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NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, THE COMMISSIONER OF THE NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, and THE ADMINISTRATOR OF THE NEW JERSEY SPILL COMPENSATION FUND, Plaintiffs, v. OCCIDENTAL CHEMICAL CORPORATION, TIERRA SOLUTIONS, INC., MAXUS ENERGY CORPORATION, REPSOL YPF, S.A., YPF, S.A., YPF HOLDINGS, INC., and CLH HOLDINGS, INC., Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION — ESSEX COUNTY DOCKET NO. L-9868-05 CIVIL ACTION OPINION

September 5, 2008

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Thomas E. Starnes appeared for Defendants, Maxus Energy Corp. and Tierra Solutions, Inc., (Andrews Kurth, LLP, attorneys)

GOLDMAN, J.S.C.

This case stems from the allegations of the New Jersey Department of Environmental Protection, the Commissioner of the New Jersey Department of Environmental Protection, and the Administrator of the New Jersey Spill Compensation Fund (collectively "NJDEP"), that operations at the former Diamond Alkali plant on the banks of the Passaic River on Lister Avenue in Newark, New Jersey (the "Lister Site") contaminated the Passaic River and Newark Bay with dioxin. Dioxin is the name given to a group of some of the most toxic man-made organic chemicals, one of the so-called "dirty dozen" which, because of their persistence in the environment, are said to be second in dangerous toxicity only to radioactive waste. Dioxin is a toxic byproduct of waste incineration and herbicide manufacturing, including Agent Orange. Dioxin is said to cause skin disease, liver disease, and cancer. It also causes disorders of the immune system, nervous system, endocrine system, and reproductive system according to the World Health Organization and the International Agency for Research on Cancer. Dioxin was discharged into the Passaic River at the Lister Site for a number of years with the last alleged discharge occurring in 1969. The Lister Site had been operated by Diamond Shamrock Chemicals Company ("Diamond") or its predecessors.

Diamond sold the Lister Site to a third party in the year 1971, two years after operations at the Lister Site had ceased. In 1983, Maxus was incorporated to be the parent company of Diamond. It was around this time that alarming levels of Dioxin contamination was discovered. In 1984 and 1986, Diamond re-acquired the parcels of property comprising of the Lister Site to facilitate the investigation and clean up of pollutants. The United States Environmental Protection Agency (EPA) has estimated the cost of this remediation may be as high as $2.3 billion.

On September 4, 1986, through a series of transactions and restructuring, Maxus sold its subsidiary, Diamond, to an affiliate of Occidental Chemical Corporation ("OCC"), and Diamond was subsequently merged into OCC in 1987. Under the 1986 purchase agreement between Maxus and OCC for the sale of Diamond, Maxus agreed to indemnify OCC for certain liabilities related to the business or activities of Diamond prior to that closing date. The Lister Site was listed as one of those liabilities. However, before the sale, Diamond transferred ownership of the Lister Site and other inactive sites in its name to Tierra.

In 1996, YPF, Argentina's largest petrochemical company, acquired Maxus. YPF purchased Maxus for approximately $1.8 billion which included a $1 billion guarantee for Maxus' third party debt. A year after the acquisition of Maxus, YPF reorganized its subsidiaries. As part of this reorganization, YPF International, Ltd. ("YPFH") was created and incorporated outside the United States to hold Maxus' foreign subsidiaries. Because Maxus still held Tierra's liability obligation, YPFH was incorporated to be the parent company of Maxus, and CLHH was created to be the parent company of Tierra and the subsidiary of YPFH. As a final component of this 1996 restructuring, Maxus and Tierra entered into an Assumption Agreement whereby Tierra agreed to assume and manage all of Maxus' indemnity obligations to OCC. YPF, YPF International, YPFH, CLHH, Tierra, and Maxus also entered into a Contribution Agreement whereby the corporate parents would supply limited funds toward the indemnity obligation assumed by Tierra.

In July of 1999, Repsol acquired YPF, forming Repsol YPF, S.A. This acquisition came three years after the Assumption and Contribution agreements were signed.

Through the decades of operations at the Lister Site, Dioxin has spread through the entire lower 17 miles of the Passaic River, seriously harming both animals and the environment.

Fishing and crabbing has been banned due to the alarming levels of dioxin in the Passaic River, and the Newark Bay Complex, to this day, remains one of the worst contaminated sites in the world.

The Lister Site has spawned extensive litigation and many published opinions, which contain detailed discussions of the underlying facts. For example, the underlying facts have been extensively described in litigation involving insurance coverage for this environmental disaster:

> Diamond's chemical manufacturing plant was located at 80 Lister Avenue in the Ironbound section of Newark and consisted of approximately 3.4 acres bounded on the north by the Passaic River, on the east by the former Sergeant Chemical Company (which was subsequently purchased by Diamond), at the southwest corner by the Duralak Company property, and on the south and west by the Sherwin-Williams property. The entire area is located in a flood zone.
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> The property has long been the site of industrial operations. The record discloses that the first manufacturing plant was constructed on the property shortly after the conclusion of the Civil War. The property was subsequently owned and developed by the Lister Agricultural Chemical Company in the early 1900's, and in 1940 was acquired by Kolker Chemical Works, Inc. (Kolker). Agricultural chemical manufacturing was in process by the mid-1940's. The chemicals manufactured or processed at the plant included dichlorodiphenyl trichloroethane (DDT) and the phenoxy herbicides. DDT production began before the end of World War II. Production of phenoxy herbicides commenced in 1948. Although other chemicals were manufactured at the site, DDT and the phenoxy herbicides were the principal products made by Kolker. In March 1951, Kolker was acquired by Diamond Alkali Company, which subsequently became known as Diamond Shamrock Chemical Company.
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> Although Diamond ceased manufacturing some of the types of chemicals made by Kolker, it continued to produce phenoxy herbicides and DDT until the late 1950's. At that point, DDT production ceased, leaving the phenoxy herbicides as the only products Diamond manufactured at the Lister Avenue plant. Two of the intermediates (products which are converted into another end product) of phenoxy herbicides are 2,4-dichlorophe-noxyacetic acid (2,4-D) and 2,4,5-trichlorophenoxyacetic acid (2,4,5-T).

Dioxin is an impurity formed as a by-product in the 2,4,5-T process. Agent Orange consists of a mixture of butyl 2,4-D ester and butyl 2,4,5-T ester.

* * *

To summarize this testimony briefly, it was clear that prior to 1956, all waste products from chemical processes were either directly discharged or ultimately released into the Passaic River. However, in 1956 an industrial sewer line was installed connecting the plant to the Passaic Valley Sewerage Commission Lister Avenue Line. Nevertheless, the testimony is persuasive that not all of the effluent from the plant was directed to that sewer line. DDT was manufactured until about 1959. So much DDT waste water was directed into the river that a mid-river “mountain” of DDT was created. Employees were directed to surreptitiously wade into the river at low tide and “chop up” the deposits so that they would not be seen by passing boats.

In 1960, a reaction in a TCP autoclave whose temperature was “out of control” caused an explosion which destroyed the larger of the two process buildings on Diamond's Newark property. The building was reconstructed in 1961 but thereafter production was limited to phenoxy herbicides. The old but undamaged chemical manufacturing building was the site of 2,4-D and 2,4,5-T production along with their esters and amines. Former Diamond employees provided graphic descriptions of the company's heedless indifference to the environmental damage which resulted from its manufacturing operations.

* * *

In addition to the spills and run-off which marked the 2,4,5-T and TCP processes, the vapors which were produced by the chemical reactions were vented into the atmosphere on a daily basis. In 1963, some of this venting was alleviated when the 2,4-D acid process was rehabilitated. The roof of that process building was raised to permit installation of new ventilating ducts which carried the process fumes to a caustic scrubber. In 1967, Diamond constructed a carbon tower through which all TCP made at the plant was processed. The carbon tower was designed to remove the dioxin to at or below one part per million. Nevertheless, despite installation of the carbon absorption tower there was still no decrease in chloracne among Diamond's workers.

The last TCP production occurred in June 1969. The plant was closed in August 1969 and remained idle until it was purchased by Chemicaland Corporation in March 1971. Chemicaland made benzyl alcohol which it sold through its affiliate, Cloray NJ Corporation. No subsequent purchaser manufactured TCP or any dioxin-containing product on the site.

In 1982 the United States Environmental Protection Agency (EPA) initiated a National Dioxin Strategy targeting facilities that produced 2,4,5-T and its pesticide derivatives for soil sampling and testing for dioxin. A list of contaminated sites was issued with the Lister Avenue property prominently designated. After the DEP was informed that dioxin had been found in the soil of Diamond's Lister Avenue plant, Governor Kean issued an executive order authorizing that agency to engage in emergency measures "necessary to fully and adequately protect the health, safety and welfare of New Jersey citizens." Pursuant to that direction, the DEP issued an administrative order on June 13, 1983, requiring Diamond to implement certain partial site stabilization measures designed to prevent further off-site migration of dioxin.

Two administrative consent orders were entered into between Diamond and the DEP. In March 1984, the first administrative consent order required Diamond to (1) perform a site evaluation to determine the extent and scope of the contamination on its property, (2) prepare a feasibility study to consider various alternatives for remediation, (3) post a letter of credit in the amount of $ 12,000,000 to guarantee its performance of its responsibilities under the order, and (4) establish a standby trust so that the DEP could draw on those funds to retain its own contractors in the event Diamond failed to perform the necessary measures. On December 20, 1984, a second administrative consent order was entered into between the DEP and Diamond, supplementing the first. This consent order pertained to off-site remediation. It required Diamond to (1) prepare a study on the remediation of the contamination of surrounding sites, (2) identify the scope and extent of the contamination, and (3) develop a feasibility study concerning the appropriate ultimate remediation of the pollution. The DEP directed Diamond to secure a $ 4,000,000 letter of credit to insure performance of its obligations.

* * *

In January 1985, the EPA and Diamond signed a voluntary cost reimbursement agreement pursuant to which Diamond paid the EPA approximately $ 2,000,000 representing expenses incurred

> with respect to the site. As we noted earlier, the amount of Diamond's ultimate liability for environmental pollution has not yet been determined.

