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 OF APPELLEE

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August 18, 2008

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Defendant-Appellee certifies as follows:

Defendant Shell Petroleum Development Company of Nigeria Limited ("SPDC") states that its parent corporation is Shell Petroleum Company Limited and that no publicly held corporation directly owns 10% or more of SPDC's stock. The shares of Shell Petroleum Company Limited are directly owned by Shell Transport and Trading Company Limited. The shares of Shell Transport and Trading Company Limited are directly owned by Royal Dutch Shell, p.l.c., which is publicly held.

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JURISDICTIONAL STATEMENT

The asserted basis for subject matter jurisdiction in the district court was 28 U.S.C. § 1331 (federal question) and 28 U.S.C. § 1350 (the Alien Tort Statute). As the same time it moved to dismiss for lack of personal jurisdiction, the defendant also moved, *inter alia*, for judgment on the pleadings for lack of subject matter jurisdiction. Because the district court dismissed for lack of personal jurisdiction, it did not reach the question of subject matter jurisdiction. This Court's jurisdiction is based upon 28 U.S.C. § 1291.

STATEMENT OF ISSUES AND STANDARD OF REVIEW

(1) Did the district court err in concluding that it lacks personal jurisdiction over a Nigerian company doing business in Nigeria that does not have continuous and systematic business contacts with the United States?

(2) Did the district court abuse its discretion in refusing to permit additional jurisdictional discovery to plaintiffs who, after having taken years of discovery (including discovery bearing on the question of personal jurisdiction), failed to support their vague and conclusory jurisdictional allegations?

This Court reviews dismissals for lack of personal jurisdiction *de novo*. *See Porina v. Marward Shipping Co.*, 521 F.3d 122, 126 (2d Cir. 2008). "In determining whether a plaintiff has met this burden, we will not draw 'argumentative interferences' in the plaintiff's favor." *In re Terrorist*

Attacks on September 11, 2001, --F.3d--, 2008 WL 3474167, at *17 (2d Cir. Aug. 14, 2008) (*quoting Robinson v. Overseas Military Sales Corp.*, 21 F.3d 502, 507 (2d Cir. 1994)). The standard of review for the court's denial of additional jurisdictional discovery is abuse of discretion. *Jazini v. Nissan Motor Co.*, 148 F.3d 181, 186 (2d Cir. 1998).[1]

STATEMENT OF THE CASE

Shell Petroleum Development Company of Nigeria, Ltd. ("SPDC") is a Nigerian company engaged in oil exploration and production in Nigeria. It has never had any jurisdictionally significant presence in the United States.

On November 8, 1996, the Wiwa plaintiffs, three foreign nationals[2], sued Royal Dutch Petroleum Company ("Royal Dutch"), a Netherlands company with no presence in Nigeria, and The "Shell" Transport and Trading Company, p.l.c. ("Shell Transport"), a U.K. company

[1] The review here is for abuse of discretion because "the district court . . . did consider [the] motion for discovery and discussed at length its reasons for denying additional discovery". *First City, Texas-Houston, N.A. v. Rafidain Bank*, 150 F.3d 172, 175 (2d Cir. 1998); *see also* A-00215-18 (discussing reasons for denying Wiwa additional discovery).

[2] In subsequent complaints, seven Nigerian nationals joined as plaintiffs.

with no presence in Nigeria, alleging that the defendants[3] had assisted the Nigerian Government in human rights abuses. *See Wiwa v. Royal Dutch Petroleum Co.*, S.D.N.Y. No. 96 Civ. 8386 ("*Wiwa I*"). (*See* A-0015; A-00302; A-0015-0041; A-00302-00305.) On March 5, 2001, the Wiwa plaintiffs sued the former managing director of SPDC, asserting human rights claims virtually identical to those in *Wiwa I*.[4] *See Wiwa v. Anderson*, S.D.N.Y. No. 01 Civ. 1909 ("*Wiwa II*"). The district court consolidated *Wiwa I* and *Wiwa II* for pretrial purposes. (*See Wiwa I* Docket Entry No. 54.) On September 20, 2002, a different group of Nigerian plaintiffs filed a similar lawsuit against the Shell Parties, *Kiobel v. Royal Dutch Petroleum Co.*, S.D.N.Y. No. 02 Civ. 7618 ("*Kiobel*").

The district court ordered the coordination of all discovery in *Wiwa I*, *Wiwa II* and *Kiobel* (*see Wiwa I* Docket Entry No. 66), and the

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[3] Because of changes in corporate form, the successor to Royal Dutch is Shell Petroleum N.V., and Shell Transport is now known as Shell Transport and Trading Company, Ltd. (*See Wiwa I* Docket Entry No. 222 at 1 & n.1.) We refer to Royal Dutch and Shell Transport, and their successors, collectively as the "Shell Parties".

[4] Two plaintiffs in *Wiwa I* do not assert claims in *Wiwa II*: James B. N-nah and Karalolo Kogbara. Also, *Wiwa I* contains RICO claims, whereas *Wiwa II* does not; *Wiwa II* contains claims under the Torture Victims Protection Act of 1991, 28 U.S.C. § 1350, note "TVPA", whereas *Wiwa I* does not.

Wiwa and Kiobel plaintiffs jointly took extensive discovery of the Shell Parties and some of their affiliates, including SPDC.

On April 6, 2004, the same group of Wiwa plaintiffs filed this lawsuit ("*Wiwa III*"), asserting the same claims as in *Wiwa I* and *Wiwa II* (aside from the RICO, TVPA and state law claims), but this time against SPDC. (*Compare* A-0015-41 *with* A-00302-363.) Shortly after that, on May 17, 2004, the *Kiobel* plaintiffs amended their complaint to add SPDC as a party. (*See Kiobel* Docket Entry No. 69.)

On January 31, 2007, SPDC filed a Motion to Dismiss for Lack of Personal Jurisdiction, Motion for Judgment on the Pleadings and Motion to Strike ("SPDC's Motion to Dismiss") in *Wiwa III* and *Kiobel*, and a separate Motion to Preclude Further Jurisdictional Discovery ("Motion to Preclude") in those cases. (*See Wiwa III* Docket Entry Nos. 12-17.) Wiwa opposed SPDC's Motion to Preclude on February 14, 2007. (*See* Docket Entry Nos. 19-20.)

On February 22, 2007, Magistrate Judge Henry B. Pitman held oral argument on SPDC's Motion to Preclude, granted the motion and set a date for Wiwa to respond to SPDC's Motion to Dismiss. (*See* SA-463-518; *see also* A-00183-184.)

On September 13, 2007, the district court withdrew the order of reference to Magistrate Judge Pitman with respect to SPDC's Motion to Dismiss, and ordered the *Wiwa* and *Kiobel* plaintiffs to respond to SPDC's arguments regarding lack of personal jurisdiction. (*See also Wiwa III* Docket Entry Nos. 25-26.)

On March 4, 2008, the district court granted SPDC's Motion to Dismiss for lack of personal jurisdiction, holding that "SPDC's alleged contacts with the United States, considered in the aggregate, are insufficient to establish the required minimum contacts for general jurisdiction purposes." (A-00214.) The district court further held that the "[p]laintiffs have had ample opportunity to obtain and present evidence with respect to SPDC's general business contacts with the United States", and therefore exercised its discretion to preclude Wiwa from taking further discovery, finding the "[p]laintiffs' jurisdictional allegations [to be] too vague and conclusory to warrant additional discovery". (A-00216.)

On March 18, 2008, the district court entered judgment in favor of SPDC in *Wiwa III*. (A-00221.) On April 15, 2008, Wiwa timely filed a notice of appeal. (A-00222-23.)

STATEMENT OF FACTS

Since its formation, SPDC has been a separate and distinct corporation whose ultimate parents have been Royal Dutch and Shell Transport. (*See* A-0082 ¶ 6.) SPDC, like several other separate and distinct corporations around the world, is part of the Royal Dutch/Shell Group of Companies. (*See* A-0081 ¶ 5; *see also Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 92 (2d Cir. 2000).) SPDC is a corporation separate and distinct from Royal Dutch and Shell Transport and the other companies in the Royal Dutch/Shell Group of Companies. (*See* A-0082 ¶ 6.) SPDC has its own officers, capital, corporate structure, facilities, work forces, business records, bank accounts, tax returns, financial statements, budgets and corporate reports. (*See id.*)

SPDC is a Nigerian corporation doing business in Nigeria. (*See* A-0081 ¶ 2.) It conducts no business in the United States. (*See* A-0081 ¶¶ 2-4.) Starting in the 1950s, SPDC has operated oil production facilities in Nigeria. (*See* A-0021 ¶ 28.) Currently, SPDC, the Nigerian National Petroleum Company ("NNPC") and two other Nigerian companies participate in a joint venture that is in the business of exploration and production of oil and gas in Nigeria. (*See* A-0081 ¶ 3.)

SPDC's participation in the joint venture entitles it to a share of the venture's crude oil. (*See* A-00139, 00141; *see also* A-0081 ¶¶ 3-4.) SPDC does not sell oil in or to the United States.[5] (*See* A-0081 ¶ 4.) SPDC sells its share of the crude oil produced in Nigeria to Shell International Trading Company ("SITCO") (or its successor)[6] through direct arm's-length commercial sales transactions. (*See id.*; *see also* A-00139, 00141 (admitting, in response to request for admission, that "SPDC sold its share of the crude oil produced by the joint venture to SITCO or its successors").)

