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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 Occidental Chemical Corporation's ("OCC") Second Amended Cross-Claims ("Cross-Claims") for lack of jurisdiction, failure to state a claim upon which relief can be granted (including because they are barred by the applicable statutes of limitations), and for failure to join indispensable parties. Repsol respectfully requests a briefing schedule for this motion.

Lack of Personal Jurisdiction. As explained in my letter to Your Honor seeking leave to file a motion to dismiss Plaintiffs' Fourth Amended Complaint ("D.E.P. Letter"), in light of changes to the allegations and recent U.S. Supreme Court cases, there is no basis to assert personal jurisdiction over Repsol. The same reasoning applies, with equal or greater force, to OCC's Cross-Claims.

Statute of Limitations. Repsol also seeks to file a motion to dismiss the Cross-Claims because they are time-barred in whole or in part. For example, OCC's breach of contract, contractual indemnification, unjust enrichment, tortious interference with contract, breach of fiduciary duty, and aiding and abetting breach of fiduciary duty claims (Counts III-IV, VI-VII and IX-XI), to the extent based on alleged breaches from years before the Cross-Claims were filed, are barred under Texas, Delaware and New Jersey statutes of limitation. *See* Tx. Civ. Prac. & Rem. Code §§ 16.003 (2 years) & 16.004 (4 years); 10 Del. Code § 8106 (3 years); N.J. Stat. § 2A:14-1 (6 years). Barred, too, is OCC's fraudulent transfer claim insofar as it targets transfers from the 1990s: The Texas and Delaware versions of the Uniform Fraudulent Transfer Act ("UFTA"), as well as the New Jersey version prior to late 2002, prohibit attacking a transfer as fraudulent after the latter of (a) four years from the transfer or (b) "one year after the transfer … *was or could reasonably have been* discovered." Tx. Bus. & Comm. Code § 24.010; 6 Del. Code § 1309; N.J. Stat. § 25:2-31 (2001). OCC has been embroiled in litigation with Maxus over indemnity obligations since the 1990s, *see Maxus Energy Corp. v. Occidental Chem. Corp.*, 1998 Tex. App. LEXIS 3242 (Tex. App.-Dallas May 28, 1998), all of the asset transfers in the 1990s were disclosed in public SEC filings, and Plaintiffs have made allegations about such transfers since 2006, but OCC did not bring UFTA claims based on these transfers until 2008. OCC's delay bars its claims in whole or part.

Failure to State a Claim. Additionally, OCC's Cross-Claims against Repsol (Counts II-XI) should be dismissed pursuant N.J. S. Ct. R. 4:6-2(e) because they fail to state a claim upon which relief can be granted.

Counts VIII (contribution under Spill Act) and IX (statutory contribution). OCC does not allege facts sufficient to plead a cause of action for contribution under the Spill Compensation and Control Act

("Spill Act"), the Joint Tortfeasors Act, or the Comparative Negligence Act. Although OCC alleges that all Cross-Claim Defendants are "dischargers" or "persons in any way responsible," Repsol did not acquire YPF until 1999 – years after the alleged discharges from the Lister Site ceased. Moreover, the 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 – under the Spill Act or as a joint tortfeasor – for acts that occurred before it acquired YPF. *See D.E.P. v. Ventron Corp.*, 94 N.J. 473, 502 (1983) (parent corporation cannot be liable under alter ego theory for torts a subsidiary committed before it was acquired); *Brodsky v. Grinnell Haulers, Inc.*, 181 N.J. 102, 114 (2004) ("The guiding principle [in New Jersey's] comparative fault system has been the distribution of loss 'in proportion to the respective faults of the parties *causing* that loss.'"); *see also Analytical Measurements v. Keuffel & Esser Co.*, 843 F. Supp. 920, 925 (D.N.J. 1993); *AYR Composition, Inc. v. Rosenberg*, 261 N.J. Super. 495, 506 (App. Div. 1993).

Count VI (unjust enrichment). This claim fails because OCC cannot demonstrate that it conferred a benefit on Repsol with an expectation at the time of remuneration from Repsol. *Cooper v. Samsung Elecs. Am., Inc.*, 2008 U.S. Dist. LEXIS 75810, at * 27 (D.N.J. 2008); *City of Corpus Christi v. S.S. Smith & Sons Masonry, Inc.*, 736 S.W.2d 247, 250 (Tex. App.-Corpus Christi 1987).

Counts V (fraudulent transfers), IX (civil conspiracy/aiding and abetting), X (breach of fiduciary duty) and XI (aiding and abetting breach of fiduciary duty). These claims fail for the same reasons as stated in my D.E.P. Letter. Unlike Plaintiffs, OCC does state that its claim that Repsol and others aided and abetted Maxus directors' alleged fiduciary duty breaches is brought derivatively on behalf of Maxus, but OCC has not alleged facts to show either demand on the current Maxus board or demand futility. *In re Bally's Grand Deriv. Litig.*, C.A. No. 14644, 1997 WL 305803, at *3 (Del. Ch. Jun. 4, 1997).

Counts II (alter ego liability), III (breach of contract) and VII (contractual indemnification). Repsol is not a party to the Stock Purchase Agreement ("SPA") between OCC and Diamond Shamrock ("Diamond"), and hence Counts III and VII are predicated on an alter ego finding that is also the basis for Count II. This alter ego theory, however, cannot be employed to bind Repsol to Diamond's contractual obligations under the SPA where Repsol had no ownership interest in Diamond at the time the SPA was entered, has no ownership interest in Diamond at present, and OCC has failed adequately to allege that Repsol abused the corporate form for its direct benefit and to commit an actual fraud on OCC in relation to obligations some other entity may have owed OCC under the SPA. *See Mobil Oil Corp. v. Linear Films, Inc.*, 718 F. Supp. 260, 268-69 (D. Del. 1989); *Outokumpu Eng. Enter. v. Kvaerner EnviroPower, Inc.*, 685 A.2d 724, 729-730 (Del. Super. 1996); Tex. Bus. Orgs. Code § 21.223.

Count IV (tortious interference with contract). OCC does not even attempt to allege that Repsol interfered with Maxus' obligations (if any) under the SPA during a time period when Repsol did not have an indirect ownership interest in Maxus. Instead, its claim is limited to the time period when Repsol was an indirect parent company to Maxus (and both Maxus and OCC were based in Texas). Under Texas law, however, a parent corporation cannot tortiously interfere with the contracts of its subsidiaries. *Cleveland Reg. Med. Ctr., L.P. v. Celtic Properties, L.C.*, 323 S.W.3d 322, 348 (Tex. App.-Beaumont 2010); *Grizzle v. Tx. Commerce Bank*, 30 S.W.3d 265, 286-87 (Tex. App.-Dallas 2001).

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 OCC does not have a basis for relief against Repsol.

Respectfully submitted,

Diane P. Sullivan