Diamond Shamrock Chemicals v. Aetna, 258 N.J. Super. 167, 181-88 (App. Div. 1992), certif. denied, 134 N.J. 481 (1993)

The many published opinions involving the Lister Site include: Diamond Shamrock Chemicals v. Aetna, supra, 258 N.J. Super. 167 (after trial, insurers not obligated to indemnify Diamond Shamrock for the claims related to pollution since it did not constitute an "occurrence" within the insurance policy); Diamond Shamrock v. Aetna Cas., 231 N.J. Super. 1 (App. Div. 1989) (issue of policy interpretation in this case requires plenary hearing or trial); Advisory Com'n v. Diamond Shamrock, 243 N.J. Super. 170 (App. Div 1990) (claims of emotional distress from fear resulting from exposure to dioxin not compensable); Vuocolo v. Diamond Shamrock Chem., 240 N.J. Super. 289 (App. Div.), certif. denied, 122 N.J. 333 (1990) (toxic tort claim for pancreatic cancer dismissed because no proximate cause shown); I.H.R.A.C. v. Diamond Shamrock Chem., 216 N.J. Super. 166 (App. Div. 1987) (trial court did not have authority to implement a plan of health testing and monitoring of neighborhood residents from alleged dioxin contamination); and Maxus Energy Corp. v. United States, 898 F. Supp. 399 (N.D. Tex. 1995), aff'd without opinion, 95 F.3d 1148 (5th Cir. 1996) (United States not responsible in any way for remediation of Lister Site although it had directed the production of Agent Orange there). Two cases have dealt with the 1996 agreement between OCC and Maxus. Maxus Energy Corp. v. Occidental Chem. Corp., 244 S.W.3d 875 (Tex. App. 2008), rev. den. 2008 Tex. LEXIS 667 (Tex. Sup. Ct. 2008) (affirming jury verdict that interpreted ambiguous indemnification agreement to require that Maxus indemnify OCC for various environmental claims including the Lister site); and Occidental Chem. Corp. v. Maxus Energy Corp., 2004 Ohio App. LEXIS 6214 (Ohio Ct. App., 2004) (action for breach of contract is not barred by prior

declaratory judgment action involving the same contract). In addition, OCC and Maxus have been co-defendants in many lawsuits involving alleged exposure to Agent Orange, many of which resulted in reported decisions involving issues totally unrelated to the claims here. The Lister Site is also included within pending proceedings under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), U.S. EPA Region 2, CERCLA Docket No. 02-2007-2009.

One of the reasons this case was delayed was its removal to federal court. In 2006 Chief Judge Brown, remanded the matter back to the state court. He described the facts as follows:

> A. Plaintiffs' Allegations Concerning Defendants' Conduct
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> On or about December 13, 2005, Plaintiffs brought suit against defendants OCC, Tierra, Maxus, Repsol YPF, S.A. ("Repsol"), YPF, S.A. ("YPF"), YPF Holdings, Inc. ("YPF Holdings"), and CLH Holdings ("CLH") (collectively "Defendants") in the Superior Court of New Jersey. According to Plaintiffs, OCC and its predecessors-in-interest polluted the Passaic River with various pesticides and chemicals over a period of approximately twenty years. (Compl. P 1.) Plaintiffs claim that in 1940, OCC's predecessor acquired a tract of land, about 3.4 acres in size, located in Newark, New Jersey. (Id. PP 15-18.) Plaintiffs refer to that location as the "Lister Site" and allege that, between 1940 and 1971, OCC and its predecessors "used, produced, and discarded" certain chemicals at the site, including dichlorodiphenyltrichloroethane ("DDT"), phenoxy herbicides, and 2,3,7,8-tetrachlorodibenzo-p-dioxin ("TCDD"). (Id. PP 23-25.) "As a result of OCC's practices at the Lister Site, TCDD has been found in the soil at and around the Lister Site, in the groundwater under and around the Lister Site, and in the Newark Bay Complex." (Id. P 30.) Plaintiffs define the Newark Bay Complex as "the lower 17 miles of the Passaic River, Newark Bay, the lower reaches of the Hackensack River, the Arthur Kill, the Kill van Kull, and [] adjacent waters and sediments . . . ." (Id. P 1.) According to the Complaint, during the relevant times, the chemicals that OCC allegedly discharged at the Lister Site and in the Passaic River -- TCDD in particular -- "migrated throughout the [Newark Bay Complex]." (Id.) Plaintiffs allege that the remaining Defendants, through various transfers of obligations, were also responsible for the environmental liabilities resulting

from the alleged pollution at the Lister Site. (Id. PP 15-22.) Moreover, Plaintiffs claim that Defendants have "orchestrated and implemented a strategy to delay and impede the clean-up and restoration of the Passaic River." (Id. P 1.)

B. Regulatory Actions by the Federal Government and the State

The Complaint also describes various regulatory actions that the Federal Government and the State have taken with respect to the implicated areas. In 1982, the U.S. Environmental Protection Agency ("EPA") initiated a National Dioxin Strategy that targeted facilities that produced certain of the chemicals that OCC allegedly discharged. (Id. P 34.) In 1987, the EPA selected an interim remedy at the Lister Site. (Id. P 36.) Former New Jersey Governor Kean issued an executive order authorizing the NJDEP "to engage in emergency measures 'necessary to fully and adequately protect the health, safety and welfare of New Jersey citizens.'" (Id. P 35.) Pursuant to that order, the NJDEP "issued an administrative order on June 13, 1983, requiring OCC to implement certain stabilization measures at the Lister Site to prevent further TCDD migration off-site. Two subsequent administrative consent orders were entered between [the NJDEP] and OCC in 1984 to address the Lister Site itself." (Id.)

With respect to the Newark Bay Complex, the EPA issued an administrative order on consent ("AOC") on April 20, 1994, whereby "Tierra agreed to study a six-mile stretch of the Passaic River and to determine: (1) the spatial distribution and concentrations of the TCDD and other contaminants in the Passaic River, (2) the primary human and ecological receptors of the contaminated sediments, and (3) the transport of contaminated sediment within the six-mile stretch." (Id. P 37.) Plaintiffs claim that after ten years, the study is not yet complete, and that instead of completing the study, Defendants have sought to "shift blame away from their activities on the Lister Site," "manipulat[e] the focus of the investigation away from TCDD," "mislead the regulators," and "bias the results of the investigation and testing that they controlled." (Id. PP 38-40.) Pursuant to an EPA letter dated January 30, 2001, Defendants are no longer responsible for certain aspects of that investigation. (Id. P 42.)

The EPA entered another AOC with OCC and other parties, effective June 22, 2004, "to fund $ 10 million of a $ 19 million study of the 17-mile stretch of the Passaic River from the Dundee Dam to Newark Bay." (Id.) On February 13, 2004, the EPA entered an additional AOC with OCC to begin another study of the

> Lister Site, with a focus on Newark Bay and its adjacent waters. (Id. P 43.)
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> On September 19, 2003, the NJDEP "issued a Spill Act directive … to OCC, Maxus, Tierra, and others pursuant to [N.J. Stat. Ann. 58:10-23.11], directing these entities to assess any natural resource that has been, or may be, injured as a result of the [TCDD discharges at] the Lister Site." (Id. P 44.)

N.J. Dep't of Envtl. Prot. v. Occidental Chem. Corp., 2006 U.S. Dist. LEXIS 71245, 5-6 (D.N.J. 2006)

In designating this site as a "Superfund" site in 1984, the United States Environmental Protection Agency (EPA) said:

> From 1951 to 1969, the Diamond Alkali Company (subsequently known as the Diamond Shamrock Chemicals Company) owned and operated a pesticides manufacturing plant at 80 Lister Avenue in Newark. The property has been used for manufacturing by numerous companies for more than 100 years. The mid-1940s marked the beginning of the manufacturing operations related to the current site conditions, including the production of DDT and phenoxy herbicides. Subsequent owners used the property until 1983, when sampling at the site and in the Passaic River revealed high levels of dioxin. Dioxin (also known as 2,3,7,8-tetrachlorodibenzo-p-dioxin or TCDD) is an extremely toxic chemical and an unwanted byproduct of the manufacture of certain chemicals which were produced at the site. Since Occidental Chemical Corporation (OCC) is a successor to the Diamond Shamrock Chemicals Company, OCC is required to perform remedial activities at the 80 and 120 Lister Avenue properties and the Newark Bay Study Area under the Superfund program.

http://www.epa.gov/Region2/superfund/npl/0200613c.pdf (visited 8/30/08).

The oldest reported lawsuit was filed 25 years ago by NJDEP's local special counsel here, Gordon and Gordon. This lawsuit, filed in 2005, is still in the jurisdictional and preliminary stages. No answer has been filed and merits discovery has not begun. Given the magnitude and complexity of the issues and amounts of money potentially involved this should not be surprising.

In this case NJDEP has brought various claims arising under the New Jersey environmental laws and New Jersey common law. OCC never owned or operated the Lister Site, but purchased the stock of a successor in interest to prior Diamond companies that had operated the Lister Site. OCC contends that under the relevant Stock Purchase Agreement (the "SPA"), Maxus and Tierra are responsible for liability associated with the Lister Site. NJDEP and OCC allege that Repsol acquired YPF, the parent of Maxus and Tierra, in subsequent stock transactions knowing the nature and extent of the obligations that Maxus and Tierra owed to OCC and NJDEP in New Jersey and to OCC elsewhere in the United States. OCC and NJDEP allege that Repsol and YPF, Maxus' and Tierra's parents, engaged in corporate misconduct intended to thwart the cleanup of the environmental condition associated with the Lister Site, the obligations owed to NJDEP, as well as OCC's indemnity rights.

Specifically, NJDEP and OCC allege that Repsol and YPF are either the alter egos of their own subsidiary companies (it is undisputed Maxus and Tierra are subject to personal jurisdiction in New Jersey) and thus liable for their subsidiaries' breach of their contractual obligations to indemnify OCC and to clean up the environmental conditions associated with the Lister Site; or, that Repsol and YPF conspired to commit various intentional torts or engaged in fraudulent transfers aimed at preventing Maxus and Tierra from satisfying these contractual obligations in New Jersey. Under both theories, NJDEP and OCC allege that they have pled facts showing that the Repsol and YPF acted with the intent and knowledge that their misconduct would have direct effects in New Jersey and give rise to claims in New Jersey such that they should have reasonably anticipated being sued in a New Jersey court.