SITCO (or its successor) is the "central trading company of the Royal Dutch/Shell Group". (*See* SA-00171.) Wiwa does not claim that SITCO lacks its own board of directors, officers, capital, corporate structure, facilities and other classic indicia of corporate separateness. SITCO is affiliated with SPDC by virtue of having the same ultimate corporate parents. (*See* "About Shell Trading", *supra* footnote 6; A-0081 ¶ 5.) SPDC plays no part in determining to whom SITCO sells crude oil or the locations

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[5] The transcript page Wiwa cites for the proposition that "approximately 50%" of the oil produced by SPDC "is imported into the United States" (*see* Appellants' Br. 12 (citing SA-0070)) mentions neither SPDC nor oil.

[6] In 1995, SITCO and Shell International Shipping Limited combined to form Shell International Trading and Shipping Company Limited. (*See* "About Shell Trading" at http://www.shell.com/home/content/trading-en/aboutshell/aboutshell.html (lasted visited Aug. 17, 2008).)

to which SITCO ships crude oil. (A-0081 ¶ 4.) As a monthly average, for the period from January 1990 to June 1996, approximately 3.8 million barrels of crude oil purchased by SITCO from SPDC showed an initial intended destination in the United States.[7] (SA-00161-00165.)

The different roles of Royal Dutch, Shell Transport, SPDC and SITCO have been the subject of years of discovery taken in *Wiwa I*, *Wiwa II* and *Kiobel*. Counsel in all three *Wiwa* cases are the same, and, as the district court noted, "the parties in these related cases have for the most part shared discovery. As such, plaintiffs in *Kiobel* and *Wiwa III* have had access to the extensive discovery taken in *Wiwa I* and *Wiwa II* over the past ten years." (A-00190.) Much of that discovery came from SPDC, and concerns facts relevant to whether SPDC has "continuous and systematic general business contacts" in the United States.

As part of the coordinated discovery, Wiwa requested and received very substantial discovery from SPDC. The district court was

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[7] Wiwa asserts that "[f]or the period January 1990-June 1996, on average, approximately 3.5 million barrels of SPDC crude was [sic] imported into the U.S. each month." (Appellants' Br. at 11-12.) However, SPDC's records do not show what amount of oil produced in Nigeria by SPDC "ended up in the United States". (*See* SA-00161.) The "ownership and/or destination of the crude oil can—and frequently does—change hands many times before the cargo reaches its final destination". (*See* SA-00161.)

intimately familiar with the nature and scope of that discovery, which it supervised closely. (*See* SA-0071-0132.) The discovery requests specifically sought documents in the possession, custody or control of SPDC. (*See, e.g.*, A-00447-448 at 8:25-9:10.) In fact, approximately 18,000 pages of documents—or about half of the documents produced by the Shell Parties—came from the files of SPDC. Of the 23 depositions taken of persons affiliated with the defendants, 13 were of SPDC directors, officers or employees. [8]

Both Wiwa and Kiobel propounded requests for admission and interrogatories concerning SPDC's corporate structure and business, and received answers thereto.[9] They also served several discovery requests

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[8] The SPDC personnel deposed were: Emeka Achebe (general manager relations); Brian Anderson (managing director); Olawale Animachaun (legal advisor and a 30(b)(6) witness for SPDC); T.M.G. Cloughy (general manager of operations); Egbert Imomoh (deputy managing director); Dozie Okonkwo (manager for health, safety and environment, security and community affairs in the western division); Precious Omuku (director of external affairs); Joshua Udofia (deputy managing director); Osazee Osunde (human resources); Victor Oteri (security advisor); George Ukpong (corporate logistics manager); Sir Philip Watts (managing director); and Nick Wood (communications advisor).

[9] *See* Defendants' Objections and Responses to [the *Kiobel*] Plaintiffs' First Set of Interrogatories, dated December 20, 2002, Nos. 5-6 (A-0094-95); Defendants' Objections and Responses to Information Requested [by the *Wiwa* Plaintiffs] Pursuant to Fed. R. Civ. P. 30(b)(6), dated September 3, 2003, Nos. 2-3, 5-6, 34 (A-00100-107); Defendants' Responses and

directed at the export to the United States of SPDC's share of the crude oil produced in Nigeria.[10] For example, Wiwa's second request for the production of documents asked the Shell Parties to produce "all documents" identifying the amount and purchaser of any oil produced in Nigeria by SPDC's operations in Nigeria and destined for the United States. (*See* SA-0045:16-18.)

Noting that there must be "an easier way to get what [plaintiffs] need [than] to ask for all documents that identify the amount" of crude oil shipped to the United States (SA-0045:16-24), the district court asked the

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Objections to *Wiwa* Plaintiffs' Requests for Admission, dated June 24, 2004, Nos. 1, 4-7 (A-00130-132); Defendants' Responses and Objections to All Plaintiffs' Requests for Admission, dated June 24, 2004, Nos. 23-25, 27, 58, 81, 83-85, 92, 101-10, 126 (A-00136-152).

[10] In the district court, Wiwa argued that "no requests for documents or interrogatories in [the related cases] were directed to SPDC's contacts with the United States". (*See Wiwa III* Docket Entry No. 19 at 1.) In fact, Wiwa propounded discovery requests concerning the amount and purchaser of any oil produced in Nigeria by SPDC's operation in Nigeria and destined for the United States; the amount and/or nature of goods or services purchased in the United States by or on behalf of SPDC; and information relating to oil shipments to the United States. (*See* SA-0045-46; SA-00111.) On appeal, Wiwa no longer argues that the discovery requests are unrelated to SPDC's contacts with the United States. Instead, Wiwa now argues that those discovery requests were relevant to another issue. (*See* Appellants' Br. 10-11.) But that misses the point. As their abundant references to documents obtained through discovery in *Wiwa I*, *Wiwa II* and *Kiobel* demonstrate, Wiwa's discovery requests did call for documents concerning—and that are relevant to—SPDC's contacts with the United States.

Shell Parties to "[t]ry to find out whether [they] can come up with anything that would assist in determining how much oil produced in Nigeria ended up in the United States." (A-0046:5-8.)[11] In response, the Shell Parties produced a chart listing the number of barrels shipped each month from January 1990 to June 1996, for which the initial shipping documentation listed a United States destination. (*See* SA-00161-165.)

Wiwa argued that such information was "relevant, inter alia, on the question of whether, consistent with testimony, all of SPDC's oil was sold to another Shell entity". (SA-00128.) The Shell Parties responded to a request for admission, "admit[ting] that SPDC sold its share of the crude oil produced by the joint venture to SITCO or its successors". (A-00141.)

Indeed, Wiwa deposed two former managing directors of SPDC, Brian Anderson and Sir Philip Watts, on SPDC's sale of crude oil. Brian Anderson testified:

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[11] Wiwa erroneously asserts that the "district court denied discovery on that issue at that time", quoting a passage from a hearing transcript suggesting that the district court found such discovery "pretty attenuated from what [plaintiffs] need". (*See* Appellants' Br. 8.) The quoted passage, however, relates to a different discovery request, one that called for all documents identifying the amount and/or nature of goods and services purchased in the United States by or on behalf of SPDC. (*See* SA-0045:18-19; SA-0046:15-18.) It was in response to that request that the district court stated that such a request "seems pretty attenuated from what [plaintiffs] need". (SA-0047:2-6.)

> "Q. Does—did SPDC during the time that you were their Managing Director export—strike that. Did SPDC export its crude oil through SITCO?
> "A. It did.
> "Q. Did SPDC sell the crude to SITCO?
> "A. Yes." (A-00156:1-6.)

Sir Philip Watts, whose two-day deposition occurred after *Wiwa III* was filed, was specifically questioned about jurisdictional facts:

> "Q. Did SITCO itself purchase the crude from SPDC?
>
> . . . .
>
> "A. As I said, to my knowledge, SITCO bought the crude and, when it left, they were the owners.
> "Q. Fine. They were not just brokers that were brokering SPDC's crude? They were the actual owners of the crude when it left? There's a difference.
> "A. There is a difference and, to my knowledge, they became the owner and, of course, they would sell it to whoever." (A-00160:16-161:10.)

The very documents cited by Wiwa (*see* Appellants' Br. 12) show that SITCO purchased crude oil not only from SPDC, but also from non-Shell-related entities, including NNPC. (*See* SA-00170.)

Wiwa also deposed Sir Mark Moody-Stuart, a director of Shell Transport, regarding the relationship between SPDC and SITCO, including SITCO's interest in certain terms of SPDC's Memorandum of Understanding with the Nigerian Government.

SUMMARY OF ARGUMENT

The district court correctly concluded that it lacks general jurisdiction over SPDC because SPDC does not have "continuous and systematic general business contacts" with the United States. (A-00214-215.)

Wiwa's primary argument for the exercise of jurisdiction over SPDC is that SPDC sells oil that eventually winds up in the United States, at least in part through sales which SPDC makes to SITCO in Nigeria. (*See* Appellants' Br. at 11-13, 29-37.) Personal jurisdiction over SPDC cannot be grounded on the fact that millions of barrels of oil extracted by SPDC wind up in the United States. Wiwa does not allege, and cannot establish, that the separate corporate identities of SPDC and SITCO should be disregarded, or that SITCO is SPDC's agent. Thus, under settled law regarding the imputation of jurisdictional contacts from one entity to another, including *Jazini v. Nissan Motor Co.*, 148 F.3d 181 (2d Cir. 1998), SPDC is not subject to personal jurisdiction in the United States.

