. Supp. 2d 541, 549 (S.D.N.Y. 2005), and *Loria & Weinhaus, Inc. v. H.R. Kaminsky & Sons, Inc.*, 495 F. Supp. 253, 256 (S.D.N.Y. 1980), concerned the personal jurisdiction test under New York law, not Rule 4(k)(2). This is a different standard that requires the defendant to be "doing business" in New York, a more demanding test. *See, e.g.*, *Intermeat, Inc. v. American Poultry, Inc.*, 575 F.2d 1017, 1022 (2d Cir. 1978) ("The constitutional standard of due process may be met by fewer contacts, however, than those required under the more restrictive statutory test of 'doing business[.]'").

While insufficient standing alone, these visits, as in *Metropolitan Life*, certainly should help to "tip the balance" towards a finding of general jurisdiction. 84 F.3d at 573; *see also Tex. Trading*, 647 F.2d at 314.

d. The District Court erred in finding that SPDC's public relations strategy targeted toward the United States did not weigh in favor of a finding of minimum contacts.

SPDC engaged in a public relations and lobbying campaign geared toward the United States. While this campaign may not have been sufficient, standing alone, for a finding of minimum contacts, it certainly weighs in favor of jurisdiction. The District Court's contrary conclusion—that these activities "do not support a finding that SPDC maintained a continuous and systematic presence in the United States," SPA0025—was error.

SPDC developed a public-relations strategy for U.S. media and non-

governmental organizations, and built and cultivated active relationships. As shown by a document produced by the defendants in *Wiwa I* entitled "Nigeria Issue: Strategy and Action Plans, October 1997-May 1998," dated November 24, 1997, SPDC sought to "cultivate active relationships" with various international NGOs and media outlets, including media outlets in the United States. SA00397-400. The plan also referred to SPDC's established relationships with senior management of the international press corps, as well as briefings, spokespeople and footage it supplies, and described "positive relationships" between SPDC and several U.S.-based organizations as well as "senior management of the international press corps." SA00397. SPDC also directly corresponded with media outlets to respond to press reports regarding the Ogoni crisis. SA00410-40; SA00446-51. And officers or agents of SPDC visited "government and private persons" in the United States on at least three separate occasions during the 1990s in an attempt to "influence opinion" regarding SPDC's operation in Nigeria. SA00402-15.

As the District Court acknowledged, public relations and lobbying activities in the forum contribute to a finding of personal jurisdiction. *Wiwa*, 226 F.3d at 98; *see also Estates of Ungar and Ungar ex rel. Strachman v. Palestinian Auth.*, 325 F. Supp. 2d 15, 54 (D.R.I. 2004); *see also Nat'l Ass'n of Home Inspectors v. Nat'l Ass'n of Certified Home Inspectors*, No. 06-CV-11957, 2006 WL 3104574, at *9

(E.D. Mich. Oct. 31, 2006). However, the court stated that only an "extensive public relations" campaign would factor into the analysis, SPA0023; otherwise this activity could be ignored. Once again, this is not supported by the case law, which only suggests that SPDC's public relations and lobbying activities may not be sufficient on their own to meet the jurisdictional test. In *Jayne v. Royal Jordanian Airlines Corp.*, 502 F. Supp. 848 (S.D.N.Y. 1980), on which the District Court relied, the only contacts at issue were the engagement of a local public relations firm, a single advertisement, and transactions with forum banks. *Id.* at 856. The court did not state that the public relations activity was irrelevant, but found that these contacts as a whole were insufficient (in that case, applying New York's more stringent "doing business" test). *Id.* The other case cited by the District Court, *Hollar v. Philip Morris*, Inc., 43 F. Supp. 2d 794 (N.D. Ohio 1998), similarly holds only that the contacts at issue in the case were insufficient, not that public relations activities do not weigh in favor of personal jurisdiction. *Id.* at 802.