In the instant motion, I must determine whether NJDEP and OCC have met their burden to establish personal jurisdiction, either general or specific, over non-resident defendants Repsol,

YPF, S.A., YPF Holding, Inc., and CLH Holdings, Inc., which I will generally refer to as "Repsol" and "YPF."

New Jersey's "long-arm statute," R. 4:4-4(b)(1), permits service of process on a non-resident defendant to the outermost limits of due process permitted by the United States Constitution. Avdel Corp. v. Mecure, 58 N.J. 264, 268 (1971). Due process requires "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" International Shoe Co. v. Washington, 236 U.S. 310, 316, 66 S. Ct. 154, 158, 90 L. Ed. 95, 102 (1945), quoting Milliken v. Meyer, 311 U.S. 457, 463, 61 S. Ct. 339, 343, 85 L. Ed. 278, 283 (1940). "Minimum contacts" requires that a defendant must "purposefully avail itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." Hanson v. Denckla, 357 U.S. 235, 253, 78 S. Ct. 1228, 1240, 2 L. Ed.2d 1283, 1298 (1958). Requiring "minimum contacts" protects defendants against litigating in inconvenient forums and ensures that states do not exceed their jurisdictional limits. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291-92, 100 S. Ct. 559, 564, 62 L. Ed.2d 490, 498 (1980). Nonetheless, this doctrine has been relaxed substantially over the years because our contemporary economy is characterized by the conduct of business transactions across both state and national borders without any physical presence. Id. at 292-93, 100 S. Ct. at 565, 62 L. Ed. 2d at 498.

"Due process" requires that a defendant should reasonably anticipate being haled into court in the forum state. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474, 105 S. Ct. 2174, 2183, 85 L. Ed.2d 528, 542 (1985). It necessitates that a defendant purposefully avail itself of the privilege of engaging in activities within the forum state, thus gaining the benefits and protections of its laws. Id. at 475, 105 S. Ct. at 2183, 85 L. Ed. 2d at 542. The requirement of a

"purposeful availment" also protects a defendant against being haled into court in a foreign jurisdiction without some substantial contact — one that is not merely random, fortuitous, or attenuated, or a contact that is the result of the unilateral activity of some other party. Ibid. "Minimum-contacts" basis as an alternative to the requirement of physical presence for the assertion of in personam jurisdiction is justified by the "increasing nationalization of commerce," in which many business transactions were conducted across state and national boundaries. Changes in transportation and communication have made it less burdensome for a party sued to defend itself in a state or country where it engages in economic activity. McGee v. Int'l Life Ins. Co., 355 U.S. 220, 222-23, 78 S. Ct. 199, 201, 2 L. Ed.2d 223, 226 (1957). In World-Wide Volkswagen, supra, the Court observed that these "historical developments … have only accelerated in the generation since [McGee] was decided." 444 U.S. at 293, 100 S. Ct. at 565, 62 L. Ed. 2d at 498-99.

In the minimum-contacts analysis, courts distinguish between specific and general jurisdiction. Wilson v. Paradise Vill. Beach Resort & Spa, 395 N.J. Super. 520, 527 (App. Div. 2007). "Although the minimum-contacts test centers on the defendant's relationship with the forum state, the sufficiency of the contacts for jurisdictional purposes depends on 'the relationship among the defendant, the forum, and the litigation.'" Charles Gendler & Co., Inc. v. Telecom Equip. Corp., 102 N.J. 460, 471 (1986), quoting Shaffer v. Heitner, 433 U.S. 186, 204, 97 S. Ct. 2569, 2580, 53 L. Ed.2d 683, 698 (1977). When the cause of action is unrelated to the defendant's contacts with the forum state, the court's jurisdiction is general, and continuous and substantial contacts are required. However, when the cause of action arises directly out of the defendant's contact with the forum state, the court's jurisdiction is specific, and an isolated act by the defendant may be sufficient to support jurisdiction over that defendant. Jurisdiction is more

likely to be found when the cause of action arises directly out of the defendant's contacts with the forum state. "Specific jurisdiction" only exists when the conduct of a non-resident defendant relates to and arises from the underlying dispute being litigated.

A plaintiff seeking to establish general jurisdiction over a defendant has a much higher burden to meet because general jurisdiction is unrelated to the subject matter of the underlying litigation and instead depends upon a showing of "continuous and substantial" systematic contacts with the forum. This higher burden is to "ensure…the fairness of treating a non-resident identically to a resident in terms of amenability to the suit in the jurisdiction." Gendler, supra, 102 N.J at 470.

Even after sufficient contacts to justify specific or general jurisdiction has been found, I must determine if jurisdiction comports with due process such that it is in accordance with "fair play and substantial justice." International Shoe v. Washington, supra, 326 U.S. 310, 66 S. Ct. 158, 90 L. Ed. 102; Waste Management v. Admiral Ins. Co., 138 N.J. 106, 119-120 (1994), cert. denied,, sub nom. WMX Techs. v. Canadian Gen. Ins. Co., 513 U.S. 1183, 115 S. Ct. 1175, 130 L. Ed. 2d 1128, (1995); Lebel v. Everglades Marina, Inc., 115 N.J. 317, 322 (1989).

In light of the extensive jurisdictional discovery here, I must review the pleadings, affidavits, interrogatories, depositions, oral testimony, exhibits, any part of the record, and any combination thereof. As to the underlying causes of action, because there has been no merits discovery, I must assume the allegations in the second amended complaint and proposed cross-claim to be true unless they are contradicted by evidence, and material issues of fact are to be resolved in favor of NJDEP and Occidental. While the issue is a mixed question of law and fact, one that may be resolved by a preliminary evidential hearing after affording the parties an appropriate opportunity for discovery, no party has requested such a hearing and all have

assumed that I would decide the jurisdiction question without a hearing on the facts presented and based upon the extensive jurisdictional discovery which prior judges have allowed and supervised. See, e.g., Meeker v. Meeker, 52 N.J. 59, 72 (1968); Corporate Dev. Spec. Inc. v. Warren-Teed Pharm., 99 N.J. Super. 493 (App. Div. 1968); First National Bank of Freehold v. Viviani, 60 N.J. Super. 221, 224-225 (App. Div. 1960).

Repsol contends that requiring it to defend itself in New Jersey would offend notions of due process where Repsol has no minimum contacts with New Jersey. Repsol asserts that:

1. It is a Spanish corporation with principal place of business in Madrid;

2. It has no designated agent for service of process in New Jersey;

3. It has never advertised, solicited, or conducted business in New Jersey;

4. It makes no business decisions in New Jersey;

5. It owns no real property in New Jersey;

6. It has no telephone listing in New Jersey;

7. It pays no New Jersey taxes;

8. It does not design, manufacture, sell, distribute products in New Jersey; and

9. In 2004-05 it sold only approximately $9,660.95 in products to New Jersey residents.

Moreover, Repsol contends that it does not have indirect contacts with New Jersey by way of "alter ego" or "cohesive economic unit" theories. Repsol contends that NJDEP's "alter ego" argument must fail because, it argues, control alone is insufficient to impute liability to the parent corporation absent a connection between the injury and parent's improper manner of doing business, citing Scott v. NG US 1, Inc., 450 Mass. 760 (2008). Here, assuming the polluting activities of Maxus and Tierra subject them to liability, those actions occurred well

before Repsol became their parent corporation; therefore, Repsol cannot be liable either under the alter ego theory or cohesive economic unit theory for previous conduct of their subsidiaries.

Repsol also argues that there is no basis to impose vicarious liability over Repsol for the acts of Tierra or Maxus. It argues that:

1. Repsol has no director or officer serving on Tierra or Maxus boards;

2. None of Repsol's directors, officers, or personnel control the business or activities of Tierra or Maxus;

3. Repsol does not commingle funds with Tierra or Maxus;

4. Repsol respects the separate corporate existences of YPF, YPFH, CLHH, Maxus, and Tierra;

5. Tierra was not formed to commit fraud, injustice, or otherwise circumvent the law;

6. Maxus and Tierra do not solicit sales on behalf of Repsol;

7. Repsol does not have mixed operations with YPF, YPFH, CLHH, Maxus, or Tierra;

8. Repsol did not control Tierra;

9. Tierra and Maxus are not mere conduits for Repsol; and

10. Repsol has no actual, participatory, or total control of Tierra.

YPF argues that NJDEP and OCC cannot establish any of its contacts with the State of New Jersey and argues that:

1. YPF is an Argentinean corporation with a principal place of business in Argentina;

2. YPFH and CLHH are Delaware corporations with principal places of business in The Woodlands, Texas;

3. YPF agents do not have designated agents for service in New Jersey;

4. YPF and its related entities have never conducted business meetings, advertised, solicited, or otherwise conducted business in New Jersey;

5. YPF and its related entities own no real property in New Jersey;

6. YPF and its related entities have no bank accounts and do not transact business in New Jersey; and

7. YPF and its related entities pay no taxes in New Jersey.

Because there are no direct contacts between Repsol and YPF New Jersey, NJDEP and Occidental assert that under either an alter ego or cohesive economic unit theory including the business of Maxus and Tierra, Repsol and YPF and its related entities are subject to jurisdiction in New Jersey. Repsol and YPF argue, however, that no vicarious liability can be imputed to them because no evidence of "control" exists such that the corporate veil could be pierced. Repsol and YPF argue that, for example:

1. No YPF or Repsol directors or officers serve as directors or officers of Tierra;

2. No YPF or Repsol directors, officers, or personnel are involved in activities or business of Tierra;

3. YPF and Repsol directors, officers, and personnel are not involved in the activities or business of Tierra;

4. Neither Repsol, nor YPF nor any of its related entities pay salaries or expenses of Tierra and do not develop the budget or control activities;

5. Repsol, YPF, YPFH, and CLHH have separate accounts for its funds and in no way control the environmental practices of Tierra; and

6. Tierra does not solicit sales from YPF or Repsol.

NJDEP and OCC, on the other hand, allege the following facts. Repsol and YPF operate a website, www.repsolypf.com, which lists specific New Jersey addresses where Repsol products are sold. The website also allows New Jersey residents to create a username and password which allow for access to an email account, services and products, clothing, and even a Repsol VISA card. Website visitors are also able to purchase Repsol products without having to create a username or any login information. Visitors can also access articles and other services including weather, household items, decorative items, and travel information. NJDEP contends that it is a fully interactive website.