Wiwa points to other trivial and sporadic alleged contacts between SPDC and the United States, contacts which are far too tenuous to constitute "continuous and systematic general business contacts".

Because the discovery has been extensive, the district court has been intimately involved in the nature and scope of the discovery requested and taken by the parties. After taking extensive coordinated discovery, Wiwa and Kiobel attempted to add SPDC as a defendant, Kiobel by seeking to amend its complaint, and Wiwa by filing this new lawsuit. The district court did not abuse its discretion in refusing to permit Wiwa to take additional jurisdictional discovery. The years of discovery that Wiwa has taken demonstrate that SPDC has no meaningful contacts with the United States. Wiwa's argument—that because SPDC was not a party, Wiwa did not take as much jurisdictional discovery as it might otherwise have—is not even germane to the question of whether the district court abused its discretion in considering the discovery that Wiwa was allowed to take and had actually taken, and what that discovery showed.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY DETERMINED THAT IT LACKS PERSONAL JURISDICTION OVER SPDC, AND DID NOT ABUSE ITS DISCRETION IN DENYING WIWA ADDITIONAL DISCOVERY.

The district court has before it "four related cases, all seeking similar damages and relief" (A-00189), of which this is the most recent. The first was filed on November 6, 1996, by essentially the same group of Wiwa plaintiffs that filed the last lawsuit, on April 6, 2004, as to which this appeal

pertains. From the time the first case was filed, Wiwa knew that SPDC was a company within the Royal Dutch/Shell Group of Companies operating in Nigeria; that the Shell Parties had no presence in Nigeria; and that millions of barrels of Nigerian crude oil produced by SPDC eventually arrived in the United States. But Wiwa's counsel did not believe that SPDC's sale of oil *could* form the basis of jurisdiction; indeed, they stated in a hearing on August 20, 2004, that they "initially didn't bring a claim against SPDC because [they] didn't believe there was personal jurisdiction over SPDC". (A-0052:2-9.) Now, relying on years of discovery including interrogatories, requests for admission, production of thousands of pages of documents from SPDC's files, and depositions of numerous SPDC directors, officers and employees, Wiwa has nothing new of any substance that would justify a different conclusion.

SPDC is a Nigerian company, operating exclusively in Nigeria. It "does not have an office, place of business, postal address, or telephone listing in the United States; nor is it licensed to do business in any state or territory of the United States . . . . SPDC also does not own any real property in the United States, or maintain any bank accounts in this country." (A-00214.)

Wiwa's new basis for asserting personal jurisdiction over SPDC is a few sporadic and unrelated contacts between SPDC and the United States. After carefully considering all those alleged contacts, the district court held: "In sum, SPDC's alleged contacts with the United States, considered in the aggregate, are insufficient to establish the required minimum contacts for general jurisdiction purposes." (*Id.*) The contacts on which Wiwa relies are nothing like the "continuous and systematic general business contacts" required to make out a prima facie case of general jurisdiction. *See Porina v. Marward Shipping Co.*, 521 F.3d 122, 128 (2d Cir. 2008) (*quoting Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 416 (1984)). Thus, the district court properly concluded that it lacks personal jurisdiction over SPDC.

A. Personal Jurisdiction Requires That SPDC Have "Continuous and Systematic General Business Contacts" With the United States and That the Exercise of Jurisdiction Is Reasonable Under the Circumstances.

"Specific jurisdiction does not exist in this case because Plaintiffs' causes of action arise out of SPDC's alleged conduct in Nigeria, and not its contacts with the United States." (A-00197.) Therefore, Wiwa asserts only general jurisdiction over SPDC. (*See* Appellants' Br. at 27.)

Wiwa asserts personal jurisdiction over SPDC on the basis of Rule 4(k)(2) of the Federal Rules of Civil Procedure. (Appellants' Br. at 3;

A-0017.) Under that Rule, the exercise of personal jurisdiction must be "consistent with the United States Constitution and laws". *Porina*, 521 F.3d at 127 (*quoting* Fed. R. Civ. P. 4(k)(2)). The exercise of personal jurisdiction over a non-resident defendant comports with the Fifth Amendment's guarantee of due process only "where the maintenance of the suit [will] not offend traditional notions of fair play and substantial justice". *Id.* (*quoting Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)) (quotation marks omitted).

A two-step analysis applies to determine whether general jurisdiction exists. *First*, a court must determine whether the defendant has "'continuous and systematic general business contacts' with the United States".[12] *Porina*, 521 F.3d at 128 (*quoting Helicopteros*, 466 U.S. at 416); *see also Metro. Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 568 (2d Cir. 1996). If no such contacts exist, the inquiry ends. *See Porina*, 521 F.3d at 129.

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[12] For purposes of the jurisdictional analysis under Rule 4(k)(2), the relevant forum is the United States. *See Porina*, 521 F.3d at 126-27 (discussing how adoption of Rule 4(k)(2) permitted consideration of contacts with the United States generally). Rule 4(k)(2) requires that the defendant "not be subject to jurisdiction in any state's courts of general jurisdiction". *Id.* at 127.

If Wiwa could satisfy that first step, the second step would require that the assertion of personal jurisdiction over SPDC comports with "traditional notions of fair play and substantial justice"—*i.e.*, is "reasonable under the circumstances of the particular case".[13] *See Met Life*, 84 F.3d at 568 (*quoting Int'l Shoe*, 326 U.S. at 316) (holding the exercise of personal jurisdiction over a non-resident defendant unreasonable despite sufficient minimum contacts); *see also Porina*, 521 F.3d at 127.

B. The District Court Applied the Proper Standard in Evaluating Jurisdiction Over SPDC.

Wiwa bears the burden of establishing personal jurisdiction. *See, e.g.*, *Met Life*, 84 F.3d at 566; *Ball v. Metallurgie Hoboken-Overpelt, S.A.*, 902 F.2d 194, 196 (2d Cir. 1990). In the absence of any discovery, a plaintiff may rely on good-faith allegations rising to the level of a prima facie case of jurisdiction. *See Jazini*, 148 F.3d at 184 (*quoting Ball*, 902 F.2d at 197). When discovery has been taken, the bar is higher; and a plaintiff must support its allegations with "an averment of facts that, if

[13] The district court correctly concluded that SPDC lacks any continuous and systematic general business contacts with the United States, and therefore did not reach—nor do we address in this brief—the second step of the test.

credited by the trier, would suffice to establish jurisdiction over the defendant". *Ball*, 902 F.2d at 197.

The district court considered Wiwa's various arguments concerning the need for additional jurisdictional discovery about SPDC, and rejected them because Wiwa had plenty of opportunity to discover such facts, and had actually taken substantial discovery of SPDC, including discovery relating to jurisdictional facts. The district court specifically found:

> "Pretrial proceedings in all four related actions have been largely coordinated. In particular, the parties in these related cases have for the most part shared discovery. As such, Plaintiffs in *Kiobel* and *Wiwa III* have access to the extensive discovery taken in *Wiwa I* and *Wiwa II* over the past ten years. . . . This includes discovery taken from SPDC." (A-00190.)

Therefore, the district court required Wiwa to make sufficient factual averments to support jurisdiction. (*See* A-00193.)

Although the district court determined that Wiwa had "ample opportunity" to discover jurisdictional facts (A-00217), Wiwa now would have this Court review the district court's judgments about the appropriate discovery limits *de novo*. (*See* Appellants' Br. at 19-20.) That is wrong.

First, Wiwa misstates the impact of Rule 26. Wiwa argues that because the discovery rules prohibit discovery of irrelevant facts, as a matter

of law the discovery taken in *Wiwa I*, *Wiwa II* and *Kiobel* could not have provided Wiwa with the opportunity to discover jurisdictional facts. (*See* Appellants' Br. at 19-20.) That argument flies in the face of the record Wiwa presented to the district court and on appeal. The voluminous FRE Rule 1006 Summary submitted by Wiwa (*see* A-00194 n.5), the numerous documents produced from the files of SPDC and cited by Wiwa on appeal, the interrogatories and document requests directed at finding out SPDC's contacts with the United States; the discovery directed at showing that the corporate veil between SPDC and its parents should be pierced; and the depositions of 13 SPDC employees, all demonstrate that a large amount of evidence related to jurisdictional facts concerning SPDC was in fact discovered by Wiwa, in spite of its argument about the Federal Rules.

Rule 26 governs the scope of the discovery to which parties are entitled—not what discovery they choose to take. *See generally* Fed. R. Civ. P. 26; *accord APWU v. Potter*, 343 F.3d 619, 627 (2d Cir. 2003) (affirming district court's denial of jurisdictional discovery because "plaintiffs had ample opportunity to uncover and present evidence relating to the events bearing on the jurisdictional question"). None of the cases cited by Wiwa is

to the contrary.[14] (*See* Appellants' Br. at 19-20.) There is no question that Wiwa had the opportunity to take jurisdictional discovery relating to SPDC, including directly from numerous SPDC witnesses.

Second, Wiwa actually sought and obtained a large volume of evidence and other information related to the question of personal jurisdiction over SPDC. The district court specifically noted:

> "In this case, Plaintiffs have conducted extensive discovery against all Defendants, including SPDC, in these and their related cases over the past ten years. This discovery has included thirteen depositions of current and former SPDC employees, including two former managing directors, and requests for admission and interrogatories on SPDC's corporate structure and business." (A-00217.)