With respect to lobbying in particular, *Hollar* also holds that lobbying activities are irrelevant to personal jurisdiction due to the "government contacts" exception. *Id.* at 801 n.6. This is incorrect; as the court in *Shepard Investments* held, the "government contacts" exception applies only to exercising jurisdiction in Washington, D.C., based on contact with federal government or exercising jurisdiction in New York based on contacts with the United Nations; it does not

apply where the goal of the lobbying is to influence the forum in which it occurs. *Shepherd Invs. Int'l, Ltd. v. Verizon Communs., Inc.*, 373 F. Supp. 2d 853, 865 (E.D. Wisc. 2005); *see also Chamberlain v. American Tobacco Co.*, No. 1:96-CV-02005-PAG,1999 WL 33994451, at *22 (N.D. Ohio Nov. 19, 1999). Thus, SPDC's lobbying efforts should have weighed in favor of jurisdiction.

In discounting the importance of these public relations activities, the District Court improperly failed to credit Plaintiffs' allegations and evidence. The court questioned whether "any of the initiatives outlined in the 'Nigeria Issue' document were ever implemented." SPA0025. But in this posture, the documented plan should be sufficient to establish a prima facie case of the activities contemplated.

e. The District Court erred in failing to find that SPDC's recruitment of employees in the U.S. through an affiliate was a "contact" for the purposes of establishing personal jurisdiction.

Finally, SPDC also engaged in substantial recruiting activities in the United States through an affiliate company, Shell People Services (SPS). With respect to this recruitment, however, the District Court made the same error as it did in the sales context, refusing to attribute SPS's recruitment activities to SPDC based on an erroneous belief that SPS would have to be a "mere department" of SPDC for these contacts to be considered. SPA0026.

As noted above, SPS, like SITCO, is an affiliate of SPDC; it operates a recruiting office in Houston, Texas that recruited graduates from U.S. schools for

SPDC positions, and encouraged them to submit applications, directing inquiries to the Houston office. *See supra* SOF(D)(3); SA00324-29. SPS in Houston operates as a regional application handling center which processes applications to various arms of the Shell Group. SA00327-29. The Shell Nigeria employment website lists the Houston recruiting office, and states that Shell Nigeria is "aggressively expanding [its] recruitment markets overseas." SA00331.

Recruitment of employees is generally considered an activity that weighs in favor of finding minimum contacts. *Chew v. Dietrich*, 143 F.3d 24, 30 (2d Cir. 1998). This recruitment often is not carried out by the defendant itself, but by an agent recruiting on behalf of the defendant. In *Chew*, for example, the defendant was subject to jurisdiction in Rhode Island because someone acting on his behalf recruited crew in Rhode Island for his yacht. *Id.* at 30. This recruitment, along with the defendant's maintenance and operation of the yacht in the United States, was enough to establish jurisdiction. *Id. See also Ochoa v. J.B. Martin and Sons Farms, Inc.*, 287 F.3d 1182, 1189-92 (9th Cir. 2002) (granting jurisdiction over a New York grower where Texas labor contractor was its agent with respect to labor recruiting activities); *Ladd v. Research Triangle Institute*, No. 05-cv-02122-LTB-OES, 2006 WL 2682239, at*6 (D. Colo. Sept. 18, 2006).

The District Court, as in the sales context, held that the recruiting activities of SPS could not be attributed to SPDC unless the *Jazini* standard for "agency" or

"mere department" was met. SPA0026. Once again, this was error, because Plaintiffs are not seeking to attribute *all* of SPS's contacts to SPDC, only SPS's recruitment *on behalf of* SPDC. In *Chew*, for example, rather than considering whether the recruiter was a "mere department" of the defendant, this Court only needed to conclude that the recruiter was "acting on his behalf." 143 F.3d at 30.

The District Court did acknowledge that Plaintiffs alleged that SPS was acting as SPDC's agent, but stated that Plaintiffs had provided "*no* facts detailing the purported agency relationship between the two entities." SPA0026 (emphasis added). This is not the case; by providing evidence that SPS was recruiting on behalf of SPDC, Plaintiff made a sufficiently specific allegation of agency at this stage of the proceeding, pre-discovery. Indeed, that SPDC was "aggressively expanding [its] recruitment markets overseas," is evidence that it would have conducted for itself the work done by SPS in Houston if SPS were not available to do so.