NJDEP and OCC also allege that YPF receives 10% of all net sales from New Jersey transactions. It asserts that YPF actively markets crude oil and refined products in the U.S. which includes the sale of lubricants and specialties (asphalt, etc). These products were readily available for purchase in New Jersey from over 19 different retailers. When New Jersey residents purchase Repsol products from any of their retailers, they receive up to five free items. NJDEP contends that this unification of the brand in the United States and abroad creates the image that Repsol and its subsidiaries are one single worldwide entity. Based on this, New Jersey residents can purchase Repsol products using three methods:

1. New Jersey consumers can find New Jersey stores listed and promoted on Repsol's website;

2. New Jersey customers can go to other New Jersey stores promoted by Repsol's distributors, and contact these stores by using the phone book; and

3. New Jersey customers can use the www.repsolypf.com website.

NJDEP and OCC assert that both YPF and Repsol are subject to jurisdiction because the income of YPF, who is actually selling these products, is combined with Repsol's, and that all

the products bear the brand name Repsol. Repsol derives a benefit from these sales because the profits are consolidated and sent up to Repsol; this is reflected in Repsol's public filings. Repsol and YPF maintain offices in New York City, which is close to the Lister Site.

NJDEP and OCC claim that not only does Repsol solicit New Jersey residents through a website; Repsol also has contracts in or with New Jersey residents. The first contact with a New Jersey resident is Week's Marine, which was contracted to build Repsol's Canaport Liquefied Natural Gas ("LNG") terminal in Massachusetts. Foster Wheeler, whose headquarters is in New Jersey, is the project manager for the Canaport construction project. Honeywell Process Solutions, another corporation operating in New Jersey, has contracted with Repsol to automate Repsol's refineries. Lastly, Repsol contracted with JLM Industries for JLM Marketing to be the exclusive marketer of certain Repsol products; and both JLM Industries and Marketing are based in Bayonne, New Jersey.

In addition, NJDEP and OCC claim that Repsol also sells LNG throughout the Northeast, including New Jersey. This LNG originates in Trinidad and Tobago through the Atlantic natural gas facilities, of which Repsol owns a significant share. The LNG comes into the U.S. through four different trains, arriving in the Northeast through Massachusetts and Maryland. This LNG from Trinidad and Tobago makes up over half of the LNG imports in the whole United States. Distrigas, the LNG facility in Massachusetts, receives all of its LNG from Repsol's Atlantic refinery. This LNG brought into Massachusetts is then funneled into New Jersey. Distrigas loads the LNG in liquid form into a truck and it is delivered to New Jersey, New York, and New England. Natural gas is also brought into New Jersey through the Tennessee and Algonquin pipelines from Repsol's Atlantic refinery. Repsol's Atlantic refinery also delivers natural gas to Maryland from where it is then transported using shippers, each having their own pipeline, which

is used, among other things, to serve the New Jersey market. Companies such as New Jersey Natural Gas and PSE&G contract with these shippers and natural gas which has originated in or passed through some Repsol or YPF facility may be used by millions of New Jersey consumers.

NJDEP and OCC contend that the fact that Repsol, YPF, Maxus, and Tierra operate as a cohesive economic unit is illustrated by the Canaport plan. Repsol owns 100% of the LNG output from the Canaport terminal and aims its product toward New Jersey, New York, and New England. The Canaport facility will receive LNG from Repsol's Atlantic refinery and transport it to the Northeast, including New Jersey. Repsol has also entered into contracts with Maritimes and Northeast Pipeline to send Repsol's natural gas into the Northeast through the Algonquin and Tennessee pipeline. New Jersey companies that directly receive Repsol's Canaport natural gas include PSE&G who recently signed a contract for supply.

NJDEP and OCC also contend that the facts fulfill the criteria needed to satisfy the "alter ego" theory, such as domination of subsidiary by parent. NJDEP says that many board members of Repsol and YPF also hold positions of authority on Maxus and Tierra. For example, in 1996, David Wadsworth served as VP, General Counsel, and Assistant Secretary to Maxus while serving at the same time as VP to Tierra, CLHH, and YPFH. This simultaneous board service continued from 1997 through 2004, wherein Wadsworth maintained his roles at Maxus, and he took on additional responsibility as Director and VP of Tierra, CLHH, and YPFH. Similarly, H.R. "Dick" Smith served as Secretary to Maxus, Tierra, CLHH, and YPFH from 1996 through 2003. In the years 2004, Smith took on additional responsibilities, serving as Secretary to Maxus in 2004, while serving as Secretary and VP to Tierra, and Director to CLHH and YPFH. In 2005, Smith served as Secretary and VP to only Maxus and Tierra. Fernando Nardi served as Treasurer and VP of Maxus in 1998, while serving as Treasury/VP to Tierra; Director, President and

Treasurer to CLHH, and Director, President, and Treasurer to YPFH. In 1999, Nardi served Maxus as Treasurer and VP, but served Tierra as Treasurer, served CLHH as Director, President, and Treasurer, and served YPFH as Treasurer. In 2000, again Nardi served as Treasurer and VP to Maxus, but served as Treasurer only to all other corporations. From 2001 to 2003, Nardi served only as Treasurer to all corporations. In 2004 Nardi served as Treasurer only to Maxus, Tierra, and CLHH. Finally, in 2005, Nardi served as Treasurer only to Maxus and Tierra. NJDEP says that this sharing of corporate officers and directors demonstrates the blurring of lines, lack of formalities, and control of the parent over its subsidiaries such that the corporate veil should be pierced.

In addition, NJDEP and OCC contend that Tierra has no assets except for the Lister site and other contaminated sites. It is totally dependant upon YPF for everything. YPF owns all of Tierra's stock, there are alleged common directors or officers. YPF effectively finances Tierra, by advancing money to Tierra; YPF finances all of Tierra's activities, pays all of its salaries, and funds virtually every expense of Tierra. Tierra is not differentiated from Repsol and YPF in corporate documents describing Repsol's and YPF's business. Emails and other documents show that Tierra's employees, directors, and executives do not act independently in Tierra's interest, but instead take direction from Repsol and YPF.

Yet Repsol and YPF have long been very aware of its responsibilities for the Lister site. In their 2005 Form 20-F, they said:

> Maxus Energy Corporation ("Maxus") and Tierra Solutions, Inc. ("TS"), wholly owned subsidiaries of YPF Holdings, Inc., have certain potential liabilities associated with operations of Maxus' former chemical subsidiary, Diamond Shamrock Chemicals Company ("Chemicals") … Compliance with more stringent laws or regulations, as well as more vigorous enforcement policies of the regulatory agencies, could in the future require material expenditures by YPF Holdings, Inc. for the installation of and operation of systems and equipment for remedial tasks, possible dredging requirements and in certain other respects. Also,

> certain laws allow for recovery of natural resource damages from responsible parties and ordering the implementation of interim remedies to abate an imminent and substantial endangerment to the environment. Potential expenditures for any such actions cannot be reasonably estimated.
>
> * * *
>
> In connection with the sale of Maxus' former chemical subsidiary, Chemicals, to Occidental Petroleum Corporation ("Occidental") in 1986, Maxus agreed to indemnify Chemicals and Occidental from and against certain liabilities relating to the business or activities of Chemicals prior to the September 4, 1986 closing date (the "Closing Date"), including certain environmental liabilities relating to certain chemical plants and waste disposal sites used by Chemicals prior to the Closing Date.
>
> * * *
>
> … The total expended by YPF Holdings, Inc. under this cost sharing arrangement [the Maxus indemnity] was approximately US $70 million as of December 31, 2004. The remaining portion of this cost sharing arrangement (16 as of December 31, 2004) has been reserved.
>
> This year Repsol and YPF announced the following:
>
> As of December 31, 2007, Repsol YPF, through YPF Holdings [defined to include Maxus and Tierra], had provisions for environmental and other contingencies totaling approximately US $106 million …
>
> In December 2005, the DEP issued a directive to Tierra, Maxus, and Occidental directing said parties to pay the State of New Jersey's costs of developing a Source Control Dredge Plan focused on allegedly dioxin-contaminated sediment in the lower six-mile portion of the Passaic River. The development of this Plan is estimated by the DEP to cost approximately $2.3 million …
>
> Also in December 2005, the DEP sued the Company, Tierra, Maxus and several affiliated entities, in addition to Occidental, in connection with dioxin contamination allegedly emanating from Chemicals' former Newark plant and contaminating the lower 17-mile portion of the Passaic River …

Finally, NJDEP contends that Repsol is subject to general jurisdiction because of its other contacts with New Jersey. The New Jersey Division of Treasury owned 5 million shares of Repsol YPF stock. The ownership of the stock qualifies as an additional contact subjecting Repsol to jurisdiction here. Also, NJDEP argues that Repsol's consistent emailing to and with New Jersey entities is a factor to consider. Repsol and YPF have continuous contact with their

subsidiaries Maxus and Tierra. Moreover, Repsol and YPF have many email communications with New Jersey based attorneys, lobbyists, and contractors hired by Tierra and Maxus, regarding Tierra's property, the Lister site.

As allowed by Judge Davidson in her March 31, 2008 order, NJDEP filed a Second Amended Complaint on April 15, 2008, which added additional causes of action against Repsol, YPF, Maxus, and Tierra. In this Second Amended Complaint, NJDEP claims that Repsol and YPF have depleted Maxus and Tierra of their assets, leaving them wholly unable to satisfy their remediation obligations. Accordingly, the Second Amended Complaint contains three new causes of action — for fraudulent transfers, for aiding and abetting, and for civil conspiracy.

Pursuant to my order of May 9, 2008, OCC was not yet required to file any responsive pleading. It contended that if it were required to do so, it would bring cross-claims and third-party actions which might include up to 100 new third party defendants. Nonetheless, it wanted to assert cross-claims against Repsol and YPF based upon the SPA and claiming jurisdiction based upon theories similar to those asserted by NJDEP. To avoid the potential duplication of motions, I allowed OCC to serve (but not file) "proposed Crossclaims against Repsol YPF, S.A., YPF, S.A., YPF Holdings, Inc.," and allowed Repsol and YPF to file a motion to bar any such proposed crossclaims on the same jurisdictional grounds that it was seeking dismissal of NJDEP's claims. In this way, the personal jurisdiction issue could be raised as it applied to OCC's claims against Repsol and YPF without OCC having to actually file its answer, crossclaims and third party complaints, which might unduly complicate an issue that was already quite complex.

