

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

IN RE:

EX PARTE APPLICATION OF THE FEDERAL
REPUBLIC OF NIGERIA AND ABUBAKAR
MALAMI THE ATTORNEY GENERAL OF THE
FEDERAL REPUBLIC OF NIGERIA

Case No. 1:20-mc-00169-LGS

Applicants.

**RESPONSE OF PROCESS AND INDUSTRIAL DEVELOPMENTS LIMITED TO
THE EX PARTE APPLICATION OF THE FEDERAL REPUBLIC OF NIGERIA
AND ABUBAKAR MALAMI THE ATTORNEY GENERAL OF THE FEDERAL
REPUBLIC OF NIGERIA UNDER 28 U.S.C. § 1782 TO TAKE DISCOVERY**

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Process and Industrial Developments Limited (“P&ID”) respectfully submits this response as an interested party¹ (Dkt. 7) in the ex parte application of the Federal Republic of Nigeria (“FRN”) and Abubakar Malami (“Malami,” together with FRN, the “Applicants” or “Nigeria”) to take discovery pursuant to 28 U.S.C. § 1782 (“Section 1782”). As explained below, P&ID does not oppose Nigeria’s application but urges that, if the Court grants the application, Nigeria be required to promptly provide P&ID’s counsel with copies of all documents produced, and with the opportunity to attend all depositions conducted, pursuant to the subpoenas.

Introduction

Nigeria seeks extraordinarily broad discovery: it seeks subpoenas of ten different banks for “all documents concerning any transaction,” dating back eleven years, involving *sixty* individuals and corporate entities whose connections to Nigeria’s conspiracy allegations are, in many instances, barely addressed by the application. This is a desperate attempt to substantiate Nigeria’s spurious allegations of a fraud supposedly “carried out” by P&ID (Dkt. 2 at 1). Without prejudice to P&ID’s arguments that there was no fraud and that this application is nothing but an absurdly overbroad fishing expedition, P&ID does not oppose Nigeria’s application because (i) the burden of the proposed subpoenas does not fall on P&ID, and (ii) the Nigerian proceedings appear to facially satisfy the statutory requirements for a Section 1782 application. However, P&ID respectfully submits this response to address two points that may aid the Court in resolving Nigeria’s application.

First, the Court should not take Nigeria’s allegations at face value and should understand the context in which the application is made. This application and the Nigerian

¹ P&ID is an interested party in this application because it is a party “against whom the requested information will be used” and who would have “standing to challenge the lawfulness of discovery orders directed to third parties” if it wished to do so. *In re Sarrio*, 119 F.3d 143, 147-148 (2d Cir. 1997); *see also In re Request For Judicial Assistance from Seoul Dist. Criminal Court, Seoul, Korea*, 555 F.2d 720, 723 (9th Cir. 1977) (subjects of criminal proceedings had standing to challenge Section 1782 application). Despite the Court’s order that Nigeria serve its application on all “interested parties” (Dkt. 7), P&ID has not been served.

proceedings in aid of which it seeks discovery are part of Nigeria's effort to undermine an arbitration award rendered in January 2017 in favor of P&ID. That final quantum award followed a five-year-long *inter partes* hearing before an impartial panel of three esteemed arbitrators. Nigeria had previously challenged the panel's earlier award on liability in the English High Court, which dismissed the challenge as being out of time and having no merit.

Because Nigeria refused to pay the final award, P&ID in 2018 brought enforcement proceedings in Washington, D.C., and in London. When in August 2019 the English Commercial Court ruled that P&ID could enforce the award in the United Kingdom, and when Nigeria's assets were suddenly at risk due to its nonpayment of the award, Nigeria unleashed a torrent of investigations and prosecutions against P&ID and its associates. P&ID understands that Nigeria is detaining witnesses for weeks without charge and under brutal prison conditions, coercing witnesses into falsely confessing to crimes they did not commit, and obtaining a purported criminal conviction of P&ID in Nigeria's own courts without any due process. P&ID denies Nigeria's allegations and is deeply troubled by Nigeria's campaign.

Second, if the Court grants Nigeria's application, the Court should ensure P&ID's access to any resulting discovery from the third-party subpoena recipients, consistent with Federal Rule of Civil Procedure 45 and this Court's precedent. If Nigeria serves the subpoenas, all discovery should be shared with P&ID. P&ID does not expect Nigeria's discovery efforts to turn up evidence of fraud by P&ID—because there was no fraud—but P&ID wants to make sure that Nigeria does not mischaracterize any evidence obtained by, for example, selectively disclosing bank transfers in other court proceedings to try to make them appear suspicious.