The District Court also stated that, even if SPS's recruitment activities were attributed to SPDC, these activities were not sufficiently "active and sustained . . . to subject SPDC to the Court's general jurisdiction." SPA0026. The District Court relied on *In re Ski Train Fire in Kaprun, Austria on November 11, 2000*, 343 F. Supp.2d 208 (S.D.N.Y. 2004), for this conclusion, but that case was manifestly different. There, the court held that finding jurisdiction would be "inappropriate"

where there was no evidence that the foreign defendant actually recruited employees in the forum, despite having mechanisms available to do so. *Id.* at 215-16 n.7. But the sole recruitment mechanism alleged was a website that was *available* to residents of the forum; a far cry from the recruitment office run by SPS in Houston. *Id.* Indeed, SPS's own website encouraged potential recruits to submit applications by mail to its offices in the U.S., such that not only the website interaction but the actual application would occur in the United States as well. SA00327--00329. Moreover, with respect to whether any U.S. residents were recruited in this manner or whether the activity was active and sustained, the District Court should not have speculated without permitting discovery.

As with the other contacts at issue, the District Court improperly failed to accept Plaintiffs' allegations and discounted this recruitment activity rather than simply determining that it was one of many factors that, while insufficient on its own, could contribute to a finding of personal jurisdiction.

3. The District Court erred in failing to find that the aggregate of SPDC's contacts was sufficient to set out a prima facie case for jurisdiction.

Regardless of whether any of the above contacts, standing alone, would have been sufficient to meet the constitutional minimum, all of them should have been considered in the minimum contacts analysis. Taken as a whole, these contacts suffice to establish a continuous and systematic presence in the United States.

SPDC's contacts have been significant and recurring over several years. Through an affiliated agent, SPDC sells large quantities of oil. SPDC has transacted hundreds of millions of dollars worth of business with U.S. entities, including private corporations and federal agencies, and including contracts to be performed in the United States. SPDC's personnel have been present in the United States on multiple occasions, often for extended training sessions. SPDC engaged in a public relations campaign that was targeted at U.S. media and the public. And SPDC used another affiliate company to recruit on its behalf in the United States.

In *Metropolitan Life,* this Court found general jurisdiction over a defendant company that made nearly $4 million dollars in sales in the forum over six years, filed income and sales tax returns in the forum, maintained a relationship with independent dealers of its products in the forum, had contracts with "authorized builders" using its products, provided product support, advertised in national catalogs and direct mail campaigns that reached the forum, and sent employees to the forum on over 150 occasions over six years, and had an employee who resided and maintained an office there for two years. *Metropolitan Life*, 84 F. 3d at 570. This Court held that while the sales alone might not have sufficed, the other contacts were more than "occasional and sporadic" and tipped the balance towards a finding of general jurisdiction. *Id.* at 572-73. The contacts here are at least as significant as those in *Metropolitan Life*, and in some ways much more significant:

the sales volume, for example, is much greater than $4 million, and SPDC has also transacted millions of dollars worth of business with U.S. entities. As in *Metropolitan Life*, while any one contact may not be sufficient, the contacts taken as a whole meet the test.

Similarly, in the recent case *Coremetrics, Inc. v. AtomicPark.com, LLC*, 370 F. Supp. 2d 1013 (N.D. Cal. 2005), the district court found that while none of the defendant's contacts was sufficient by itself to support jurisdiction, the aggregate contacts met the standard. *Id.* at 1021. As in *Coremetrics*, *see id.* at 1021-22, SPDC engaged in public relations or marketing activities that reached the forum; while this was a weak factor in *Coremetrics*, because the defendant had merely marketed its product over the internet without specifically targeting the forum, Plaintiffs' evidence here shows that SPDC did purposefully target its public relations activities toward the United States. As in *Coremetrics*, *see id.* at 1022, SPDC made contracts with parties in the forum—very substantial contracts, in fact. Furthermore, by having technical people work on projects in the U.S. and sending employees to regular trainings and trade conferences, SPDC had a physical presence in the forum that did not exist in *Coremetrics*. *See id.* at 1022-23. Finally, SPDC's sales to the forum through SITCO outweigh any factor present in *Coremetrics*. As in that case, SPDC's individual contacts may not have been enough to be considered "continuous and systematic", but taken as a whole, they

meet the standard.