One purpose of the Second Amended Complaint was to allege a claim of fraudulent transfer. At common law, transfers made to defraud creditors could be set aside. Smith v.

Whitman, 75 N.J. Super. 228, 236 (App. Div. 1962), modified on other grounds, 39 N.J. 397 (1963). Even if a transfer itself was not initially fraudulent, a subsequent fraudulent use could be prevented. Baker v. Josephson, 137 N.J. Eq. 377 (Ch. Div.), rev'd in part on other grounds, 138 N.J. Eq. 107 (E. & A. 1946). Today, fraudulent conveyances are governed by the Uniform Fraudulent Transfer Act, N.J.S.A. 25:2-20, et seq., which states that a transfer made or obligation incurred with the intent to hinder, delay, or defraud present and future creditors is fraudulent. N.J.S.A. 25:2-25 sets forth the factors utilized in determining fraudulent intent:

> A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:
>
> a. With actual intent to hinder, delay, or defraud any creditor of the debtor, or
>
> b. Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:
>
>> (1) Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or
>>
>> (2) Intended to incur, or believed or reasonably should have believed that the debtor would incur, debts beyond the debtor's ability to pay as they become due.

N.J.S.A 25:2-26 also sets forth a non-exclusive list of factors ("badges of fraud") that may show whether a party has established actual intent to hinder, delay, or defraud under N.J.S.A. 25:2-25(a). Firmani v. Firmani, 332 N.J. Super. 118, 121 (App. Div. 2000); Gilchinsky v. National Westminster Bank, 159 N.J. 463, 475 (1999). Showing such badges of fraud may infer the necessary intent. While only one "badge" is sufficient to characterize a transfer as

fraudulent, the presence of several will strongly infer fraud. The "badges of fraud" as set forth in N.J.S.A. 25:2-26 are as follows:

> a. The transfer or obligation was to an insider;
>
> b. The debtor retained possession or control of the property transferred after the transfer;
>
> c. The transfer or obligation was disclosed or concealed;
>
> d. Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;
>
> e. The transfer was of substantially all the debtor's assets;
>
> f. The debtor absconded;
>
> g. The debtor removed or concealed assets;
>
> h. The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;
>
> i. The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;
>
> j. The transfer occurred shortly before or shortly after a substantial debt was incurred; and
>
> k. The debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

Good faith is not an issue in determining whether there was sufficient consideration. However, a showing that sufficient consideration has been given in good faith is a complete defense. This is so even if transfer was intended to hinder, delay, or defraud creditors. If there is good faith but less than sufficient consideration, damages may be reduced to the extent of the value actually paid. The creditor seeking to set aside the transfer bears the burden of proving actual intent.

Pursuant to N.J.S.A. 25:2-29, defrauded creditors have various remedies. The creditor may request that the court do any of the following:

> a. set aside the transfer to the extent necessary to satisfy his claim;
>
> b. enjoin the transferee or debtor against further disposition of the asset or property;
>
> c. appoint a custodian of the property; or
>
> d. any other equitable relief that the circumstances require.

While NJDEP also has counts claiming aiding and abetting and civil conspiracy, the essential claim is one of a series of fraudulent transfers. NJDEP claims that specific jurisdiction over Repsol and YPF is proper on account of their engaging in fraudulent transfers and conspiracy. NJDEP and OCC contend that YPF and Maxus engaged in a scheme to transfer all of Maxus's assets to YPF affiliates for less than fair market value in order to isolate the liabilities associated with the Lister site. NJDEP and OCC assert that Repsol also directed that assets be transferred from YPF subsidiaries to Repsol subsidiaries. The reorganization plan consisted of: YPF acquiring Maxus in 1993 for about $2 million and assuming a substantial debt. Repsol and YPF then allegedly reorganized Maxus in a way that the oil and gas business of Maxus would be separate and apart from the environmental liabilities. Pursuant to the 1996 plan, Tierra became the subsidiary responsible for the debt (because Maxus had been reorganized). YPFH, CLHH, YPF, and Maxus all funded certain portions of the environmental debt. The "cash infusions" were funneled from subsidiary to subsidiary until it reached Tierra. After paying a set amount of $111 million, YPF stopped funneling money towards the environmental liability.

NJDEP and OCC also allege that the reorganization plan also involved YPF's transfer of Maxus' income producing assets to offshore entities owned by YPF. Maxus' subsidiaries (income producing assets) were worth over $1 billion, but were transferred for only $568

million. NJDEP and OCC claim that in 2001, Repsol completed the financial stripping by taking the remaining $325 million (the loan that was never repaid). As a result, NJDEP alleges that Maxus and Tierra were left with no income producing assets. NJDEP points to a situation in 2001 when YPF was required to submit a $20 million financial guarantee on behalf of Maxus to NJDEP with respect to another contaminated site in South Jersey because Maxus itself lacked the necessary funds.

When the assets were sold for less than market value, NJDEP and OCC allege that Repsol and YPF knew they were facing significant liabilities in New Jersey. As proof of that knowledge, NJDEP and OCC cite the fact that Maxus, YPF, and Repsol have reserved millions of dollars for such liability for years as shown by their SEC filings. NJDEP and OCC say that Repsol, YPF, and Maxus knew that New Jersey would feel the brunt of the asset transfers in that there would be no resources available for cleanup and restoration of the Passaic River. As reflected in their financial records, YPFH and its affiliates, Maxus, Tierra and CLH Holdings, have a consolidated value of negative $750 million after the transfers.

Finally, OCC alleges that Repsol and YPF, by engaging in the above conduct, has tortiously interfered with its1986 purchase and indemnification agreement with Maxus.

NJDEP and OCC allege jurisdiction under the Calder "effects test."

In Calder v. Jones, 465 U.S. 783, 104 S. Ct. 1482, 79 L. Ed. 2d 804 (1984), the actress Shirley Jones sued the author and editor of a National Enquirer article for defamation in California. Neither defendant had meaningful contacts with California, but the newspaper had its largest circulation there. The Court found that the exercise of personal jurisdiction over the defendants was proper. The Court concluded:

> The allegedly libelous story concerned the California activities of a California resident. It impugned the professionalism of an

> entertainer whose television career was centered in California. The article was drawn from California sources, and the brunt of the harm, in terms of both respondent's emotional distress and the injury to her professional reputation, was suffered in California. In sum, California is the focal point both of the story and of the harm suffered. Jurisdiction over petitioners is therefore proper in California based on the "effects" of their Florida conduct in California . . . . Their intentional, and allegedly tortious, actions were expressly aimed at California. Petitioner South wrote and petitioner Calder edited an article that they knew would have a potentially devastating impact upon respondent. And they knew that the brunt of that injury would be felt by respondent in the State in which she lives and works and in which the National Enquirer has its largest circulation.

Calder, supra, 465 U.S. at 788-89. This language has spawned much litigation about claims of jurisdiction based upon the Calder "effects test."

The parties here agree that to prevail on this theory of jurisdiction, NJDEP and OCC must prove the three part test applicable to business torts under Calder as required by In IMO Industries, Inc. v. Kiekert AG, 155 F.3d 254 (3d Cir. 1998):

1. Repsol and YPF committed an intentional tort or its equivalent;

2. New Jersey was the focal point of the harm suffered by the NJDEP as a result of that conduct; and

3. New Jersey was the focal point of the wrongful conduct in the sense that the wrongful conduct "expressly aimed" at New Jersey.

Repsol and YPF claim that none of these criteria have been met. They claim that:

1. The Calder effects test only applies to intentional torts but that the fraudulent transfer claim is not a tort but a contract action;

2. That the alleged fraudulent transfers did not occur in New Jersey, did not involve New Jersey property, and most did not even occur in the United States; and

3. The alleged fraudulent transfers were not directed at New Jersey because the environmental liabilities in New Jersey are only one part of Maxus' and Tierra's liabilities all over the United States, especially in Ohio and Texas and the alleged fraudulent transfers were equally directed at other jurisdictions.

Repsol and YPF first argue that a fraudulent transfer is a contract and not a tort action so that the Calder "effect test" does not apply. Repsol and YPF point to a number of cases holding that for the purpose of choosing appropriate statute of limitations, a claim of fraudulent transfer is a contract and not a tort. United States v. Neidorf, 522 F.2d 916, 917-18 (9th Cir. 1975), cert. denied, 423 U.S. 1087, 96 S. Ct. 878, 47 L. Ed. 2d 97 (1976). At least one court has applied this principle in the context of the issue of in personam jurisdiction and held that the Calder effects test does not apply to a claim of fraudulent transfer. Astropower Liquidating Trust v. Xantrex Tech., Inc. (In re Astropower Liquidating Trust), 2006 Bankr. LEXIS 2443, 2006 WL 2850110 (Bankr. D. Del 2006). On the other hand, another court has allowed jurisdiction based upon a claim of fraudulent transfer in the specific context of a claim that the fraudulent transfer was designed to keep the subsidiary of funding its obligations to fund remediation and indemnification, just as OCC and NJDEP allege here. Amoco Chem. Co. v. Tex Tin Corp., 925 F. Supp. 1192, 1200 (S.D. Tex. 1996) (transferee of fraudulent transfer from guarantor of CERCLA funding agreement subject to jurisdiction even though alleged transfer occurred outside of forum state). Very recently the Third Circuit has characterized a claim of fraudulent conveyance as "a species of the intentional tort of fraud" for the application of the Calder and Imo standards for personal jurisdiction. Gambone v. Lite Rock Drywall, 2008 U.S. App. LEXIS 16028 (3d Cir. 2008) (party to fraudulent conveyance had the requisite minimum contacts to allow the exercise of jurisdiction under Imo and Calder).

The argument between the parties as to the nature of a claim of fraudulent transfer as a tort or contract must be understood in the proper context. This is not a statute of limitations case. The issue is not to decide which statute of limitations should be applied if the statute creating the cause of action for a fraudulent transfer fails to specify one. Given the secretive nature of fraudulent transfers and the difficulties in discovering them, it is logical that a longer statute of limitations will be chosen if there is a choice and typically contract actions have longer statutes of limitations than torts. The policies behind the decision as to the appropriate statute of limitations are much different than those involved in the issue of in personam jurisdiction under the Calder and Imo "effects test." A fraudulent transfer is a deliberate, intentional, and wrongful act that makes it more akin to an intentional tort for jurisdictional purposes.

