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BY COURIER

December 14, 2012

Honorable Marina Corodemus
Corodemus & Corodemus LLC
120 Wood Avenue South, Suite 500
Iselin, New Jersey 08830

Re: *NJDEP, et al., v. Occidental, et al.*, No. ESX-L-986-05 (PASR)

Dear Judge Corodemus:

On behalf of defendant Repsol, S.A. ("Repsol"), we respectfully seek leave pursuant to Paragraph 8 of CMO XII to file a Motion to Dismiss the Fourth Amended Complaint (the "Complaint") for lack of personal jurisdiction, failure to state a claim and failure to join indispensable parties. Repsol respectfully requests a briefing schedule for this motion. Plaintiffs filed the Complaint on September 28, 2012, revising both their allegations and their claims against Repsol. This new Complaint – and any assertion of personal jurisdiction over Repsol – cannot be maintained, and Repsol should not be forced to litigate this matter further in light of the Complaint's deficiencies.

Lack of Personal Jurisdiction. In light of changes both to the Complaint and to the law on state courts asserting personal jurisdiction over foreign defendants, Repsol should be permitted to move to dismiss this lawsuit because the Court lacks personal jurisdiction over it. *See Weiss v. Pinnacle Entm't, Inc.*, 2012 WL 1448050 at *4-5 (N.J. App. Div. Apr. 27, 2012) (law of the case doctrine, which is discretionary in any event, does not prevent a court from readdressing an issue in light of changed circumstances). Plaintiffs have abandoned in their new Complaint a key allegation upon which Judge Goldman relied in 2008 to hold that personal jurisdiction could be asserted over Repsol – namely, that Maxus made an interest-free $325 million loan to Repsol that Repsol never repaid, amounting to a $325 million transfer from Maxus to Repsol (allegations Plaintiffs have abandoned because they now know that Repsol repaid the loan, with interest). Plaintiffs have also revised other allegations in a way that clarifies that many of the facts upon which they rely for personal jurisdiction relate to actions of the Argentinian company YPF, S.A., not the Spanish company Repsol (including the transactions that allegedly rendered certain U.S. companies insolvent). More significantly, since Judge Goldman's 2008 decision, the United States Supreme Court has decided two significant cases – one reversing a decision by the New Jersey Supreme Court – that have narrowed the bases upon which a state court can assert personal jurisdiction over a foreign company. *See J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011); *Goodyear Dunlop Tires Ops., S.A. v. Brown*, 131 S. Ct. 2846 (2011). Those Supreme Court opinions rejected assertions of personal jurisdiction based on general notions of foreseeability and broad interpretations of what it means for a company to purposely avail itself of a State's benefits and protections, both of which Judge Goldman relied upon in his earlier decision.

Failure to State a Claim. Plaintiffs' claims must be dismissed under N.J. S. Ct. R. 4:6-2(e) because their "factual allegations are palpably insufficient to support a claim upon which relief can be granted." *Matter of Prudential Ins. Co. Derivative Litig.*, 282 N.J. Super. 256, 268 (Ch. Div. 1995).

Counts I (Spill Act) and II (WPCA). Plaintiffs do not allege facts sufficient to plead a cause of action under the Spill Compensation and Control Act ("Spill Act") or the Water Pollution Control Act ("WPCA"). Although Plaintiffs allege that all Defendants are "dischargers" or "persons in any way

