UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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KEN WIWA, Individually and as Executor of his deceased father KEN SARO-WIWA, and OWENS WIWA and BLESSING KPUINEN, Individually and as Administratrix of the Estate of her husband, JOHN KPUINEN, and JANE DOE,

Plaintiffs,

-against-

96 Civ. 8386 (KMW)(HBP)
ORDER

ROYAL DUTCH PETROLEUM COMPANY and SHELL TRANSPORT AND TRADING COMPANY, p.l.c.,

Defendants.

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WOOD, U.S.D.J.:

In a Report and Recommendation dated March 31, 1998 (the "Report"), Magistrate Judge Henry Pitman recommended that the Court grant defendants' motion to dismiss (1) under Federal Rule of Civil Procedure 12(b)(1) for lack of personal jurisdiction and (2) pursuant to the doctrine of forum non conveniens. Both parties filed timely objections to those portions of the Report with which they disagreed. Pursuant to 28 U.S.C. § 636(b)(1) and Federal Rule of Civil Procedure 72(b), the Court reviews de novo those aspects of the Report to which the parties object. Because the Court concludes that personal jurisdiction is appropriate in New York, the Court reaches a different conclusion than the Report on that issue. However, the Court adopts and accepts the Report in

concluding that defendants' motion to dismiss should be granted for forum non conveniens.

I. Background

A. Plaintiffs' Claims

Plaintiffs have alleged the involvement of defendants in human rights violations in Nigeria from 1990 to 1995. According to the Amended Complaint, plaintiffs and their decedents protested oil exploration and development activity by defendants' affiliated companies in the Ogoni region of Nigeria. (Am. Comp. ¶¶ 29, 32, 41, 46.) As a result, plaintiffs contend, defendants and their affiliates conspired with the Nigerian government in committing a host of human rights violations. (Id. ¶¶ 33, 35-45.)

The human rights violations alleged by plaintiffs include the beating and shooting of plaintiff Jane Doe (id. ¶ 43), the repeated arrest, detention, torture, illegal conviction, and execution of Ken Saro-Wiwa and John Kpuinen (id. ¶¶ 47, 66-69, 72, 74, 75, 81-83), and the beating of Saro-Wiwa's family when they attended Saro-Wiwa's trial (id. ¶ 73). Plaintiff Owen Wiwa further alleges that he fled Nigeria because he feared arrest, torture, and execution. (Id. ¶¶ 84-85.) Plaintiffs seek damages for: summary execution; crimes against humanity; torture; cruel, inhuman and degrading treatment; arbitrary arrest and detention; violations of the rights

to life, liberty, security of the person and peaceful assembly and association; wrongful death; assault and battery; intentional infliction of emotional distress; negligence; and violation of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 et seq. ("RICO"). (See Report at 4.)

B. Facts Relevant to Jurisdiction

The following facts, agreed to by both parties, form the basis for the present controversy over personal jurisdiction. Royal Dutch and Shell Transport are foreign holding companies that engage in no operational activities. (See Report at 6.) These two companies own, directly or indirectly, three holding companies: Shell Petroleum N.V., a Dutch corporation; The Shell Petroleum Company Limited, an English corporation; and Shell Petroleum Inc. ("SPI"), a Delaware corporation. (See id. at 6-7.) SPI, in turn, owes all the shares of Shell Oil company, a Delaware corporation. (See id. at 7.) The crux of the issue is whether SPI, through its wholly owned subsidiary Shell Oil, may be subject to personal jurisdiction in this Court.

The fact upon which plaintiffs' assertions of personal jurisdiction rest is that the defendants operate an "Investor Relations Program" in the United States with the assistance of Mr. James Grapsi ("Grapsi"). (See id. at 8.) Grapsi, employed by Shell Oil as Manager of Investor Relations, provides the following

services for defendants:

- provides information to the shareholders of Royal Dutch and Shell Transport (see Deposition of James Grapsi, July 21, 1997, Pl. Exh. A ("Grapsi Dep."), at 6);
- responds to telephone calls from investors or potential investors (see id. at 7-8);
- organizes approximately six meetings a year between investors and officers/employees of defendants, in cities such as New York, Philadelphia, Chicago, and Houston (see id. at 7, 14, 29-67);
- sends out financial information to persons on a mailing list prepared for Shell Oil, and to any other person who requests it (see id. at 7-11).

Grapsi's office is located in New York. (See id. at 97.) Defendants reimburse Shell Oil for the expenses connected with Grapsi's services, including rent, electricity, salary, expenses, and meeting and mailing costs. (See id. at 18-21.) The total monthly cost of Grapsi's services is less than $45,000. (See id. at A-2.) Plaintiffs contend that these activities suffice to allow personal jurisdiction over defendants.