Facts produced in discovery relating to, *e.g.*, how much oil produced in Nigeria by SPDC shipped with an initial destination listed in the United States, contracts between SPDC and other affiliates or entities, and the relationship between SPDC and the Royal Dutch/Shell Group of

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[14] In all of those cases, the court considered a party's entitlement to certain discovery, and collectively they stand for the unremarkable proposition that Rule 26 places certain limitations on discovery. *See Hickman v. Taylor*, 329 U.S. 495 (1947); *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340 (1978); *Glendale Fed. Sav. and Loan Ass'n v. Republic Ins. Co.* (*In re Surerty Ass'n of Am.*), 388 F.2d 412 (2d Cir. 1967). Not one of them—or any other case of which we are aware—interprets Rule 26 to determine as a matter of law what discovery has, in fact, been taken.

Companies all are relevant to the existence of jurisdiction over SPDC. Wiwa's counsel admitted as much. (A-0052:4-11.)

District courts are afforded "wide latitude" in making determinations about discovery, including jurisdictional discovery. *See, e.g.*, *Em Ltd. v. Republic of Argentina*, 473 F.3d 463, 486 (2d Cir. 2007) (*citing Wills v. Amerada Hess Corp.*, 379 F.3d 32, 41 (2d Cir. 2004)); *APWU*, 343 F.3d at 627; *Lehigh Valley Indus. v. Birenbaum*, 527 F.2d 87, 93-94 (2d Cir. 1975).[15] The district court determined that numerous depositions of SPDC employees, including two managing directors, requests for admission and interrogatories regarding SPDC's corporate structure and business and the production of thousands of pages of documents from SPDC's own files constituted a sufficient opportunity for discovery about whether SPDC had "continuous and systematic business contacts" with the United States. The fact that the information obtained by Wiwa demonstrates that SPDC has, at

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[15] *Turbana Corp. v. M/V "Summer Meadows"*, No. 03 Civ. 2099, 2003 WL 22852742 (S.D.N.Y. Dec. 2, 2003), does not help Wiwa. At a point where no discovery whatsoever had occurred, *see id.* at *2, the district court in *Turbana* granted the plaintiff jurisdictional discovery. *Turbana* provides no support for the proposition that this Court should reverse the district court's discretionary decision to deny Wiwa additional jurisdictional discovery. Indeed, *Turbana* correctly interprets *Jazini* to hold that a plaintiff may rest on allegations to establish a prima facie case only "when no discovery and no evidentiary hearing has been conducted", *id.* at *2, and thus undermines Wiwa's argument.

most, sporadic contacts with the United States itself is a good reason for the district court to have denied Wiwa an extended fishing expedition. *See Trammell v. Keane*, 338 F.3d 155, 161 n.2 (2d Cir. 2003) (affirming grant of motion to dismiss and denial of discovery where plaintiff was afforded discovery in related case and could not muster sufficient claims).

C. The District Court Correctly Determined That SPDC's Contacts With the United States Are Neither Continuous Nor Systematic.

The district court, after noting that "all pleadings and affidavits are construed, and any doubts resolved, in the light most favorable to plaintiff" (A-00193), reviewed as "a whole, and not individually" (A-00197) all of Wiwa's averments concerning SPDC's contacts with the United States, and held that Wiwa "fail[ed] to establish a prima facie case of sufficient minimum contacts" (A-00215). The court correctly determined that SPDC had no continuous and systematic general business contacts with the United States showing that SPDC "*purposefully* avails itself of the privilege of conducting activities within the forum". *Helicopteros*, 466 U.S. at 416 (*quoting Hanson v. Denckla*, 357 U.S. 235, 253 (1958)).[16]

[16] "The Due Process Clause provides this fair warning in order to confer 'a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance

The contacts on which Wiwa relies are "random", "fortuitous" or "attenuated", and therefore cannot support the exercise of general jurisdiction over SPDC. *See BP Chems. Ltd. v. Formosa Chem. & Fibre Corp.*, 229 F.3d 254, 259 (3d Cir. 2000). We review those categories of alleged contacts in turn.

1. SPDC's Sale of Oil in Nigeria Does Not Give the Court Jurisdiction Over SPDC.

Wiwa's primary jurisdictional argument is that oil extracted in Nigeria by SPDC eventually reaches the United States. (*See* Appellants' Br. at 29-37.) As the district court noted, Wiwa "do[es] not allege that SPDC directly participated in any sales transactions with United States buyers, or that any sales of its energy products were actually conducted in the United States." (A-00198.) SPDC sells oil to SITCO, a separate company whose ultimate parents are Royal Dutch and Shell Transport, in Nigeria. That is insufficient to support the exercise of jurisdiction over SPDC. *See Porina*, 521 F.3d at 128 ("The unilateral activities of third parties . . . cannot, in themselves, satisfy the requirement of contact with the forum."); *McShan v. Omega Louis Brandt et Frere, S.A.*, 536 F.2d 516, 517-18 (2d Cir. 1976) ("[S]ales, no matter how substantial, of a foreign manufacturer's product in

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as to where that conduct will and will not render them liable to suit'." *Bensmiller v. E.I. Dupont de Nemours & Co.*, 47 F.3d 79, 85 (2d Cir. 1995).

New York through an independent agency do not make the foreigner amenable to suit in New York.").

Wiwa's attempt to attribute SITCO's activities to SPDC is indistinguishable from the attempt rejected by this Court in *Jazini*. The Jazinis brought product liability claims against Nissan Motor Co. ("Nissan Japan"), a Japanese corporation that manufactured the vehicle in which the Jazinis were injured while driving in Iran. *See Jazini*, 148 F.3d at 183. The Jazinis argued that Nissan Japan was subject to general jurisdiction in the United States because its wholly owned subsidiary, Nissan U.S.A. (and two wholly owned subsidiaries of Nissan U.S.A.) sold Nissan automobiles in the United States. *Id.* The Jazinis also claimed that Nissan Japan dominated and controlled Nissan U.S.A., and cited statements in Nissan Japan's annual reports in which its president demanded that all subsidiaries "focus on contributing to the company as a whole". *Id.* at 185. The Jazinis specifically alleged that one of Nissan Japan's four executive directors was the chairman of the United States subsidiary and that Nissan Japan directed the manufacturing operations of Nissan U.S.A. *Id.* at 183.

The district court in *Jazini* dismissed the complaint without permitting the Jazinis any discovery, and this Court affirmed, stating:

> "We recognize that without discovery it may be extremely difficult for plaintiffs in the Jazinis' situation to make a

> prima facie showing of jurisdiction over a foreign corporation that they seek to sue in the federal courts in New York. That, however, is the consequence of the problems inherent in attempting to sue a foreign corporation that has carefully structured its business so as to separate itself from the operation of its wholly owned subsidiaries in the United States—as it properly may do. The rules governing establishment of jurisdiction over such a foreign corporation are clear and settled, and it would be inappropriate for us to deviate from them or to create an exception to them because of the problems plaintiffs may have in meeting their somewhat strict standards." *Id.* at 186.

Royal Dutch and Shell Transport have "carefully structured [their] business" too. Wiwa attempts to distinguish *Jazini* by saying that the Jazinis made only conclusory allegations. (*See* Appellants Br. at 32.) Wiwa insists that, unlike the Jazinis, Wiwa "presented hard evidence of SPDC's crude sold in the United States". (Appellants Br. at 32.) That proves nothing—there is "hard evidence" that Nissan automobiles are sold in the United States, and some of them may even run on gasoline refined from crude oil originally produced in Nigeria by SPDC. Neither Nissan Japan nor SPDC sell anything in the United States, even if their affiliates do. The only difference is that in this case, Wiwa has had the benefit of years of discovery, and thus is able to aver facts that are completely insufficient to demonstrate that SPDC has any "continuous and systematic" presence in the United States and, indeed, demonstrate just the opposite.

Wiwa also argues that *Jazini* is irrelevant because the Jazinis tried to attribute Nissan U.S.A.'s "entire business" to Nissan Japan, whereas Wiwa would like to attribute only SITCO's sale of crude oil to SPDC. (*See* Appellants' Br. at 33.) That argument is incomprehensible. SITCO's entire business is the sale of crude oil. Part of Wiwa's argument seems to turn on the observation that *Jazini* discussed "the relationship between the parent and subsidiary, without any mention of the subsidiary selling the parent's products" (Appellants Br. at 33), but *Jazini* does expressly state: "[A] foreign car manufacturer is not 'present' in New York simply because it sells cars through a New York distributor." *Jazini*, 148 F.3d at 184. Moreover, the distinction Wiwa seems to be trying to make would cut against it. If Nissan U.S.A.'s sale of Nissan cars in the United States cannot be attributed to Nissan Japan for jurisdictional purposes, then the United States sales of crude oil by SITCO, which is not the parent or subsidiary of SPDC and which sells crude oil other than oil produced by SPDC, surely cannot be attributed to SPDC.