As indicated earlier, Hanson v. Denckla, supra,, 357 U.S. at 253, 78 S. Ct. at 1240, 2 L. Ed.2d at 1298, requires that NJDEP prove that Repsol and YPF "purposefully avail[ed] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." The purpose of the Calder "effects test" is to provide substance to the requirement of purposeful availment.

> The term "purposeful direction," commonly seen in tort cases or cases involving internet contact, is another term, like "purposeful availment," used to connote the requirement that the defendant's contact with the forum state is the foreseeable result of the defendant's action, wherever that action might have taken place. The Supreme Court developed the purposeful direction concept in Calder v. Jones, a defamation case, in which the Court held that a California court could assert personal jurisdiction over Florida defendants whose defamatory article was published in California, where the plaintiff lived and worked, and its effects were felt there. The Court ruled that personal jurisdiction could be based on a defendant's (1) intentional actions (2) expressly aimed at the forum state (3) causing harm, the brunt of which is suffered, and which defendant knows is likely to be suffered, in the forum state. These three elements are known as the "effects test."

16-108 Moore's Federal Practice - Civil § 108.42 (LEXIS Ed. 2008).

Thus the question here is not whether the alleged wrongful conduct of Repsol and YPF in allegedly stripping Maxus of assets it might otherwise have to satisfy its obligation to remediate the environmental damage or to indemnify OCC, is a breach of contract, a quasi-contract, or a tort. The question is whether or not Repsol and YPF, at the time that it engaged in the alleged wrongful conduct, knew of Maxus' and Tierra's obligations to NJDEP and OCC and intentionally arranged for the transfer of assets to hinder, delay, or defraud NJDEP or OCC, thus intentionally causing harm in New Jersey.

The Sixth Circuit has also held that fraudulent transfer claims meet the first prong of the Calder "effects test." Air Products and Controls, Inc. v. SafeTech Int'l., 503 F.3d 544 (6th Cir. 2007). Air Products sold goods to SafeTech, a Kansas corporation, in Michigan and obtained a judgment against SafeTech when it failed to pay for the goods. Later it found out that SafeTech was judgment proof, having sold its assets after Air Products had obtained its judgment; in doing so, Air Products secured a $400,000 side payment to its President and sole shareholder, R. Gaylen Davenport (Davenport), a resident of Kansas. Air Products started a suit against SafeTech and Davenport in Michigan pursuant to Michigan's Uniform Fraudulent Transfer Act, Mich. Comp. Laws § 566. 31 et seq., the same uniform law as in New Jersey. It was removed to federal court.

SafeTech and Davenport contended that there could be no in personam jurisdiction because the alleged fraudulent conveyance was based on the sale of SafeTech's assets which presumably occurred in another jurisdiction. No evidence was presented to suggest that the complained of fraudulent transfer of SafeTech assets took place in Michigan or involved another

business entity within this State. Air Prods. & Controls, Inc. v. SafeTech Int'l, Inc., 2006 U.S. Dist. LEXIS 8423 (E.D. Mich. 2006). The District Court dismissed the case.

The Sixth Circuit reversed, holding that the evidence of contacts specifically related to SafeTech's transfer of assets supported a finding that SafeTech's conduct was directed at or aimed at Air Products such that the case would meet the Calder "effects test." The fact that Davenport knew that SafeTech owed a judgment debt to Air Products at the time it engaged in the allegedly fraudulent transfer, that it transferred the assets with the intent to hinder, delay or defraud Air Products, and that it knew Air Products had its principal place of business in Michigan such that the focal point of its actions and the brunt of the harm would be in Michigan, was sufficient to find that SafeTech's "contacts with Michigan are enhanced by its conduct which, at least as alleged, was intentionally directed to cause harm to a Michigan resident." By relying on the Calder "effects test" the Sixth Circuit considered the conduct itself and not a label of tort or contract, which might be relevant for some other purpose.

Air Products also addresses the argument made by Repsol and YPF that because the alleged fraudulent transfer itself did not take place in New Jersey, New Jersey cannot assert jurisdiction. Actually this is more akin to a subject matter jurisdiction argument, which is without merit. If an entity fraudulently transfers assets to avoid an obligation in New Jersey, the victim of that fraud need not follow the transferee all over the world to procure the benefits of the Uniform Fraudulent Transfer act. Anyone who buys an asset for less than market value, knowing that it is intended to hinder, delay or defraud a creditor of the seller of that asset must understand that it is potentially subjecting itself to the jurisdiction where the debt exists.

Finally, Repsol and YPF argue that because Maxus and Tierra have contaminated sites all over the country, particularly in Texas and Ohio, even if its actions were otherwise covered by

the Uniform Fraudulent Transfer Act, its conduct was not directed exclusively at New Jersey. Repsol and YPF argue that to satisfy IMO's third prong, NJDEP and OCC must "point to specific activity indicating that [Repsol and YPF] expressly aimed [their] tortious conduct at the forum." IMO Industries, supra, 155 F.3d at 266.

This argument also lacks merit. The actions were equally intended to hinder, delay, and defraud environmental agencies in New Jersey, Ohio, and Texas, and were intended to hinder, delay, and defraud OCC by making Maxus unable to fulfill the indemnification agreement with respect to New Jersey properties as well as those in Texas and Ohio, to a lesser degree in other states as well. Taken to its logical conclusion, this argument suggests that because Repsol's and YPF's alleged fraudulent transfers were intended to hinder, delay and defraud governments in more than one state and OCC with respect to properties in more than one state and because most of the fraudulent transfers occurred in foreign countries, no court in the United States would have jurisdiction. The fact is that NJDEP and OCC allege that Repsol and YPF knew of Maxus's and Tierra's obligations when it made them make the transactions and did so to specifically hinder, delay, and defraud NJDEP and OCC in New Jersey. It is undisputed that New Jersey is one of three states in which Maxus and Tierra have the largest environmental liabilities and thus New Jersey is one of three states that bear the bulk or the brunt of the alleged fraudulent transfers. Whether or not the effect on New Jersey is characterized as the "brunt" or "bulk" of the fraud, stripping Maxus of $432 million ($1 billion worth of assets transferred for only $568 million) of assets for the purpose hindering, delaying and defrauding NJDEP and OCC in New Jersey, Texas and Ohio is substantial enough to justify jurisdiction in any of them under due process standards, if permitted by long arm statutes. See, e.g. Yahoo! Inc. v. La Ligue Contre Le Racisme, 433 F.3d 1199, 1207 (9th Cir. Cal. 2006) (jurisdictionally sufficient harm — not "brunt" — is required for

in personam jurisdiction under "effects test"). The fact that Repsol and YPF are also alleged to have hindered, delayed, and defrauded the environmental protection agencies in Ohio and Texas and have also intended to hindered, delayed, and defrauded OCC with respect to its properties in those jurisdictions as well, cannot deprive New Jersey (and by analogy Texas and Ohio) of jurisdiction.

"General jurisdiction," however, must be based upon Repsol's and YPF's alleged "continuous and systematic contacts" with New Jersey not related to the underlying facts of the litigation. Waste Management, supra, 138 N.J. at 119; Lebel, supra, 115 N.J. at 322. General jurisdiction may be established where the totality of their contacts with New Jersey, such as doing business in New Jersey, soliciting customers of New Jersey, having employees present in New Jersey, owning property and paying taxes in New Jersey, among other considerations. There are two claims asserted here. The first is that the allegedly interactive website, www.repsolypf.com, and other activities in New Jersey justify jurisdiction; however, it is conceded that neither Repsol nor YPF have a direct presence here such as by having offices, owning property, paying taxes or having employees stationed in New Jersey. The second claim is that Repsol and YPF are subject to jurisdiction under theories commonly referred to as "alter ego" and "cohesive economic unit."

Regarding my analysis of allegations of an alter ego and cohesive economic unit theories, because the nature of this inquiry is interconnected with establishing liability ultimately at trial, at this motion to dismiss stage, NJDEP and OCC need only articulate facts "with sufficient specificity to convince the Court of the non-frivolous nature of its allegations" Star Video v. Video USA, 253 N.J. Super. 216, 224; see also Jacobs v. Walt Disney World, Co., 309 N.J. Super. 443, 454 (App. Div. 1998). New Jersey's long-arm statute permits the State to exercise

jurisdiction to the "outermost limits" under the United States Constitution. Avdel Corp. v. Mercure, supra, 58 N.J. at 268; R. 4:4-4(b)(1). Due process requires the defendant have "minimum contacts" or have "purposefully availed itself" invoking the benefits and protections of law. International Shoe v. Washington, supra, 326 U.S. at 316, 66 S. Ct. at 158, 90 L. Ed. at 102; Lebel v. Everglades Marina, Inc., supra, 115 N.J. at 322; Asahi Metal Indus. Co., Ltd. V. Superior Court of California, 480 U.S. 102, 109 (1987). Under the New Jersey law, part of the Court's inquiry into whether non-resident defendants are subject to personal jurisdiction in New Jersey includes an evaluation of the contacts and activities of resident defendants, Maxus and Tierra.

No dispute exists that both Maxus and Tierra are subject to personal jurisdiction in New Jersey. Jurisdiction is unquestioned because the present litigation involves Maxus' and Tierra's financial liability for the environmental clean-up of the Lister Site. Maxus and Tierra can expect to be haled into court in New Jersey because they are incorporated and are authorized to do business here. Jurisdiction is also proper because Maxus and Tierra have employees located here, pay taxes here, and own property here. Therefore, a finding that Maxus and Tierra either operate as a cohesive economic unit with Repsol and YPF or are their alter egos will establish general jurisdiction over Repsol and YPF.

There is also a substantial evidential dispute about whether www.repsolypf.com confers jurisdiction on Repsol and YPF and an evidential dispute about alleged hearsay regarding Repsol product purchases in New Jersey. While many of the evidential disputes were resolved by consent of the parties after oral argument, Repsol and YPF continue to argue that much evidence about www.repsolypf.com is not authenticated and not relevant. NJDEP cites Bauman v.