II. Discussion

A. Rule 12(b)(1) Standard

In evaluating a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1), plaintiff bears the burden of establishing personal jurisdiction. Prior to an evidentiary hearing, the plaintiff need only make a prima facie showing of personal jurisdiction. See Ball v. Metallurgie Hoboken-Overpelt, S.A., 902 F.2d 194, 197 (2d Cir. 1990). In the present case, however, plaintiffs have had discovery on the issue of personal jurisdiction; thus plaintiffs' showing "'must include an averment of facts that, if credited by [the ultimate trier of fact], would suffice to establish jurisdiction over the defendant.'" Metropolitan Life Ins. Co. v. Robertson-Ceco Corp., 84 F.3d 560, 567 (2d Cir.), cert. denied, 117 S. Ct. 508 (1996)(quoting Ball, 902 F.2d at 197).

B. Jurisdiction Under Rule 4(k)(1)(A)

Under Federal Rule of Civil Procedure 4(k)(1)(A), service of process and personal jurisdiction are proper wherever a court of general jurisdiction in the state in which the district court is located exercises jurisdiction. Under New York law, personal jurisdiction over a foreign corporation exists when that

corporation is "doing business" in the state. See Hoffritz for Cutlery, Inc. v. Amajac, Ltd., 763 F.2d 55, 58 (2d Cir. 1985). Plaintiffs claim that defendants are doing business in New York by virtue of their own activities or by virtue of the activities of their agent James Grapsi.

1. Whether Defendants Are "Doing Business" Through Their Own Activities

The Report correctly rejects plaintiffs' contention that personal jurisdiction over defendants is proper by virtue of defendants' own activities in New York. For defendants' conduct to give rise to jurisdiction, it must constitute a "continuous and systematic course of doing business here." Frummer v. Hilton Hotels International, Inc., 19 N.Y.2d 533, 536, 281 N.Y.S.2d 41, 43 (1967). Evidence of such contact would include "the existence of an office in New York; the solicitation of business in the state; the presence of bank accounts and other property in the state, and the presence of employees of the foreign party in the state." First American Corp. v. Price Waterhouse LLP, 988 F. Supp. 353, 362 (S.D.N.Y. 1997).

The contacts plaintiffs cite are not substantial. The contacts upon which plaintiffs rely, beyond the presence of James Grapsi, are that defendants' stock is traded on the New York Stock

Exchange, that defendants maintain a site on the Internet accessible from New York, and that defendants are involved in litigation in New York. The Report notes the overwhelming authority that suggests that the trading of a company's stock is insufficient to establish jurisdiction. (See Report at 15-16.) The argument that defendants maintain a Web site accessible in New York is likewise unavailing; many Web sites are accessible from anywhere in the world. See Bensusan Restaurant Corp. v. King, 937 F. Supp. 295, 299 (S.D.N.Y. 1996), aff'd, 126 F.3d 25 (2d Cir. 1997). Finally, in the litigation cited by plaintiffs, defendants have preserved their jurisdictional objections. (See Report at 17.)

Plaintiffs' objection to the Report on this issue is that although none of the individual contacts taken alone may suffice to establish personal jurisdiction, the aggregate of these contacts does suffice. (See Pl. Obj. at 9-11.) Plaintiffs fail to explain, however, why the sum of jurisdictionally insignificant facts should confer jurisdiction.

2. Whether Defendants Are Doing Business Through Grapsi

The "more difficult problem," (see Report at 19), in this case is whether personal jurisdiction over defendants is proper because of the actions of their agent James Grapsi. This is indeed a close question, and one which the Court answers slightly differently from

the Report.

Jurisdiction may be proper under an agency theory of jurisdiction. See Palmieri v. Estefan, 793 F. Supp. 1182, 1187 (S.D.N.Y. 1992); Saraceno v. S.C. Johnson & Son, Inc., 83 F.R.D. 65, 67 (S.D.N.Y. 1979). Under Bellomo v. Pennsylvania Life Co., 488 F. Supp. 744 (S.D.N.Y. 1980), a subsidiary created by the parent to carry on business on its behalf subjects the parent to jurisdiction. See id. at 746. As noted in the Report, all of Grapsi's expenses are paid by defendants, who would not be paying almost half a million dollars per year were his services not of significant value to defendants. (See Report at 19-20.) A reasonable inference to be drawn from this arrangement is that Grapsi provides services important to defendants that defendants would otherwise have to perform themselves. See General Electric Co v. Circle Air Freight Corp., 1997 WL 129400, at *9 (S.D.N.Y. Mar. 20, 1997) (citing Gelfand v. Tanner Motor Tours, Ltd., 385 F.2d 116, 121 (2d Cir. 1967)). On this basis, the Report applied the analysis of Frummer, 19 N.Y.2d 533, to conclude that Grapsi can be considered an agent of defendants. (See Report at 19-20.)