The factual assertions made by Wiwa in an effort to evade *Jazini* are unavailing. To overcome the fact that SPDC does not sell oil—or anything—in the United States, Wiwa speculates that "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." (Appellants' Br. at 30.) To the contrary, the only evidence germane to that issue shows that SPDC and SITCO are wholly independent and separately constituted (and capitalized) subsidiaries, and SPDC sells oil to SITCO in arm's-length transactions. (*See* A-0081 ¶ 4.)[17]

Wiwa's conclusory assertion of the "closely intertwined" nature of SITCO and SPDC is insufficient to make out a prima facie case of personal jurisdiction over SPDC. "[C]onclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to [defeat] a motion to dismiss." *Achtman*, 464 F.3d at 337 (*quoting Smith v. Local 819 I.B.T. Pension Plan*, 291 F.3d 236, 240 (2d Cir. 2002)); *see also In re*

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[17] Wiwa claims that the district court committed legal error by considering a declaration submitted by SPDC instead of crediting Wiwa's assertion that SPDC and SITCO are "closely intertwined". (*See* Appellants' Br. at 31.) However, the district court properly rejected Wiwa's "legal conclusions masquerading as factual conclusions", *Achtman v. Kirby, McInerney & Squire, LLP*, 464 F.3d 328, 337 (2d Cir. 2006), and further determined that Wiwa's other factual contentions neither supported Wiwa's bare assertion of the identity of SPDC and SITCO nor sufficed to attribute SITCO's contacts in the United States to SPDC. (*See* A-0019, A-00206-07.) Moreover, Wiwa does not dispute most of the facts in that declaration; and so the district court did not err in crediting those facts. *See Robinson*, 21 F.3d at 510-11 (dismissing claims for lack of personal jurisdiction and crediting affidavits submitted by defendants in support of motion to dismiss).

Terrorist Attacks on September 11, 2001, --F.3d--, 2008 WL 3474167, at *17 ("[W]e are not bound to accept as true a legal conclusion couched as a factual allegation.") (*quoting Jazini*, 148 F.3d at 185).

Stripped of legal conclusions, Wiwa makes only the following assertions:

- SPDC presented SITCO's request to the Nigerian Government to reinstate SITCO's privilege of buying Nigerian oil from NNPC, describing SITCO as an "affiliate" and "one of the 'associates'" of an oil producing joint venture (*see* Appellants' Br. at 12);[18]

- In a memorandum to other Shell officials, the managing director of SPDC proposed to present a plan to the Nigerian Government in which SITCO would purchase crude from NNPC and SPDC would receive the payments to settle debts NNPC owed to SPDC (*id.* at 12-13);

- During negotiations between SPDC and the Nigerian Government on the agreement that governed the price at which SPDC could sell its equity share of the oil, SPDC was concerned about how that price could impact SITCO's ability to make a profit (*id.* at 13); *and*

[18] SITCO and SPDC are "affiliates". To reach the conclusion, from use of words like "affiliate" and "associate", that SPDC and SITCO are "the same entity" (Appellants' Br. at 12) is impossible. In *Jazini*, no one would dispute that Nissan Japan and Nissan U.S.A. were "affiliates", yet Nissan U.S.A.'s widespread sale of Nissan automobiles in the United States could not, as a matter of law, establish personal jurisdiction over Nissan Japan. Under long-settled federal law, the presence of a subsidiary in the forum does not confer personal jurisdiction over the parent corporation. *See, e.g.*, *Cannon Mfg. Co. v. Cudahy Packing Co.*, 267 U.S. 333, 336-37 (1925). SPDC is not even the parent of SITCO.

- SITCO occasionally lost money on its resale of oil purchased from SPDC (*id.*).

None of those allegations suggests that SPDC and SITCO are the same company. SITCO and SPDC are indeed affiliates. The fact that SPDC proposed that SITCO might buy crude oil from NNPC and the proceeds could be used to pay off debts owed by NNPC to SPDC suggests that SPDC and SITCO are separate corporations; if they were not, there would have been no need to mention SITCO. A producer whose price is regulated will always be concerned about whether the regulated price will succeed in the market. People who trade in volatile commodities, like SITCO, sometimes lose money. None of these facts pertain to whether the corporate forms of SPDC and SITCO should be disregarded.

Wiwa's allegations are far more interesting for what they omit than for what they include. They omit any allegation that corporate formalities of each entity were not observed. They omit any claim that SPDC controlled SITCO, or vice versa. Indeed, they omit any allegation that SITCO undertook *any* action at the direction of SPDC. Wiwa cannot justify disregarding the separate corporate forms of SPDC and SITCO when its allegations omit such facts. *See, e.g., Cent. States, Se. and Sw. Areas Pension Fund v. Reimer Express World Corp.*, 230 F.3d 934, 943 (7th Cir. 2000) ("[C]onstitutional due process requires that personal jurisdiction

cannot be premised on corporate affiliation or stock ownership alone where corporate formalities are substantially observed and the parent does not exercise an unusually high degree of control over the subsidiary."); *BP Chems.*, 229 F.3d at 263 ("[P]arty seeking to pierce corporate veil must establish that controlling corporation wholly ignored separate status of controlled corporation and so dominated and controlled its affairs that separate existence is a mere sham.") (*quoting Insurance Co. of N. Am. v. Chon (In re Cohn)*, 54 F.3d 1108, 1117 (3d Cir. 1995)); *Consolidated Dev. Corp. v. Sherritt, Inc.*, 216 F.3d 1286, 1293 (11th Cir. 2000) ("Where the subsidiary's presence in the state is primarily for the purpose of carrying on its own business and the subsidiary has preserved some semblance of independence from the parent, jurisdiction over the parent may not be acquired on the basis of the local activities of the subsidiary.").[19]

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[19] Wiwa's reliance on *In re Magnetic Audiotape Antitrust Litig.*, 334 F.3d 204 (2d Cir. 2003), is misplaced. (*See* Appellants' Br. at 56-57.) This Court reversed the district court's dismissal for lack of personal jurisdiction where the plaintiff had received no discovery whatsoever but had made much more detailed allegations suggesting the lack of corporate separateness between a Korean company and its U.S. subsidiary. *In re Magnetic Audiotape*, 334 F.3d at 208. The plaintiff had alleged that the parent: guaranteed the subsidiary's credit arrangements with banks in the U.S.; described the subsidiary as its marketing and sales arm on its website; previously operated the subsidiary as a business office of the parent in the United States; established overlapping executive personnel between the two

The Seventh Circuit in *Central States*, echoing this Court's observations in *Jazini*, wrote:

> "Where two corporations are in fact separate, permitting the activities of the subsidiary to be used as a basis for personal jurisdiction over the parent violates . . . due process. . . . [T]he primary purpose of the corporate form is to prevent a company's owners, whether they are persons or other corporations, from being liable for the activities of the company. Where corporate formalities have been observed, a company's owners reasonably expect that they cannot be held liable for the faults of the company. Thus, such owners do not reasonably anticipate being hailed into a foreign forum to defend against liability for the errors of the corporation." 230 F.3d at 944.

Central States then went on to cite *Jazini* for the proposition that: "Foreign nationals usually should not be subjected to extensive discovery in order to determine whether personal jurisdiction over them exists." *Id.* at 946 (affirming dismissal for lack of personal jurisdiction of foreign affiliate of domestic corporation where corporate formalities were substantially observed).

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companies; frequently rotated other personnel between the two companies; established financial reporting requirements for the subsidiary; and shared resources and infrastructure with the subsidiary. *Id.* at 208-09. Those allegations did not prove the lack of corporate separateness, but merely entitled the plaintiff to a chance at some discovery to prove it. Here, after years of discovery, Wiwa cannot even make comparable assertions, much less meet the post-discovery standard for specific factual averments.

Unable to disregard the corporate form, Wiwa also argues--inconsistently--that SITCO sells oil in the United States as SPDC's agent. The district court correctly rejected that argument. Someone who buys a product and resells it is typically not an agent. *See* Restatement (Third) of Agency § 1.01 (2006) cmt. g ("A purchaser is not 'acting on behalf of' a supplier in a distribution relationship in which goods are purchased from the supplier for resale."); *see also Hygienic Specialties Co. v. H. G. Salzman, Inc.*, 302 F.2d 614, 622-23 (2d Cir. 1962). An agency relationship results when a principal manifests "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". Restatement (Third) of Agency § 1.01 (2006); *see also Pan Am. World Airways, Inc. v. Shulman Transp. Enters.* (*In re Shulman*), 744 F.2d 293, 295 (2d Cir. 1984) (*citing* Restatement (Second) of Agency § 1(1) (1958)). An agent has authority to bind the principal. *See Minskoff v. American Express Travel Related Servs. Co.*, 98 F.3d 703, 708 (2d Cir. 1996).

Wiwa alleges none of the attributes necessary to make SITCO SPDC's agent. Wiwa does not allege that SITCO has the power to bind SPDC; that SPDC consented to be bound to SITCO's acts; that SITCO does not take title to SPDC's oil; or that SPDC receives the proceeds of SITCO's

sales. Indeed, Wiwa does not claim that SPDC exercises control over SITCO, which failure precludes an agency relationship. *See Pan Am.*, 744 F.2d at 295. Wiwa argues that SITCO is SPDC's agent because a large percentage of oil extracted by SPDC is sold in the United States by SITCO. (*See* Appellants' Br. at 35.) That allegation is insufficient to confer jurisdiction. *See McShan*, 536 F.2d at 517-18 ("[S]ales, *no matter how substantial*, of a foreign manufacturer's product in New York through an independent agency [not necessarily acting as an agent] do not make the foreigner amenable to suit in New York") (emphasis added) (*citing Delagi v. Volkswagenwerk AG*, 278 N.E.2d 895, 898 (N.Y. 1972)); *see also H. Heller & Co. v. Novacor Chems. Ltd.*, 726 F. Supp. 49, 55-56 (S.D.N.Y. 1988), *aff'd*, 875 F.2d 856 (2d Cir. 1989) (rejecting argument that where U.S. affiliate not marketing foreign affiliate's goods, foreign affiliate would have to do so where foreign affiliate received no sales profits and nothing suggested sales could not be performed by independent brokers).