DaimlerChrysler AG, 2005 WL 3157472, 2005 U.S. Dist. LEXIS 31929 (N.D. Cal. 2005) which discusses the opposing views on this issue:

> Although some courts have refused to consider unauthenticated internet documents for purposes of any motion, see, e.g., Wady v. Provident Life and Accident Ins. Co. of Am., 216 F.Supp.2d 1060 (C.D.Cal.2002) (excluding internet evidence on a summary judgment motion for these reasons), this court agrees with a recent Central District of California decision holding that the court should consider the stage of litigation when determining the admissibility of unauthenticated evidence. In Moose Creek, Inc. v. Abercrombie & Fitch Co., 331 F.Supp.2d 1214 (C.D.Cal.2004), the court considered unauthenticated internet documents submitted by plaintiffs in support of their motion for preliminary injunction for trademark infringement.

I do not need to decide this authentication issue, although I note that Repsol and YPF have not specifically alleged that the description of the website and the discussion of the activities which may be conducted at the website are inaccurate, at least as of 2008. The facts about the website and product purchases all occurred in 2008 (long after the complaint was filed in 2005 and served in January of 2006) and thus cannot be used as a basis to establish jurisdiction. On the other hand, there is no statute of limitations issue as to Repsol and YPF. State Dep't of Envtl. Prot. v. Caldeira, 171 N.J. 404 (N.J. 2002) (10-year limitation period under N.J.S.A. 2A:14-1.2 applied to a fraudulent transfer action brought by the DEP rather than the 4-year limitation period under N.J.S.A. 25:2-31). If there is no jurisdiction over Repsol or YPF because they are outside New Jersey, the statute of limitations may be tolled. N.J.S.A. 2A:14-22. As was discussed during oral argument, in our increasingly global economy, who would have ever thought that Lukoil, the Russian oil company, would have the contract to operate gas stations on the Garden State Parkway? There is little doubt that someday Repsol gas stations will populate New Jersey highways. Keep in mind that internet contacts, if sufficient, justify general jurisdiction. If Repsol were dismissed in 2008 but its website justified jurisdiction in 2009 or

2010, it could be brought back into this case, which will probably last for years, if not decades, in any event.

As to internet activity:

> Internet sites have been categorized in three ways, according to interactivity levels: (1) interactive sites used to conduct business over the Web; (2) semi-interactive sites allowing the exchange of information with a host computer; and, (3) passive sites allowing access to information but not enabling the exchange of information with a host computer. When a defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper. When a defendant's [I]nternet use involves exchanging information with a host computer, the court must examine the level of interactivity and commercial nature of the exchange in order to determine the propriety of exercising personal jurisdiction. When a defendant merely posts information or advertisements on a Web site, however, personal jurisdiction over such defendant is not proper.

Machulsky v. Hall, 210 F. Supp. 2d 531, 538-39 (D.N.J. 2002)

Because the internet evidence fails to show the status of www.repsolypf.com when the lawsuit began or when Repsol and YPF were served, it cannot be evaluated; however, internet sites are becoming more and more interactive in today's global economy. It is likely that www.resolypf.com is more interactive in 2008 than it was in 2005 and in 2009 and 2010 it will even be more so. Just like someday there will likely be Repsol gas stations in New Jersey, someday www.repsolypf.com will be fully interactive and personal jurisdiction will be proper. But based upon this record at this time, www.repsolypf.com cannot be the basis for general jurisdiction.

NJDEP and OCC also seek jurisdiction over Repsol and YPF on the theory that they constitute a "cohesive economic unit" with Maxus and Tierra. The key to determining whether corporations operated as a "cohesive economic unit" is to evaluate the "economic realities of the

situation." Hoagland v. Springer, 75 N.J. Super. 560 (App. Div.), aff'd, 39 N.J. 32 (1962). That case held that if the existence of a foreign corporation relies and depends on sister or parent corporations which are present within the forum and which form a single, cohesive economic unit, then personal jurisdiction may be exercised over that foreign corporation. While Genesis Bio Pharmaceuticals, Inc. v. Chiron Corp., 27 Fed. Appx. 94, 2002 WL 27261, 2002 U.S. App. LEXIS 749 (3d Cir. 2002) suggests that the application of New Jersey's "cohesive economic unit" theory is limited to claims against a subsidiary when there is established jurisdiction over the parent, that limitation is not supported by case law or logic.

In Star Video Entertainment v. Video USA Assoc. 1, LP, 253 N.J. Super. 216 (App. Div. 1992), the Appellate Division determined that non-resident defendant limited partnerships were subject to jurisdiction in New Jersey under either a "cohesive economic unit" theory or an "alter ego" theory, or both; and that such determination did not require plaintiffs to affirmatively establish those theories at the motion to dismiss stage because where the underlying merits of the case are so intertwined with the issue of personal jurisdiction, provided facts are plead "with sufficient specificity to convince the court of the non-frivolous nature of the allegations, the case may proceed to trial." Id. at 224, quoting Vespe Contracting Co. v. Anvan Corp., 433 F. Supp. 1226, 1233 (E.D. Pa. 1977). Star Video Entertainment ("Star") entered into a contract with Video USA Associates ("Video"). Video agreed to purchase tapes on behalf of various limited partnerships, who like Video, were also non-residents. Video defaulted and owed over $500,000 to Star, which sued Video in Hudson County, naming the defendant, its principals, directors, and the series of limited partnerships seeking unpaid monies on the account as well as claims for unjust enrichment and conspiracy to defraud. Video did not answer, but ultimately agreed to conduct limited jurisdictional discovery. The trial court determined that based on the agency

relationship between the limited partnerships and Video, that the non-resident partnerships "purposely availed" themselves and should have been on notice of being haled into court in New Jersey where they were invoiced on the purchases and knew the tapes originated in New Jersey. In making that determination, the trial court found that Video's role, by agreement with the partnerships, provided "centralized management" including selection of store location, employee training, and lease negotiations. However, the court dismissed as to the Video's general partners. The trial court rejected the argument that the corporate veil should be pierced to impute liability over individual partners.

The Appellate Division affirmed as to jurisdiction over the partnerships but reversed as to jurisdiction over the general partners, finding plaintiffs plead sufficient facts to demonstrate that the partnerships were alter egos and personal investment vehicles for the partners. The court reasoned that it was appropriate to "look[] beyond the corporate form to its functional reality." Id. at 223, citing Taca Int'l Airlines v. Rolls Royce, Ltd., 84 N.J. Super. 140, 201 (Law Div. 1964). The court noted that "fairness is the essential due process inquiry." Cooke v. Yarrington, 62 N.J. 123, 128 (1973). In affirming jurisdiction based upon the theory of the entities operating as a cohesive, economic unit, the court reasoned:

> Video USA and various partnerships formed an integrated enterprise which the individual defendants control; [two men] serve as officers of the general partners; pooled revenues from most of the limited partnerships; combine financial statements for …limited partnerships; sizeable undocumented loans from the two individuals to Video USA, still outstanding and with no collection effort; interchangeable use of letterhead; the identity of office space; the abrupt severance of the management arrangement between the partnerships and Video…and …contemporaneous formation of a not-for-profit corporation to replace it.

Star Video Entertainment v. Video USA Assoc. 1, LP, supra, 253 N.J. Super. at 224-25.

The court, however, also stated that jurisdiction was appropriate under the alter ego theory, under which Star must demonstrate: (1) common ownership plus subsidiary's financial dependency; (2) the parent's domination/control; or (3) either's failure to observe corporate formalities. It concluded that despite the fact that the individual partners had never been to New Jersey or directly participated in the initial contract between Star and Video, New Jersey jurisdiction would not "offend notions of fair play and substantial justice." Id. at 226 citing International Shoe v. Washington, supra, 326 U.S. at 316, 66 S. Ct. at 158, 90 L. Ed. at 102.

To the extent that non-resident defendants in this case argue that a New Jersey court cannot exercise jurisdiction over a non-resident parent by virtue of the activities of the subsidiary in this state, they are in error. In Taca Int'l Airlines, Inc. v. Rolls-Royce, Ltd, supra, 84 N.J. Super. 140, general jurisdiction was asserted over non-resident parent corporations where subsidiaries operating in New Jersey acted with non-resident defendants as a cohesive economic unit. Taca sued Rolls-Royce, Ltd, an English corporation ("Parent"); Rolls-Royce of Canada, Ltd, a Canadian Corporation ("Canada"); and Rolls-Royce, Inc. ("Rolls-Royce") in two separate actions for property damage resulting from an alleged negligence and breach of warranty that resulted in a plane crash in Managua, Nicaragua. One suit was instituted against Rolls-Royce, which did business in New Jersey. A second suit was instituted against Parent and Canada. The cases were consolidated. Parent and Canada moved to dismiss for lack of personal jurisdiction, among other grounds alleging that they did not directly engage in business in New Jersey; had no offices in New Jersey; had no employees in New Jersey; were not authorized to do business in New Jersey; and had no bank accounts in New Jersey. Taca alleged, however, that the operations among the three companies were so interwoven that Rolls-Royce was the alter ego of Parent and Canada.

The court determined that while a subsidiary's mere doing of business in a state does not necessarily subject the parent to jurisdiction where the subsidiary operating is an "integral part of the … economic empire" creating one "cohesive economic unit," jurisdiction is proper. Id. at 149. The court found "minimum contacts" with New Jersey so as to comport with "fair play and substantial justice." The court evaluated the following facts and concluded that such activities established that Parent, Canada, and Rolls-Royce operated together as a cohesive economic unit. Significantly, Parent required Rolls-Royce to perform certain services; all lines of credit extended to Rolls-Royce were guaranteed by Parent; Rolls-Royce's employees were taken from Parent and Canada; and Rolls-Royce's board of directors consisted of those from Parent and Canada. Parent owned stock in Canada, and Canada was Rolls-Royce's sole stockholder. Rolls-Royce had representatives present at several New Jersey airports to repair and overhaul engines for aircrafts; by way of agreement between Rolls-Royce and Parent, Rolls-Royce is the sole distributor of Parent's vehicles to the United States. For each mandatory warranty given with the vehicle, Rolls-Royce authorizes claims on warranty; Rolls-Royce's employees were trained either in Canada or with Parent; at times, Rolls-Royce supplied Parent with personnel at "no charge"; and Rolls-Royce used Parent's trademark absent any licensing agreement. The court noted that the fact that no direct evidence proved that Rolls-Royce supplied the faulty part causing the accident in issue was not "conclusive on the jurisdictional argument" in and of itself.