As Grapsi is an agent of defendants, the question becomes whether he was "doing business" in this forum. The Report concludes that Grapsi's activities were limited to investor relations, and that advertising and soliciting business alone is not enough to

confer jurisdiction. (See Report at 22.) However, Grapsi did not simply conduct advertising or solicit business on defendants' behalf, see, e.g., Schenck v. Walt Disney Co., 742 F. Supp. 838, 842 (S.D.N.Y. 1990), but served as a constant presence in New York to promote defendants' interests. In this respect, Grapsi's conduct may be characterized as "solicitation plus." The Second Circuit has explained in Landoil Resources Corp. v. Alexander & Alexander Serv., 918 F.2d 1039 (2d Cir. 1990), that in determining personal jurisdiction, "'once solicitation is found in any substantial degree very little more is necessary to a conclusion of "doing business."'" Id. at 1044 (quoting Aquascutum of London, Inc. v. S.S. American Champion, 426 F.2d 205, 211 (2d Cir. 1970)). In Landoil, the Court ruled that periodic business trips did not establish jurisdiction, but explained in a footnote that "renting a hotel room to solicit business on a systematic and regular basis might be the functional equivalent of an office in New York and therefore might be sufficient to establish presence within the state." Id. at 1045 n.10. The office maintained by defendants and staffed by Grapsi provides the "physical corporate presence," Artemide SpA v. Grandlite Design & Mfg. Co., 672 F. Supp. 698, 703 (S.D.N.Y. 1987), required for jurisdictional purposes. In Lane v. Vacation Charters, Ltd., 750 F. Supp. 120 (S.D.N.Y. 1990), the court found that personal jurisdiction was lacking because the

defendant, a ski resort, merely advertised in New York. See id. at 123-24. However, the court emphasized that, "Perhaps the most important factor needed for a finding of jurisdiction under CPLR § 301 is the in-state presence of employees engaged in business activity." Id. at 125. Grapsi's continuous in-state presence, coupled with his solicitation and organizational efforts on defendants' behalf, confers personal jurisdiction over defendants.

The Report found it significant that Grapsi never sold or offered to sell the stock of the defendants, and as a result did not directly affect the finances of defendants. (See Report at 21.) This distinction appears to have some merit. Several decisions suggest that the inability of the agent to bind his or her company counsels against a finding of "doing business." See Gelfand, 385 F.2d at 121 (jurisdiction proper where agent could make and confirm reservations); Palmieri, 793 F. Supp. at 1192 (jurisdiction proper where agent could contract with musical acts); Schenck, 742 F. Supp. at 842 (no jurisdiction because agent could not "perform services that can contractually bind" defendant); Frummer, 19 N.Y.2d at 537 (jurisdiction proper where agent could confirm reservations). However, in light of the Second Circuit's instruction to require little beyond solicitation, see Landoil, 918 F.2d at 1044, the Court declines to rely on the distinction suggested in the Report.

3. Jurisdiction Under Rule 4(k)(2)

For the reasons stated in the Report, the Court concludes that plaintiffs have not shown that jurisdiction would be proper under Federal Rule of Civil Procedure 4(k)(2). Jurisdiction under Rule 4(k)(2) requires three elements: first, that plaintiff's cause of action arise under federal law; second, that the defendant is not subject to the jurisdiction of the courts in any one state; and third, that the defendant's total contacts with the United States as a whole suffice to confer jurisdiction without offending due process. See Aerogroup Int'l, Inc. v. Marlboro Footworks, Ltd., 956 F. Supp. 427, 434 (S.D.N.Y. 1996). Even assuming that plaintiffs satisfy the first two prongs of this test, as the Report did, (see Report at 25-26), the analysis of Metropolitan Life, 84 F.3d 560, is dispositive on the third requirement.

In Metropolitan Life, the defendants' contacts included $4 million in sales into the state over four years, the filing of state income and sales tax returns in the state, contracts with dealers and building companies in the state, distributing product support and training manuals, and over 100 visits by employees and engineers. See id. at 570. These contacts were in addition to maintenance of a resident employee and advertising and solicitation of business, which is all that exists in the present case. The court concluded that while jurisdiction was proper, it was a "close

case." Id. at 572. If the business contacts in Metropolitan barely sufficed for jurisdictional purposes, then the "minimum contacts" required by the Due Process Clause are absent in this case. For the same reason, plaintiffs' claim that jurisdiction is proper under RICO also fails. See PT United Can Co. v. Crown Cork & Seal Co., 138 F.3d 65, 73 (2d Cir. 1998)("[A] civil RICO action can only be brought in a district court where personal jurisdiction based on minimum contacts is established as to at least one defendant.").