The District Court erred in failing to find these contacts sufficient. *See* SPA0029. The extent of this error is difficult to tell, however, because while the District Court stated that it was considering these contacts "in the aggregate," *id.*, it gave no indication as to which contacts, if any, it was aggregating. Indeed, in all of the prior sections, the District Court held that each alleged contact did not factor into the analysis at all: the sales were not "attributable to SPDC," SPA0022; the contracts were "irrelevant to the jurisdictional analysis," SPA0028; the visits by SPDC personnel "cannot support a finding of continuous and systematic" contacts, SPA0027; the public relations campaign was "too limited in scope to support a finding of general jurisdiction," SPA0023; the recruitment activities could not "be attributed [to] SPDC," *id.* at SPA0026. Under the *Metropolitan Life* standard, the District Court should have considered all of these contacts as a whole, but the Opinion strongly suggests that the District Court did not consider *any* of them in the aggregate.

Instead, the District Court erred by focusing solely on a few factors that have no talismanic significance. Rather than explaining which contacts it was considering in the aggregate analysis and whether these contacts were sufficient, the District Court's Opinion falls back on a few alleged facts: that "SPDC does not have an office, place of business, postal address, or telephone listing in the United

States," is not "licensed to do business" in the United States, and owns no real property or bank accounts in the United States. SPA0029 (citing defendant's declaration). The focus on this arbitrary set of factors is flatly inconsistent with *Metropolitan Life*, which approvingly discussed the minimum contacts analysis of the Third Circuit case, *Provident National Bank v. California Federal Savings & Loan Ass'n*, 819 F.2d 434 (3d Cir. 1987). In that case, "the Third Circuit found continuous and systematic contacts between California Federal ('Cal Fed') and the state of Pennsylvania, where Cal Fed 'maintained no Pennsylvania office, employees, agents, mailing address, or telephone number' and 'had not applied to do business in Pennsylvania, did no advertising in Pennsylvania, and paid no taxes there.'" *Metropolitan Life*, 84 F.3d at 572 (quoting *Provident Nat'l Bank*, 819 F.2d at 436). This is almost exactly the same list of factors cited by the District Court in finding no minimum contacts; it demonstrates the District Court's error in checking off a list of factors rather than examining the contacts as a whole. Aggregating these contacts, there should be little doubt that the evidence shows at least a prima facie case of SPDC's continuous and systematic contacts with the United States.[10]

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[10] The District Court also compared this case to *Bearry*, 818 F.2d 370, in which the Fifth Circuit declined to find general jurisdiction. In *Bearry*, however, the defendant had structured its transactions to avoid Texas, the forum state, making sure that all of its contracts were performed in Kansas and that its Texas retailers

III. THE DISTRICT COURT ABUSED ITS DISCRETION BECAUSE IT BASED ITS DECISION TO DENY DISCOVERY ON ERRORS OF LAW AND FACT.

The District Court also erred in refusing to allow jurisdictional discovery before dismissal. A district court has broad discretion in determining whether to grant jurisdictional discovery. *Daventree Ltd. v. Republic of Azer.*, 349 F. Supp.2d 736, 761 (S.D.N.Y. 2004). As the District Court stated, discovery may be authorized where plaintiff has made "a threshold showing that there is some basis for the assertion of jurisdiction." *Daval Steel Prods. v. M.V. Juraj Dalmatinac,* 718 F. Supp. 159, 162 (S.D.N.Y. 1989); *see also Stratagem Dev. Corp. v. Heron Int'l N.V.*, 153 F.R.D. 535, 547-48 (S.D.N.Y.1994) (authorizing jurisdictional discovery where plaintiff "made a sufficient start" toward establishing jurisdiction). However, a district court "abuses" or "exceeds" that discretion when its decision rests on an error of law (such as application of the wrong legal principle) or a clearly erroneous factual finding. *Cooter & Gell v. Hartmarx Corp.,* 496 U.S. 384, 405 (1990); *Milanese v. Rust-Oleum Corp.,* 244 F.3d 104, 110 (2d Cir. 2001); *Patricia Hayes Assocs., Inc. v. Cammell Laird Holdings U.K.,* 339 F.3d 76, 80 (2d Cir. 2003). In particular, it would be "legal error" to forbid jurisdictional

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were independent, *see id.* at 375-76; by contrast, SPDC made contracts that were performed in the U.S. and sold in the U.S. through a closely affiliated entity. While in *Bearry,* the defendant's national advertising campaign had merely reached Texas, *see id.* at 376, here there is evidence that SPDC's campaign specifically targeted media and others in the United States

discovery based on a finding that a plaintiff had not made a prima facie showing of jurisdiction. *Ehrenfeld v. Mahfouz,* 489 F. 3d. 542, 550 n.6 (2d Cir. 2007).