Wiwa offers nothing but bare allegations that SITCO's sales are conducted "on behalf of" (as an agent of) SPDC. It does not even allege that SPDC receives revenue from the sales. SITCO owns the oil that it sells, and thus bears the economic exposure to that oil. Its sales are not "on behalf of" and cannot be attributed to SPDC. *See Ball*, 902 F.2d at 199 ("Jurisdiction

has been denied . . . where the foreign defendant relinquished title and risk of loss outside the state"). In *Ball*, this Court rejected allegations that the putative agent opened new markets for the defendant, had the exclusive right to sell the defendant's products in the forum, serviced those products and earned fees for those sales as *insufficient* to confer jurisdiction. *Id.* at 198-99. There is far less here. Apart from purchasing oil from SPDC in Nigeria, SITCO does nothing "for" SPDC.

Because SITCO lacks authority to bind SPDC, no agency relationship can exist. *See, e.g.*, *Ball*, 902 F.2d at 199; *Minskoff*, 98 F.3d at 708. SITCO also lacks other typical indicia of agency such as an agreement with SPDC or primary employment on SPDC's behalf. *See Ball*, 902 F.2d at 199; *Wiwa I*, 226 F.3d at 95.

Wiwa misconstrues *Jazini* and *Stutts v. De Dietrich Group*, 465 F. Supp. 2d 156 (E.D.N.Y. 2006). (*See* Appellants' Br. at 36.) Both cases examine the question of personal jurisdiction over a foreign parent by virtue of a domestic subsidiary alleged to be an agent; and both reject jurisdiction on facts like those present here. In *Stutts*, the plaintiffs alleged that the domestic subsidiary "did all the business the parent would do", and also alleged that the domestic subsidiary did not manufacture any products of its own, sold products manufactured by its parent only and employed sales

agents throughout the United States who were "doing little more than booking U.S. orders for delivery of the [parent's] products." *Stutts*, 465 F. Supp. 2d at 162. Those allegations—which go far beyond the ones Wiwa makes—were insufficient to impute jurisdiction by agency. *Id.* at 163. In reaching its conclusion, the *Stutts* court followed this Court's holding in *Jazini* that a foreign manufacturer is not "present" in New York "simply because it sells [products] through a New York distributor", a subsidiary. *Jazini*, 148 F.3d at 184.

2. SPDC's Contacts with the United States Do Not Suffice to Confer Personal Jurisdiction.

The district court carefully considered all the alleged contacts between SPDC and the United States, and correctly determined that those contacts "are 'sporadic and occasional' and therefore are insufficient to support a finding of continuous and systematic general business contacts". (A-00208.)

Wiwa relies on the following contacts: (1) SPDC entered into contracts with the U.S. Government and U.S.-based corporations for services; (2) SPDC employees visited the United States for trade shows and

to work in Houston assessing Nigerian deep water blocks[20]; (3) SPDC conducted a public relations "campaign" targeting the United States; *and* (4) SPDC participated in a regional employment application handling center run by a Shell affiliate in Houston. (*See* Appellants' Br. at 13-17.) To look at the list is to understand that SPDC's contacts were "sporadic and occasional", not "systematic and continuous".

a. Contracts with the United States Government and U.S.-based corporations.

The district court correctly determined that Wiwa's allegations about SPDC's contracts with the U.S. Government and U.S.-based companies contributed nothing towards demonstrating that SPDC had "continuous and systematic" contact with the United States. The government contracts cited by Wiwa were projects with the United States Agency for International Development ("USAID"), including a gas pipeline project in West Africa that received a $1.5 million grant from USAID and a project for the development of cassava farming in Nigeria, for which SPDC and USAID entered into a $20 million memorandum of understanding. (*See*

[20] Wiwa points to documents produced by SPDC that indicate that the "SPDC New Venture Team" examined seismic data in Houston, Texas at some point in late 1991. (*See* SA-00310-315 at SA-00313; SA-00317-318 at 317.)

Appellants' Br. at 37-38.) Those contracts, at most, demonstrate occasional contacts by U.S. governmental entities with Nigeria, not continuous and systematic contacts of SPDC with the United States.

The major flaw with Wiwa's allegations regarding contracts with affiliates of both U.S.-based corporations and the U.S. Government is that they ignore the central question for jurisdictional purposes—contacts with the forum. Instead, Wiwa focuses on entities: subsidiaries of corporations or arms of the government. Personal jurisdiction over SPDC depends on SPDC's contacts with the United States—not on SPDC's contacts with other entities that have contacts with the United States. *See Porina*, 521 F.3d at 128.[21]

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[21] Wiwa complains that the district court erred in relying on *BP Chemicals*, both because the district court cited language from the portion of *BP Chemicals* discussing specific jurisdiction and because *BP Chemicals* looked at a cumulation of factors, not just contracts with U.S.-based companies, before rejecting the assertion of personal jurisdiction over a Taiwanese defendant. (*See* Br. Appellants at 39-40.) As to the first point, *BP Chemicals*, in discussing specific jurisdiction, noted that the Supreme Court's "*Burger King* [decision] teaches that 'a non-resident's contracting with a forum resident . . . is insufficient to establish the requisite "minimum contacts"'." 229 F.3d at 261 (*citing Sunbelt Corp. v. Noble, Denton & Assocs.*, 5 F.3d 28, 32 (3d Cir. 1993)). Because a lesser showing is required to demonstrate specific jurisdiction than general jurisdiction, *see Porina*, 521 F.2d at 128, the district court properly relied on *BP Chemicals* to explain why SPDC's contracts with the foreign subsidiaries of United States companies does not demonstrate continuous and systematic contact with the

Baker Hughes, Halliburton Company and ABNL Limited,[22] three of the companies SPDC is alleged to have contracted with for goods and services (*see* Appellants' Br. 16), are Nigerian or multinational corporations with subsidiaries or entities operating in Nigeria. Brown & Root Energy Services, the Halliburton business unit with which Wiwa asserts that SPDC contracted (*see* Appellants' Br. 16-17[23]), operates in "Nigeria through Halliburton West Africa Limited in association with Halliburton's Nigerian entity, Halliburton Energy Services Nigeria

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United States. As to the second point, *BP Chemicals* also discussed general jurisdiction, and held that although the Taiwanese defendant: (1) sold millions of dollars of products to United States customers by use of agents, at least one of which was a wholly-owned subsidiary; (2) entered into contracts with eight different U.S. companies for the purchase of materials, and expressly chose New York law in one of those contracts; (3) several times sent its employees to the United States for training regarding those materials; (4) entered into four other contracts with U.S.-based companies for the purchase of chemical technology; (5) sent employees to the United States for training in those technologies; and (6) received sales orders through a U.S. affiliate, general jurisdiction did not exist. 229 F.3d at 262-63. SPDC's contacts with the United States are fewer and more attenuated; the district court properly relied on *BP Products* to support its conclusion that SPDC's contacts were not "continuous and systematic".

[22] The materials upon which Wiwa relies expressly state that ABNL, Ltd. is a "foreign limited liability corporation established under Nigerian law". *See Boyo v. Boyo*, 196 S.W.3d 409, 413 (Tex. App. 2006).

[23] Wiwa cites to SA-00230-238 as evidence of SPDC's hiring of or contracting with Halliburton. (*See* Appellants' Br. 16.) The documents at SA-00230-238, however, do not mention Halliburton, let alone suggest that SPDC has hired or contracted with Halliburton or any of its subsidiaries.

Limited".[24] SPDC entered into contracts with that Nigerian entity, "to work on the development of the first major offshore oil and gas facility for SPDC *in Nigeria*". (SA-00350 (emphasis added).)

With the exception of the exploration barge, Wiwa does not even claim that any of these contracts were performed in the United States. For example, SPDC's $70 million contract with Baker Hughes related to Baker Hughes' activity in Nigeria. (*See* SA-00340-341.) It strains credulity to suggest that work performed by "Pecten in Houston" in connection with an evaluation of two deepwater blocks off the coast of Nigeria could contribute meaningfully to the assertion of general jurisdiction over a Nigerian corporation. (*See* Appellants' Br. 16; *see also* SA-00379; SA-00313.) Likewise, the documents Wiwa cites show that Western Atlas International of Houston, Texas was merely an "overseas supplier[]" to SPDC. (*See* SA-00364.)