C. Forum Non Conveniens

For the reasons stated in the Report, the Court adopts the Recommendation that this case be dismissed for forum non conveniens. The Court must examine "the availability of an alternative forum, the private interests of the parties, and the public interest in forum selection." United Can, 138 F.3d at 73 (citing R. Maganlal & Co. v. M.G. Chem. Co., 942 F.2d 164, 167 (2d Cir. 1991)). Plaintiffs rely on Chase Manhattan Bank v. Banque Generale du Commerce, 1997 WL 266968, at *3 (S.D.N.Y. May 20, 1997), to suggest that plaintiffs' choice of forum is favored, but Chase is distinguishable in that jurisdiction in Chase arose from a transaction that occurred in New York. See id. at *1.

First, England appears to be an adequate alternative forum in which to conduct the present litigation. The Report provides

extensive analysis of the suitability of English courts to address plaintiffs' claims. (See Report at 39-42.) Plaintiffs assert that English law "preclude[s] plaintiffs' claims altogether." (Pl. Obj. at 20.) This claim is not supported by the statement of their expert, who explains that the law may be more favorable in the United States because such litigation in England would involve a "very difficult path, likely failure, . . . [and] low prospects of success." (Second Declaration of Peter Duffy, May 5, 1998, Pl. Exh. 2, at ¶ 5.) Plaintiffs' expert also explains that a conditional fee arrangement, which would be necessary were an English law firm to take the case, would be "less attractive," (Declaration of Richard Meeran, Pl. Exh. 3, at ¶ 13(a)), than a similar arrangement in the United States. Yet this is very different from the conclusion that it is "inconceivable" that an English attorney could take the case, (id. at ¶ 14), nor does it rule out the possibility that plaintiffs' current attorneys could continue to work on the case with local counsel.

The Supreme Court has explained that, "The possibility of a change in substantive law should ordinarily not be given conclusive or even substantial weight in the forum non conveniens inquiry." Piper Aircraft Co. v. Reyno, 454 U.S. 235, 247 (1982). Similarly, this Court has ruled that, "[t]he test of whether an alternative forum for the litigation exists does not hinge upon plaintiff's

lived in New York. Surprisingly, plaintiffs' attorney commented at oral argument before the Magistrate Judge that, "[I]t is true that in some sense the choice of New York over some other jurisdiction within the United States is not particularly relevant. I mean, we can't say that New York has a closer connection to the events in Nigeria than, let's say, a court in the Third Circuit." Pl. Obj. Exh. 1, at 46. Thus, private interest factors weigh against plaintiffs' current choice of forum.

Third, public interest factors strongly advise against trial in this district. The questions presented by this case implicate significant and weighty issues. Yet, as the Report correctly points out, none of the parties to this action is a citizen of the United States, there is no allegation that defendants' actions had an effect on the United States, and the conduct at issue was engaged in by an English corporation in a nation formerly part of the Commonwealth of Nations, under a liability standard determined by English law. (See Report at 50-53.) The ends of justice are better served by litigating this case in a forum more closely connected to the parties in the case. Accordingly, the Court finds that the ends of justice will be served by trial before an English court.

prediction of the outcome of the case in the alternative forum under consideration." Monsanto Int'l Sales Co. v. Hanjin Container Lines, Ltd., 770 F. Supp. 832, 838 (S.D.N.Y.), modified, 1991 WL 210951 (S.D.N.Y. Oct. 8, 1991), aff'd, 962 F.2d 4 (2d Cir. 1992). Nor should the asserted difference in the nature and type of remedy available to plaintiffs be confused with no remedy at all. See United Can, 138 F.3d at 74 ("The district court was obliged to discern whether the laws enforceable in [the alternative forum's] courts were an adequate, not identical, alternative.").

Second, the Report correctly weighs the private interest factors in reaching its conclusion that England would be a better forum for this litigation. The bulk of the documents necessary for litigation are in England, and "[i]ssues with respect to document production usually must be pursued at the source." See PT United Can Co. v. Crown Cork & Seal Co., 1997 WL 31194, at *7 (S.D.N.Y. Jan. 28, 1997), aff'd, 138 F.3d 65 (2d Cir. 1998). Equally important, plaintiffs do not allege that any of their witnesses or defendants' witnesses are present in this jurisdiction. It seems that only two plaintiffs reside in the United States, neither in the Southern District of New York. (See Pl. Obj. at 26.) Moreover, the decision plaintiffs cite to establish that public interest factors weigh in favor of the present forum, Cabiri v. Assasie-Gyimah, 921 F. Supp. 1189 (S.D.N.Y. 1996), involved a plaintiff who

III. Conclusion

For the reasons stated above and the reasons stated in the Report, the Court grants defendants' motion to dismiss on the ground of forum non conveniens. [Docket No. 7] The Clerk of Court is directed to close this case.

SO ORDERED.

Dated: New York, New York
September 25, 1998

Kimba M. Wood
United States District Judge

Copies of this Order have been mailed to counsel for the parties.