The District Court erred both as a matter of law and fact. The District Court based its decision to deny discovery on the erroneous holding that Plaintiffs' jurisdictional allegations were "vague and conclusory." SPA0031. The District Court further relied on the erroneous conclusion "that Plaintiffs have had ample opportunity to obtain and present evidence with respect to SPDC's general business contacts with United States." SPA0032.

As set forth *supra*, in Section I, the latter conclusion is erroneous as a matter of law and fact. Plaintiffs did not have an opportunity to take discovery of SPDC's jurisdictional contacts with the United States. As set forth in Section II(B), *supra,* Plaintiffs' jurisdictional allegations were neither vague nor conclusory. Among others, Plaintiffs made specific allegations that SPDC imported substantial amounts of oil into the United States on an on-going basis through an affiliate that not only did all of the activities in the jurisdiction that SPDC would have had to perform with its own employees, but did so without obtaining a profit. *See supra* Section II(B)(2)(a). Plaintiffs point to numerous contracts between SPDC and companies based in the United States, including one contract that was clearly to be performed in the United States. *See supra* Section II(B)(2)(b). Plaintiffs alleged that SPDC employees came to the United States for training sponsored by SPDC.

See supra Section II(B)(2)(c). Plaintiffs alleged that SPDC maintained a public relations campaign aimed at influencing opinion in the United States. *See supra* Section II(B)(2)(d). These allegations were all supported by evidence presented to the District Court.

The District Court supported its decision with inapposite cases. *See* SPA0031-32 (citing *Warner Bros. Entm't Inc. v. Ideal World Direct* (*Warner Bros.*), 516 F. Supp. 2d 261, 267 (S.D.N.Y. 2007); *Sodepac, S.A. v. Choyang Park*, No. 02 Civ. 3827, 2002 WL 31296341 (S.D.N.Y. Oct. 10, 2002); *Celton Man Trade, Inc. v. Utex S.A.*, No. 84 Civ. 8179, 1986 WL 6788 at *4 n.3 (S.D.N.Y. June 12, 1986). In *Warner Bros.*, the plaintiffs were granted jurisdictional discovery; the court dismissed because, despite such discovery, the plaintiffs failed to aver specific connections between defendants' operations and customers in the forum state. 516 F. Supp. 2d at 267. In *Sodepac*, the plaintiff requested discovery to show that the defendant was subject to jurisdiction through its agent. 2002 WL 31296341 at *5. The plaintiffs argued that "discovery [would] likely show that [defendants] regularly conduct[ed] business in New York" and that discovery would "demonstrate an ongoing relationship between [defendant] and its agent [in New York]." *Id.* The court denied jurisdictional discovery holding that "[v]ague and generalized allegations, such as these, are insufficient to make a prima facie showing of jurisdiction." *Id.* Moreover, the court held that plaintiffs had not

submitted affidavits to support allegations and had not alleged specific facts supporting their claims of jurisdiction. *Id.* In contrast, Plaintiffs provided specific evidence of the ongoing relationships between SPDC and its agents SITCO and SPS. In *Celton Man Trade, Inc.*, the court dismissed because the only contacts the plaintiff asserted were that the defendant made telephone calls to the forum state. 1986 WL 6788 at *3. SPDC's contacts with the United States far exceed mere telephone calls.

In short, unlike *Warner Bros.*, *Sodepac*, and *Celton*, plaintiffs here went beyond "vague and generalized allegations;" Plaintiffs' allegations were supported with affidavits and other non-conclusory and detailed evidence to support jurisdiction. Moreover, unlike *Warner Bros.*, plaintiffs have not had an opportunity for jurisdictional discovery. Therefore, the District Court abused its discretion by resting its decision on errors of law and on clear errors of facts. Even if the District Court correctly found that plaintiffs had, at this point, failed to present a prima facie case of personal jurisdiction, it was erroneous to dismiss without allowing discovery. In *Magnetic Audiotape*, 334 F.3d at 207-8, this Court reversed a district court's dismissal which was based on the finding the plaintiffs' allegations were "insufficiently developed" to give rise to a prima facie showing of jurisdiction. The district court held that the record did not present a prima facie case. This Court reversed, holding that discovery was appropriate because the