responsible," Repsol did not acquire YPF until 1999 – years after even Plaintiffs concede that the alleged discharges from the Lister Site ceased. Accordingly, Repsol cannot be either a discharger or a person responsible for discharges in connection with the Lister Site. Moreover, Plaintiffs' theory that all Defendants are alter egos of each other – even if sufficiently pled (which it is not as to Repsol) – does not remedy this defect because Repsol cannot be held responsible for acts that occurred before it acquired a majority share in YPF. *Scott v. NG US 1*, 881 N.E.2d 1125, 1133 (Mass. 2008) (corporate veil piercing cannot be used to hold a parent corporation responsible for the acts of a subsidiary that occurred decades before the parent acquired the subsidiary); *Analytical Measurements v. Keuffel & Esser Co.*, 843 F. Supp. 920, 925 (D.N.J. 1993) (*citing D.E.P. v. Ventron Corp.*, 94 N.J. 473, 501 (1983)) (parent corporation cannot be held liable under the Spill Act's "in any other way responsible" standard for discharges committed by a subsidiary years before it was acquired by the parent); *see also AYR Composition, Inc. v. Rosenberg*, 261 N.J. Super. 495, 506 (App. Div. 1993); *D.E.P. v. Arky's Auto*, 224 N.J. Super. 200, 205-206 (App. Div. 1988).

Counts III (public nuisance), IV (trespass) and V (strict liability). Plaintiffs' public nuisance, trespass and strict liability claims all fail on their face. Public nuisance requires that the defendant have control over the alleged nuisance. *In Re Lead Paint Litig.*, 191 N.J. 405, 429 (2007). Repsol has never controlled the Lister Site, and Repsol did not have a relationship with the entities that controlled the Lister Site during the time of the alleged discharges. Plaintiffs also cannot plead a trespass claim against Repsol given the fact that the alleged discharges occurred long before YPF acquired shares in Maxus, let alone before Repsol acquired shares in YPF. *Starego v. Soboliski*, 11 N.J. 29, 33-34 (1953). Finally, Plaintiffs' strict liability claim cannot be sustained because Repsol never engaged in whatever abnormally dangerous activity took place at the Lister Site, which is alleged to have ceased by at least 1977.

Counts VI (fraudulent transfers), VII (civil conspiracy/aiding-abetting) and VIII (breach of fiduciary duty). These claims must be dismissed to the extent they are based, as they primarily are, on conduct such as transfers of assets that took place before Repsol acquired YPF in 1999; there are no allegations of Repsol aiding or entering into an agreement with YPF and its subsidiaries, let alone Maxus, during any pre-YPF acquisition time period. Plaintiffs' fraudulent transfer claim fails for at least two additional reasons: Plaintiffs fail to join indispensable parties (the recipients of the pled transfers), *see* N.J. S. Ct. R. 4:28-1; *D.E.P. v. Caldeira*, 338 N.J. Super. 203, 224-225 (App. Div. 2001), *rev'd in part on other grounds* 171 N.J. 404 (2002); and Plaintiffs inappropriately seek to apply the New Jersey Uniform Fraudulent Transfers Act ("NJUFTA") to transfers of assets outside the United States between foreign corporations. Plaintiffs also cannot employ the device of a supposed "civil conspiracy" to expand the remedies available under the NJUFTA to reach entities such as Repsol that did not receive the alleged fraudulent transfers, and even if they could, such an expansion would be barred by the intracorporate conspiracy doctrine. *See Howmedica Osteonics Corp. v. Zimmer, Inc.*, 2012 WL 5554543, at *17 (D.N.J. Nov. 14, 2012). Finally, Plaintiffs' fiduciary duty claims fail for at least two additional reasons: (1) Repsol, as YPF's shareholder, does not owe a fiduciary duty to Plaintiffs or any other creditor of Maxus, *Trenwick Am. Litig. Trust v. Ernst & Young, L.L.P.*, 906 A.2d 168, 173 (Del. Ch. 2006); and (2) creditors such as Plaintiffs cannot assert a direct breach of fiduciary duty claim against a corporation's directors, *N. Am. Catholic Programming Found. v. Gheewalla*, 930 A.2d 92, 103 (Del. 2007), and others who allegedly aided the directors.

Anticipated Benefits to Judicial Economy and Advancement of Ultimate Resolution. Allowing Repsol to file the requested Motion to Dismiss would save judicial resources and advance the ultimate resolution of the matter by removing a party that has no place in this litigation. For the reasons explained above, the Court lacks jurisdiction over Repsol and Plaintiffs do not have a basis for relief against Repsol.

Respectfully submitted,

Diane P. Sullivan