These sporadic, unrelated and mostly foreign events have no weight in demonstrating SPDC's "purposeful availment" of a United Sates forum and cannot support the exercise of jurisdiction. The purchase of the

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[24] Press Releases, Halliburton, Halliburton Business Unit Wins $300 Million Shell Contract (Apr. 17, 2000), available at http://www.halliburton.com/news/archive/2000/bresnws_041700.jsp.

barge, or of other goods, cannot form the basis for an assertion of general jurisdiction: "mere purchases, even if occurring at regular intervals, are not enough to warrant a State's assertion of in personam jurisdiction over a nonresident corporation". *Helicopteros*, 466 U.S. at 418. In *Helicopteros*, the Supreme Court held that a Colombian transportation company that purchased helicopters, spare parts and accessories from Bell Helicopter in Texas over an eight-year period, and sent pilots and management and maintenance personnel to Texas as part of the deal, did not have sufficient contacts with Texas for due process to permit the exercise of jurisdiction. *Id.* at 418-19. Those contacts were far more "continuous and systematic" than SPDC's alleged contacts with the United States.[25]

Wiwa's assertions that SPDC received financing from and contracted with USAID for projects in Africa similarly do not rise to the

[25] Wiwa attempts to distinguish *Helicopteros* on the ground that SPDC's barge cost a lot more than a helicopter. (*See* Appellants' Br. at 38.) No court has ever adopted a dollar threshold for the assertion of general jurisdiction; doing so would ignore the relative sizes and scopes of foreign companies, a legal error for jurisdictional purposes. *See Landoil Res. Corp. v. Alexander & Alexander Servs., Inc.*, 918 F.2d 1039, 1044 (2d Cir. 1990) (holding that minimum contacts analysis is necessarily a fact-specific inquiry).

level of cognizable minimum contacts.[26] Even under specific jurisdiction's laxer standard, constitutional due process requirements are not met because "simply receiving financing from a [forum] resident is tantamount to an individual's contract with an out-of-state-party, which alone cannot automatically establish sufficient minimum contacts in the . . . forum". *Savin v. Ranier*, 898 F.2d 304, 307 (2d Cir. 1990) (*quoting Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 478 (1985) (internal quotations and brackets omitted). Moreover, those projects took place in Africa—not the United States—and involved several participants, including companies, non-governmental organizations and governments.[27]

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[26] As Congress has recognized in the context of Foreign Sovereign Immunities Act: "[A] foreign state's mere participation in a foreign assistance program administered by the Agency for International Development . . . would not itself constitute a commercial activity. By the same token, a foreign state's activities in and 'contacts' with the United States resulting from or necessitated by participation in such a program would not in themselves constitute a sufficient commercial nexus with the United States so as to give rise to jurisdiction." H.R. Rep. No. 94-1487, at 16 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6615.

[27] *See* SA-00385-386 (discussing the construction of a $500 million gas pipeline off the coast of Africa, involving SPDC and Chevron and the governments of Nigeria, Benin, Togo and Ghana, to which USAID has contributed $1.55 million in "technical assistance"); SA-00388-390 (discussing USAID's "large and diverse development programme in Nigeria" including a "public-private" partnership between USAID, the government of Nigeria, the International Institute for Tropical Agriculture and SPDC to provide greater income to cassava farmers in Nigeria).

As the district court found, Wiwa's assertions concerning SPDC's contracts with the U.S. Government and U.S.-based corporations do not, even when considered with all of Wiwa's other factual averments, demonstrate that SPDC has "continuous and systematic" contacts with the United States. (A-00213.)

b. Visits to the United States.

Wiwa claims that SPDC employees attended training sessions in the United States (and the United Kingdom) over a 36-month period, worked in Houston assessing Nigerian deep water blocks and "regularly" attended trade meetings in the United States. (*See* Appellants' Br. at 15-16, 41.) The documents Wiwa cites, however, show only that a few SPDC employees occasionally attended the annual conferences and exhibitions of a few trade groups.

SPDC employee Egbert Imomoh traveled to the United States almost yearly to attend the annual meetings of the Offshore Technology Conference in Houston and the Society of Petroleum Engineers throughout the 1990s until his retirement in 2002. (*See* SA-00282 at 196:3 to SA-00283 at 198:22.) He also attended a conference by the Corporate Counsel for Africa held in Houston in May 1999. (*See* SA-00286 at 211:9-212:22.) SPDC former employee George Ukpong attended the annual seminars and

exhibitions of the American Society for Industrial Security in the United States from approximately 1996/1997 through 2004. (*See* A-00166 at 308:16-25; A-00167 at 438:12 to A-00169 at 440:9.) Former SPDC employee Victor Oteri attended the annual seminars and exhibitions of the American Society for Industrial Security in the United States from approximately 1988 to 1995, when he retired. (*See* A-00175 at 14:21 to A-00176 at 15:24; A-00178 at 124:8 to A-00182 at 128:23.) Mr. Oteri attended a "short course in the National Crime Prevention Institute in the University of Louisville" sometime between 1987 and 1990 before becoming the Security Advisor for SPDC. (*See* A-00172 at 10:24 to A-00173 at 11:9; A-00174 at 12:12-20; A-00180 at 126:13-19.)[28]

[28] Wiwa asserts that there is *one* document from www.shell.com that evidences that "SPDC employees underwent training in the United States". (*See* Appellants' Br. 16 (citing SA-00381).) That is incorrect and is based upon mischaracterization of the underlying document. The webpage referred to discusses a visit by officials to Wallsend, England where they met with "some Nigerian crew who [had] been undergoing training in the UK and United States for about 36 months" in relation to the Bonga deepwater exploration project. (*See* SA-00381.) *First*, there is no indication that the reference to "some Nigerian crew" refers to SPDC employees. (*See id.*) *Second*, the website upon which Wiwa relies, actually shows that the Bonga project involves Shell Nigeria Exploration and Production Company and not SPDC. (*See* http://www.shell.com (follow "About Shell" hyperlink; then "Our strategy" hyperlink; then "Our major projects" hyperlink; then "Bonga Deepwater Project" hyperlink).)

Such contacts are merely sporadic, and cannot support the exercise of general jurisdiction over SPDC. In *Helicopteros*, the defendant's CEO travelled to Texas to negotiate contracts, and other employees followed to receive training purchased along with the helicopters. *See Helicopteros*, 466 U.S. at 410-11. Those contacts were far more substantial than the ones alleged to have taken place here. Similarly, this Court, in *Landoil Resources Corp.*, 918 F.2d at 1045-46, determined that 13 visits to the forum to conduct and solicit new business did not, even in combination with other contacts, support the exercise of jurisdiction.

Wiwa's attempt to distinguish *Helicopteros* on the theory that the visits in that case were merely "part of the package of goods and services purchased by the defendants" also fails. (Appellants' Br. at 41.) Under Wiwa's interpretation, visits made in connection with the purchase of products in the United States would not count as "continuous and systematic general business contacts" under *Helicopteros*, whereas visits that were unconnected to the purchase of anything—such as attendance at industry conferences or educational sessions—would count. In viewing non-commerical visits such as attendance at conferences as more significant than the visits in Helicopteros, which were part of a deal to purchase helicopters,

that argument reads "general business" right out of the Supreme Court's language.

The cases cited by Wiwa, *Met Life* and *Texas Trading & Milling Corporation v. Federal Republic of Nigeria*, 647 F.2d 300, 314 (2d Cir. 1981) (*see* Appellants' Br. at 41-42), do not compel a different conclusion than that reached by the district court. In *Met Life*, the defendant's employees visited the forum on more than 150 occasions over a seven-year period; and one employee resided and maintained an office in the forum. *Met Life*, 84 F.3d at 570. Thus, *Met Life* is like *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437 (1952), which the Court in *Helicopteros* distinguished on the ground that the defendant had an employee with an office in the forum state from which it regularly conducted business. *Helicopteros*, 466 U.S. at 414-15. *Texas Trading* involved the interrelated questions of sovereign immunity, subject-matter jurisdiction and personal jurisdiction over the Government of Nigeria under the Foreign Sovereign Immunities Act; because of the nature of the Act, the question of personal jurisdiction over a foreign sovereign must always be

akin to an examination of specific jurisdiction, not general jurisdiction, and thus *Texas Trading* has no bearing here.[29]

Put simply, there are no cases in which the occasional visits attributed to SPDC personnel by Wiwa have formed the basis for the assertion of personal jurisdiction without the existence of other facts not present here, such as the defendant's maintenance of an office in the United States. The district court properly relied on *Helicopteros* and *Landoil Resources Corp.* to conclude that Wiwa's assertions about visits by SPDC personnel—primarily annual visits to attend trade shows and conventions—even when taken together with Wiwa's other averments, did not make out a prima facie case of jurisdiction. (*See* A-00212013.)

c. Recruiting.

Wiwa argues that SPDC "engaged in substantial recruiting activities in the United States through an affiliate company, Shell People Services". (*See* Appellants' Br. at 45.) The district court correctly rejected that argument on two equally compelling grounds. *First*, Wiwa "allege[d]

[29] In *Texas Trading*, this Court concluded that the Nigerian Government could be sued in New York for breaches of letters of credit issued by New York banks for the benefit of United States cement producers, with whom the Nigerian Government had contracted. *See Texas Trading & Milling Corporation*, 647 F.2d at 314-15.

no facts detailing the purported agency relationship between [SPDC and SPS] . . . . The Court need not credit such conclusory allegations on a motion to dismiss. *Jazini*, 148 F.3d 184." (A-00211.) *Second*, "SPS's alleged recruiting activities on behalf of SPDC were not sufficiently 'continuous and systematic' to warrant the exercise of general jurisdiction over SPDC." (A-00211 n.14.)