plaintiffs had, in their complaint and in materials submitted in opposition to the motion to dismiss, pointed to evidence which *could* give rise to personal jurisdiction. *Id.* at 208. This Court held that "plaintiffs are entitled to further development [of the record through discovery] on this point *prior* to a conclusion that they have failed to make a *prima facie* showing" relevant to jurisdiction. *Id.* (emphasis added). This Court held that the district court prematurely granted dismissal prior to allowing discovery on the grounds for personal jurisdiction. *Id.*

The same conclusion holds here. Even if Plaintiffs did not present a prima facie case of personal jurisdiction, there can be little doubt that they presented allegations of SPDC's contacts and relationships with SITCO and SPS that could have been further developed through discovery. Thus, just as in *Magnetic Audiotape*, it was "premature to grant dismissal" here. 334 F.3d at 208.

IV. EVEN ASSUMING THAT PLAINTIFFS HAD AN OPPORTUNITY TO TAKE DISCOVERY, PLAINTIFFS HAVE MET THE POST-DISCOVERY STANDARD BY MAKING A PRIMA FACIE SHOWING THAT SPDC HAD CONTINUOUS AND SYSTEMATIC CONTACTS WITH THE FORUM.

The District Court's dismissal of the action for lack of personal jurisdiction is subject to de novo appellate review. *Overseas Media, Inc. v. Skvortsov*, No. 06-4095-cv, 2008 WL 1994981, at *1 (2d Cir. May 8 2008) (citing *Best Van Lines, Inc. v. Walker*, 490 F.3d 239, 242 (2d Cir.2007)). Where jurisdictional discovery has taken place, plaintiffs' "*prima facie* showing, necessary to defeat a jurisdiction

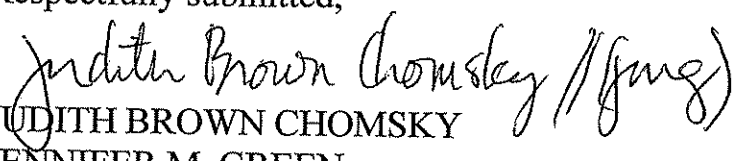
testing motion, must include an averment of facts that, if credited by the trier, would suffice to establish jurisdiction over the defendant." *Ball*, 902 F.2d at 197 (citing *Hoffritz for Cutlery, Inc. v. Amajac, Ltd.,* 763 F.2d 55, 57 (2d Cir. 1985); *Birmingham Fire Ins. Co. v. KOA Fire & Marine Ins. Co.,* 572 F. Supp. 962, 964 (S.D.N.Y. 1983)). As discussed *supra* at Section IIB, Plaintiffs detailed the bases for jurisdiction over SPDC. Evidence supports the assertion that SPDC imports substantial amounts of crude oil through its agent SITCO. Clearly the sales of its product to the United States in such quantities were significant to SPDC's business operation. As this Court articulated the test, a prima facie case may be established when an affiliate "does all the business that the foreign parent could do were it in the U.S. through its own officials." *Wiwa*, 226 F.3d at 95. SITCO did all the business, the sale of SPDC product, that SPDC "could do were it in the U.S through its own officials." *Id.* Taken together with the other contacts acknowledged by the District Court, plaintiffs have made a prima facie case for personal jurisdiction.

CONCLUSION

Plaintiffs respectfully request that the Court reverse the District Court's 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: July 18, 2008

Respectfully submitted,



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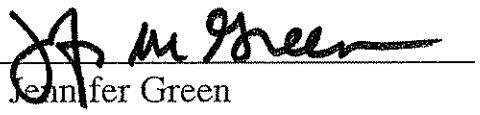

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Counsel for the Plaintiff-Appellant

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I hereby certify that on this 18th day of July 2008, I served true and correct copies of the Parties in the following documents in *Wiwa v. SPDC,* 08-1803,

1) Opening Brief in the Appellants – Plaintiffs (Sealed)
2) Joint Appendix Volume 1
3) Joint Appendix Volume 2 (Sealed)
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