POINT I
Additional Context for Nigeria's Application

The Nigerian proceedings described in the application arise from a commercial agreement that the country's petroleum ministry entered into with P&ID a decade ago. The agreement provided that P&ID would process large amounts of natural gas over a 20-year

period so that the gas—a byproduct of crude oil production that otherwise would have been burned off—could be used to generate much-needed electricity for Nigerians. When Nigeria failed to perform under the agreement, P&ID commenced arbitration in London in 2012.

A tribunal of esteemed arbitrators—comprising a former judge on England’s then highest court (the House of Lords), a former judge on England’s Court of Appeal, and a former Attorney General of Nigeria—unanimously concluded in 2015 that Nigeria had repudiated the agreement and that P&ID was entitled to compensation. In 2017, the tribunal determined that P&ID was entitled to US \$6.6 billion plus interest, reflecting the profit P&ID would have earned over the 20-year supply term if Nigeria had performed. In August 2019, Mr. Justice Christopher Butcher of the Commercial Court of England and Wales concluded that P&ID could enforce the award in the same manner as an English court judgment. *See Process & Industrial Developments Ltd v. Federal Republic of Nigeria*, [2019] EWHC 2241 (Comm), 2019 WL 03848529. Enforcement in the UK has been stayed pending Nigeria’s appeal, but Nigeria was first required to provide security in the amount of US \$200 million.

Immediately after the English court decision, Nigeria began a nakedly political campaign to rewrite history and manufacture evidence to suggest that the award is part of a “fraudulent scheme to defraud” Nigeria. (*See* Dkt. 2 at 1). In P&ID’s view, Nigeria’s ongoing criminal prosecutions of P&ID, its founders, its lawyers, and others who have been associated with the company—the predicate foreign proceedings in Nigeria’s application—are part of an illegitimate and abusive campaign designed to evade a politically damaging commercial debt.

For instance, Nigeria claims that P&ID “plead[ed] guilty” to criminal charges in Nigeria. (Dkt. 2 at 15). But P&ID, a company registered in the British Virgin Islands, was never served with or otherwise given notice of the Nigerian proceedings against it. Instead, with no due process, P&ID was arraigned, tried and convicted just two days after Nigeria filed charges. The supposed guilty plea was entered by a former employee of P&ID’s Nigerian

affiliate: he was never employed by P&ID itself; he was not (and has never been) a director of P&ID; and he has never had the authority to plead guilty on the company's behalf. Nigeria's Economic and Financial Crimes Commission has also "been involved in the detention of innocent individuals and withheld critical medical care and legal representation all in violation of the Nigerian Constitution," specifically against "individuals who have spoken against" the Nigerian government, as U.S. Senator Charles Grassley recently noted when inquiring with the Department of Justice whether Applicant Malami should be sanctioned under "the Global Magnitsky Act or the Frank R. Wolf International Religious Freedom Act."² Specifically, P&ID understands that Nigeria has applied this pressure to individuals associated with P&ID in an attempt to coerce them into admitting wrongdoing: detaining them for weeks without charge, threatening them and their families, and at times denying them access to counsel and to medical care.³

Of course, the full history of P&ID's dispute with Nigeria is beyond the scope of this response and is ultimately immaterial to the Court's resolution of Nigeria's application. P&ID provides its side of the story only to give the Court a more complete context for Nigeria's application. Nor is this application the appropriate forum to litigate Nigeria's claims of fraud. In fact, Nigeria is currently seeking permission from the English Commercial Court, years out of time, to pursue its fraud claims against P&ID in order to set aside the arbitration awards against it. Given that Nigeria has been decanting evidence from its domestic investigations

² Letter from Sen. Charles E. Grassley, Chairman, S. Comm. on Finance, to Deborah Connor, Chief, Money Laundering and Asset Recovery Section of the U.S. Dep't of Justice at 2, 3 (April 1, 2020), <https://www.grassley.senate.gov/sites/default/files/2020-04-01%20CEG%20to%20DOJ%20%28Abacha%29.pdf>.

³ As the U.S. State Department recently noted, "Prisoners and detainees [in Nigeria] were reportedly subjected to torture, gross overcrowding, food and water shortages, inadequate medical treatment, deliberate and incidental exposure to heat and sun, and infrastructure deficiencies that led to wholly inadequate sanitary conditions that could result in death." U.S. Dep't of State, Bureau of Democracy, Human Rights, & Labor, 2019 Country Report on Human Rights Practices: Nigeria at 8 (March 11, 2020), <https://www.state.gov/reports/2019-country-reports-on-human-rights-practices/nigeria/>.

into the English proceedings for the last five months, it is notable that Nigeria does not once mention the English proceedings in its Section 1782 application. Instead, Nigeria's application explicitly seeks evidence for use in Nigerian criminal proceedings. The Court should therefore proceed on the basis that Nigeria intends to use this discovery in Nigerian proceedings only.