As to the district court's first rationale, Wiwa made no assertions sufficient to conclude that SPS's activities in the United States could be attributed to SPDC.[30] As explained with regard to SITCO, *supra* at I.C.1, because Wiwa has nothing more than a conclusory allegation that SPS

[30] Wiwa notes that the "Shell Nigeria employment website 'lists the Houston recruiting office'" and "states that Shell Nigeria is 'aggressively expanding [its] recruitment markets overseas'". (Appellants' Br. at 46.) Those facts do not support an agency relationship; more to the point, they do not demonstrate contacts with the United States. The website lists the Houston office and several other application handling centers around the world, including a global website. (*See* SA-00331-37.) The statement that "Shell Nigeria is 'aggressively expanding [its] recruitment markets overseas'" does not particularly mention the United States. These statements are very much like those found insufficient in *Jazini*, in which the president of Nissan Japan directed all subsidiaries to focus on Nissan as a whole. A foreign employer should not have to fear that it has submitted itself to general jurisdiction in the United States if it announces that it is hiring, and mentions that interested persons can send their applications to the office of any worldwide affiliate, including those in the United States.

is really SPDC's agent, the alleged "recruiting" activities of SPS cannot be attributed to SPDC.

Chew v. Dietrich, 143 F.3d 24 (2d Cir. 1998), on which Wiwa relies (*see* Appellants' Br. at 46-47), concerns specific jurisdiction, not general. In *Chew*, this Court determined that it had specific jurisdiction over Dietrich, a German citizen who hired crew members in Rhode Island to race his yacht from Rhode Island to Bermuda and back again, relating to a tort claim by the parents of a crew member who fell overboard on the return trip. *See Chew*, 143 F.3d at 30. There is absolutely no suggestion in *Chew* that the recruitment of the deceased crew member—or any other contact between Dietrich and the United States—would have been sufficient to subject Dietrich to general jurisdiction.[31] If a U.S. citizen applied for a job with SPDC by submitting an application to SPS, accepted that job, and was then injured in Nigeria through the fault of SPDC, *Chew* might have some

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[31] *Ochoa v. J.B. Martin & Sons Farms, Inc.*, upon which Wiwa relies (*see* Appellants' Br. at 46), is also a case involving specific jurisdiction; the Ninth Circuit held that a New York farm that had used an agent to recruit and transport migrant workers from Arizona to New York was subject to specific jurisdiction in a suit brought by those workers alleging violations of the Agricultural Workers Protection Act. *See Ochoa*, 287 F.3d 1182, 1189-92 (9th Cir. 2002). As with *Chew*, nothing in *Ochoa* suggests that the recruitment and transport of the migrant workers from Arizona to New York would have counted towards a finding of "continuous and systematic" business activities by the New York farm in Arizona.

bearing on whether that person could sue SPDC in the United States. However interesting that question of personal jurisdiction might be, it is not relevant here.[32]

As to the second ground, the district court correctly concluded that Wiwa had failed to aver facts necessary to suggest that SPDC's recruitment activities were continuous and systematic. (A-00211 n.14.) The documents Wiwa cites merely demonstrate that applicants interested in working for SPDC can mail, fax or email an application to various locations around the world, one of which is located in the United States, and that "Shell Oil" is interested in interviewing applicants for positions around the world, including Nigeria. (*See* SA-00325-336.) Furthermore, if, as the Supreme Court has held in *Helicopteros*, foreign businesses who come to the United States to purchase goods for use overseas have not subjected themselves to general jurisdiction in the United States, it would be

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[32] Wiwa also interprets *Chew* as holding that any contacts by a third party can be imputed to the defendant so long as the contacts are "on behalf of" the defendant. (*See* Appellants' Br. at 47.) That would be completely inconsistent with the due process concerns that underlie personal jurisdiction. Under Wiwa's interpretation, a party acting wholly on its own, yet still conferring some benefit upon the defendant, could unilaterally subject that defendant to the court's jurisdiction. *See, e.g.*, *Helicopteros*, 466 U.S. at 417 ("[U]nilateral activity of another party or a third person is not an appropriate consideration when determining whether a defendant has sufficient contacts with a forum State to justify as assertion of jurisdiction.").

impossible to conclude that foreign businesses who announce that interested persons may submit applications to an affiliated company in the United States have subjected themselves to personal jurisdiction.

d. Public Relations.

Wiwa contends that SPDC engaged in a "public relations and lobbying campaign geared toward the United States". (Appellants' Br. at 42.) Putting aside the gross overstatement of describing occasional contacts with the media as a "campaign", the factual assertions Wiwa makes are only that SPDC created a strategy for countering claims being made about it in the international media, including the United States. (*Id.* at 43.) That strategy made mention of ongoing "relationships" with members of the press corps, including in the United States, and SPDC effectuated it by corresponding with media outlets to respond to press reports about the Ogoni crisis and sending representatives to the U.S. sporadically to "influence opinion" about SPDC's operations in Nigeria. (*Id.*)

Unlike the operative facts in the cases upon which Wiwa relies (*see* Appellants' Br. at 42-45), the alleged activities regarding SPDC's purported "campaign to influence public opinion" are not the kind of activities that courts consider when assessing general jurisdiction. SPDC has no public relations office in the U.S. (*See* A-0082 ¶ 7(a).) Many of the

exhibits on which Wiwa relies are correspondence by SPDC employees in Nigeria to the editors of publications that had written about the Ogoni crisis or notes about responding to events in Nigeria.[33] Another is an exhibit that relates to the schedule for a *New York Times* reporter's visit to Nigeria. (*See* SA-00445.) Yet another is a document outlining a plan of action for increasing the understanding of SPDC's position in the Ogoni crisis for the period from September 1997 to May 1998. (*See* SA-00393-403.)

These alleged contacts do not even approach what could be considered "continuous and systematic business contacts". They are sporadic and reactive, not systematic. Courts have rejected even far more purposeful availments of a forum than those cited by Wiwa here. For example, in *Ehrenfeld v. Mahfouz*, 489 F.3d 542, 548 (2d Cir. 2007), this Court noted that sending a cease and desist letter to a forum in an attempt to settle legal claims would not suffice to confer jurisdiction. *Id.* A cease and desist letter is closer to an attempt at the purposeful availment of a forum than merely responding to accusations made in the press. Mere correspondence does not suffice to establish minimum contacts. *See Nicholas v. Buchanan*, 806 F.2d 305, 307-308 (1st Cir. 1986) (citing cases).

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[33] *See* SA-00453-461; SA-00411-424; SA-00434-436; SA-00447-451.

In essence, Wiwa's argument is that because SPDC occasionally responded publicly to allegations made against it, including and fueled by those made by Wiwa in this lawsuit, it has subjected itself to general personal jurisdiction in the United States. The district court was correct in giving that argument little weight in its analysis of general jurisdiction. (A-0209-10.)

e. The district court considered Wiwa's jurisdictional allegations in the aggregate.

Finally, Wiwa argues that the district court considered SPDC's alleged contacts individually, not in the aggregate. (*See, e.g.*, Appellants' Br. at 28-29, 38, 40, 48-52.) However, the district court repeatedly and emphatically stated that it had considered SPDC's alleged "aggregate contacts" (A-00195, A-00196), "over a period of time that is reasonable under the circumstances" (A-00197), "considered as a whole and not individually" (A-00197), "taken as a whole" (A-00202), and "considered in the aggregate" (A-00214).

Wiwa argues that the district court, despite reiterating the correct governing standard at the beginning, middle and end of its analysis, did not consider the contacts in the aggregate because the court used phrases such as "irrelevant to the jurisdictional analysis" and "cannot support a finding of continuous and systematic [contacts]", when discussing particular

contacts. (Appellants' Br. at 51.) However, the Supreme Court used precisely the same sort of point-by-point dismissive language in *Helicopteros*, when evaluating the alleged jurisdictional contacts that it ultimately found to be insufficient in the aggregate. *See* 466 U.S. at 416-17 ("The one trip . . . cannot be described or regarded as *a* contact of a 'continuous and systematic' nature"; "acceptance . . . of checks drawn on a Texas bank *is of negligible significance*"; "purchases and related trips, *standing alone*, are not a sufficient basis for a State's assertion of jurisdiction") (emphasis added). Here, as in *Helicopteros*, the district court discussed the significance of each contact individually, but did so with the clear understanding that they had to be considered in the aggregate. *Accord Porina*, 521 F.3d at 129 (holding that one of several alleged forum contacts "*is inadequate to support a finding* of continuous and systematic general business contacts") (emphasis added).

3. Wiwa Does Not Allege the Classic Indicia of Minimum Contacts.

Wiwa claims that the district court erred because it focused "solely" on the fact 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" (all of which plaintiffs do not dispute). (*See*

Appellants' Br. at 51-52.) That is incorrect. As discussed above in Section I.C.2.e, *supra*, the district court considered all of the alleged contacts in the aggregate, and concluded that they did not suffice to permit the exercise of jurisdiction. Indeed, its mention of those classic indicia of minimum contacts *comes after* its determination that they fail to allege minimum contacts. (*See* A-00214.)

Moreover, the district court's consideration of the absence of the classic indicia of continuous and systematic business contacts is entirely proper. Courts routinely rely on the absence of such factors when concluding that general jurisdiction is absent. *See, e.g.*, *Helicopteros,* 466 U.S. at 416 ("It is undisputed that Helicol does not have a place of business in Texas and has never been licensed to do business in the State."); *Landoil Res.*, 918 F.2d at 1042 **(**recognizing as relevant to the general jurisdiction analysis the undisputed facts that the defendants had never been incorporated or licensed to do business in the forum; did not have designated agents for service of process in the forum; and did not have offices, bank accounts, telephone listings or a mailing address in the forum**)**.

CONCLUSION

For the foregoing reasons, the district court's dismissal should be affirmed.

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Respectfully submitted,

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