Under the totality of the circumstances, and taking all of the contacts together, NJDEP and OCC allege that Repsol and YPF and their subsidiaries have built and operate one of the world's largest energy empires such that Repsol utilizes many subsidiaries that engage in all activities relating to the oil and gas industry. Here, NJDEP and OCC allege that Repsol and YPF

utilize its position as a central command and control unit to manage all subsidiaries. Their position is best summarized by Repsol's own 2005 SEC Form 20-F:

> Repsol YPF has operations in 32 countries, the most significant of which are Spain and Argentina. Repsol YPF has a unified global corporate structure headquarters in Madrid, Spain and Buenos Aires, Argentina. Repsol YPF manages its business as a fully-integrated organization at both the operational and organizational levels. Key functions such as strategic planning, control, finance and human resources are centrally coordinated.

NJDEP also alleges that the "alter ego" theory justifies jurisdiction over Repsol and YPF (meaning Maxus and Tierra are the "alter ego" of Repsol and YPF such that jurisdiction over one is sufficient to extend jurisdiction over all). A subsidiary can be the alter ego of a parent where it is used as a "mere instrumentality of the parent" where the parent "so dominated the subsidiary that it had no separate corporate existence"; and even where corporate dominance present, liability is only generally imposed where the parent uses the subsidiary to "perpetrate a fraud or injustice or otherwise to circumvent the law." State, Dept. of Envtl. Prot. v. Ventron Corp., 94 N.J. 473 (1983). In evaluating whether a subsidiary is the alter ego of the parent, courts consider the "entities' common ownership plus one's financial dependency"; and the "other's domination/control, or either's failure to observe corporate formalities." See Star Video v. Video USA, supra, 254 N.J. Super. at 225 (deciding jurisdiction over limited partnerships proper under cohesive economic unit theory, but that jurisdiction would also be proper under the alter ego theory). It is also notable that some of the same facts that justify specific jurisdiction also help justify general jurisdiction under the "alter ego" theory. In particular, if NJDEP's and OCC's claim is correct that YPF caused Maxus to sell it assets worth $1 billion for only $568 million, it will be hard to say that Maxus is not the "alter ego" of YPF. Why would a truly independent entity effectively give away over $432 million?

Repsol and YPF argue that because neither was involved in any way with the wrongful discharge of dioxin, even if Maxus and Tierra were "mere instrumentalities" of Repsol or YPF, Repsol and YPF could not be liable because neither committed any wrongful act.

> Except in cases of fraud, injustice, or the like, courts will not pierce a corporate veil. … The purpose of the doctrine of piercing the corporate veil is to prevent an independent corporation from being used to defeat the ends of justice … to perpetrate fraud, to accomplish a crime, or otherwise to evade the law….
>
> Under certain circumstances, courts may pierce the corporate veil by finding that a subsidiary was "a mere instrumentality of the parent corporation." … Application of this principle depends on a finding that the parent so dominated the subsidiary that it had no separate existence but was merely a conduit for the parent… Even in the presence of corporate dominance, liability generally is imposed only when the parent has abused the privilege of incorporation by using the subsidiary to perpetrate a fraud or injustice, or otherwise to circumvent the law. [citations omitted]

State, Dept. of Envtl. Prot. v. Ventron Corp., supra, 94 N.J. at 500-01.

But Repsol and YPF misconstrue the wrongful act NJDEP and OCC allege. It is not the toxic discharge; it is the fraudulent transfer. To the extent that some wrongful conduct is required for establishing "alter ego" liability, this extraordinary stripping of Maxus' assets, if proven, is arguably sufficient, at least for jurisdictional purposes.

It is important to keep in mind that the alter ego theory is a theory of piercing the corporate veil.

> The corporate entity is distinct, although all or a majority of its stock is owned by a single individual or corporation, or although the corporation is a so-called "family" or "close" corporation or is a professional service corporation consisting of persons licensed to engage in a particular profession. In certain circumstances, courts can pierce the corporate veil, that is, disregard the corporate entity and treat the shareholder and his or her corporation as a single entity. In such cases, the corporation is treated as the alter ego of the shareholder, thereby rendering the shareholder liable for the obligations of the corporation.

> A court can pierce the corporate veil of an entity where there is fraud or where a subsidiary is in fact a mere instrumentality or alter ego of its owner. The imposition of liability on a controlling person is not limited to situations where the corporation is an individual's alter ego, but extends to an individual who exercised general control over the corporation and who had the ability to control the specific activity upon which the primary violation was predicated. Moreover, the corporate entity will not be disregarded in aid of fraud or where to do so would work an injustice, and the alter ego doctrine may not be applied so as to prejudice the rights of an innocent third party who has dealt with the corporation as such.
>
> Although single or controlling ownership alone does not support a disregard of the corporate entity, and even in a close corporation, the principal or sole stockholder, permitted by law to play an active role in management, may deal with third parties without incurring personal liability, as long as the separate corporate identity is maintained, where the corporate fiction is merely an alter ego or business conduit of an individual, it may be disregarded in the interest of securing a just determination of an action. The alter ego doctrine arises when a plaintiff comes into court claiming that an opposing party is using the corporate form unjustly and in derogation of the plaintiff's interests.

18 Am Jur 2d Corporations § 51 (Lexis ed. 2008)

Repsol and YPF agree that there is a consonance between the alter ego doctrine and the doctrine of piercing the corporate veil. (See August 8, 2008 transcript at page 30). In their reply brief, Repsol argues:

> Plaintiffs want this Court to accept that there is a difference between the elements of alter ego jurisdiction and alter ego liability. There is not. The courts make no distinction between the elements required to establish jurisdiction based on alter ego and liability based on alter ego. Seltzer, 339 F. Supp. 2d at 610; Ventron, 94 N.J. at 500-01.
>
> Because corporate veil piercing requires that the parent's use of the subsidiary cause the plaintiffs harm, 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. Scott v. NG US 1, Inc., 881 N.E.2d 1125, 1133 (Mass. 2008); W. Fletcher, Cyclopedia of the Law of Private Corporations

> § 41.1; see also Ziegler v. Delaware County Daily Times, 128 F. Supp. 2d 790, 798-99 (E.D. Pa. 2001).

[Repsol Reply Brief p. 15]

In other words, if there is enough evidence to pierce the corporate veil under the alter ego theory, there is enough evidence to allow jurisdiction. The "alter ego" theory is really one of liability and not jurisdiction; however, if there is "alter ego" liability there are more than sufficient contacts to establish jurisdiction. Because the extent of liability and damages, if any, is determined by either the piercing of the corporate veil or by the alleged fraudulent transfer, there is no need to independently decide whether jurisdiction also might be proper under the "cohesive economic unit" theory alone. This is true particularly if the extent of Repsol's and YPF's liability is eventually limited to the wrongful act which forms the basis for "alter ego" liability, in this case the fraudulent transfer and not the entire costs of the remediation. At the same time, unless there is enough evidence to pierce the corporate veil and hold Repsol and YPF vicariously liable for the obligations of Maxus and Tierra, at least to the extent of any fraudulent transfers, there is little point in keeping them in this case. In essence, the merits and the jurisdictional issues are identical. YPF and Repsol argue that they should not be subject to involvement is this litigation whose costs may be substantial if, in the end, they will have no liability. While it might be convenient to decide these issues early in the litigation, NJDEP and OCC have at least made out a prima facie case for piercing the corporate veil and, with much merits discovery ahead, it would be premature to dismiss this claim, which ultimately will require a jury trial if not dismissed by summary judgment. G-I Holdings, Inc. v. Bennet (In re G-I Holdings, Inc.), 380 F. Supp. 2d 469, 478 (D.N.J. 2005) explains that while "the Court's conclusion is not without doubt, the Court finds that [in New Jersey] the doctrine of piercing the corporate veil is a legal remedy entitling Defendants to a jury trial." Accord, Verni ex rel. Burstein v. Harry M. Stevens, Inc., 387

N.J. Super. 160, 199 (App. Div. 2006) ("The issue of piercing the corporate veil is submitted to the factfinder, unless there is no evidence sufficient to justify disregard of the corporate form.") Moreover, since jurisdiction is established independently by the fraudulent transfer claim, jurisdiction is proper in any event.

While the case for "alter ego" liability and piercing the corporate veil may be easier for YPF than for Repsol because YPF is Maxus' direct parent and because the alleged fraudulent transfer was made to a subsidiary of YPF, Repsol is allegedly the recipient of an interest-free $325 million loan that has never been paid and may never be paid. In either case, there is enough to allow this case to proceed. Repsol and YPF clearly understand that the cases for jurisdiction and liability against each of them are different and, for that reason, submitted separate motions and briefs on the issues even though they are represented by the same counsel.

Regardless of the theory of jurisdiction, general or specific, it is also necessary for me to decide whether or not it is unreasonable or burdensome to require Repsol and YPF to defend this action in New Jersey. Whether or not they are vicariously liable through Maxus or Tierra or directly liable for a fraudulent transfer (without regard to the amount of damages for which they may be liable), Repsol and YPF surely knew what they were getting themselves into when they purchased Maxus and Tierra with full knowledge of their extensive exposure to gigantic environmental claims in New Jersey. As large global petrochemical companies, even the substantial litigation costs here will not be an undue burden. If NJDEP's and OCC's allegations are true, and can be proven, Repsol and YPF will justifiably be required to defend this case. NJDEP and OCC deserve the chance to try to prove their case because they have alleged sufficient facts, supported by limited jurisdictional discovery, as required under New Jersey law. Under these circumstances there is no unfairness, no surprise, and no undue burden; requiring

Repsol and YPF to appear is not unreasonable. The maintenance of this lawsuit does not offend due process because: "[d]ue process requirements are satisfied when in personam jurisdiction is asserted over a nonresident corporate defendant that has "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" Helicopteros Nacionales De Colombia, S.A. v. Hall, 466 U.S. 408, 104 S. Ct. 1868, 80 L.Ed.2d 404, quoting International Shoe Co. v. Washington, supra, 326 U.S. at 316, 66 S. Ct. at 158, 90 L. Ed. at 102. Under these facts fair play and justice are not offended in any way.

Repsol's and YPF's motion to dismiss the complaint is denied. Their motion to bar OCC's crossclaims is also denied.