POINT II

P&ID Should Be Given Access to All Discovery Pursuant to the Application

Since Nigeria has chosen to pursue discovery under Federal Rule of Civil Procedure 45 (Dkt. 1 at 1), P&ID should be given access to any discovery obtained through the application because it is Nigeria's adversary in the foreign proceedings.

Nigeria's application leaves little doubt as to the identity of its opponent. Nigeria repeatedly maligns P&ID as having "carried out" a "fraudulent scheme to defraud" Nigeria (Dkt. 2 at 1), and Nigeria describes the Nigerian proceedings as those against "individuals and entities that participated in or benefitted from P&ID's fraud, which proceedings are currently pending before the Federal High Court of Nigeria." (Dkt. 2 at 18). While the application does not identify these proceedings in detail, such as by identifying specific defendants or case numbers, Nigeria's allegations of wrongdoing center on P&ID, and Nigeria identifies at least one proceeding in which P&ID is named as a defendant. (Malami Decl. Ex. 95).

Like any litigant who seeks third-party civil discovery to use against an adversary, Nigeria must "make reasonable provision for prompt access" by P&ID to any discovery obtained by this application. *See* Fed. R. Civ. P. 45 advisory committee's note to 2013 amendment. Thus, courts in this District and elsewhere have ordered Section 1782 applicants to provide their adversary in the foreign proceeding with "all documents or other materials received in response to such subpoenas." *In re Hornbeam Corp.*, No. 14 Misc. 424, 2015 WL 13647606, at *9 (S.D.N.Y. Sept. 17, 2015), *aff'd*, 722 F. App'x 7 (2d Cir. 2018); *In re Rivada Networks*, 230 F. Supp. 3d 467, 474 (E.D. Va. 2017) (requiring Section 1782 applicant "to permit [an adversary in foreign proceeding] to inspect any documents or tangible things

produced pursuant to the subpoena issued by the magistrate judge”). This approach also applies where civil discovery is sought in aid of foreign criminal proceedings. *See In re Letter of Request from Supreme Court of Hong Kong*, 138 F.R.D. 27 (S.D.N.Y. 1991) (suppressing discovery taken under Section 1782 unless defendant in foreign proceeding “is afforded an opportunity to review the transcripts and to cross-examine the witnesses”).⁴

P&ID’s access to the discovery is particularly important given Nigeria’s apparent insistence on mischaracterizing P&ID and its associates. For example, in this application, Nigeria points to large cash withdrawals on bank statements as improper, but in fact they are consistent with lawful business operations in Nigeria’s cash economy. Nigeria now seeks even more bank statements. When Nigeria selectively cites to that evidence in other proceedings (as P&ID expects it will), P&ID should have the benefit of the complete documents.

Conclusion

P&ID does not oppose Nigeria’s application but urges that, if the Court grants the application, Nigeria be required to promptly provide P&ID’s counsel with copies of all documents produced, and with the opportunity to attend all depositions conducted, pursuant to the subpoenas. P&ID also urges the Court to retain jurisdiction over the applicants to ensure their and their counsel’s compliance with the access to discovery contemplated by the Federal Rules of Civil Procedure, especially since in the pending award-recognition proceeding Nigeria has objected to the jurisdiction of the U.S. courts to adjudicate P&ID’s claim.⁵

⁴ It is unusual for foreign states to rely on civil discovery under Section 1782 to seek evidence in aid of domestic criminal investigations. P&ID can only speculate why Nigeria apparently has not sought these records through assistance from the U.S. Department of Justice. *See* US-Nigeria Mutual Legal Assistance Treaty, Sept. 13, 1989, T.I.A.S. No. 03-114.1. P&ID observes, however, that the MLAT permits the United States to deny assistance if executing the request would be contrary to the U.S. Constitution. *See id.* at Article III(1)(d); *see also* S. Rep. No. 106-24 at pdf at 12, 89 (2000), *available at* <https://www.congress.gov/treaty-document/102nd-congress/26>. Whatever the reason behind Nigeria’s decision to proceed via civil discovery, it must now abide by the Federal Rules of Civil Procedure.

⁵ *Process & Industrial Developments Ltd. v. Federal Republic of Nigeria*, 18-cv-594 (D.D.C.), *appeal pending*, 18-7154 (D.C. Cir.).

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Respectfully submitted,

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