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Honorable Marina Corodemus (Ret.)
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**REQUEST TO FILE
MOTION TO DISMISS
OCCIDENTAL'S
CROSS- CLAIMS**

Re: *New Jersey Department of Environmental Protection et al. v. Occidental Chemical Corp., et al.*, Dkt. No. ESX-L-9868-05, Superior Court of New Jersey, Law Division, Essex County

Dear Judge Corodemus:

On September 26, 2012, Occidental Chemical Corp. ("OCC") filed its Second Amended Cross-Claims ("Cross-Claims"). Pursuant to Paragraph 8 of CMO XII, YPF S.A., YPFH, YPFI and CLH (collectively "YPF") seek permission to file a motion to dismiss most of the Cross-Claims as they are barred by the statutes of repose and statutes of limitations. YPF has previously asserted a challenge to personal jurisdiction, which it does not reassert in this letter with the understanding that its challenge thereto is preserved. To the extent that they are applicable to YPF, YPF joins in the arguments for dismissing the Cross-Claims as stated in the letter sent today on behalf of Repsol, S.A.

Legal grounds. YPF's motion would seek dismissal of OCC's claims against YPF for (i) fraudulent transfers, (ii) declaratory judgment on alter ego liability, (iii) breach of fiduciary duty, (iv) tortious interference with contract, (v) unjust enrichment, and (vi) related aiding and abetting and conspiracy claims, all of which were asserted at the earliest on June 29, 2007 when OCC filed its Motion to File Cross-Claims. Prior to then, such claims had been extinguished or otherwise time-barred.

OCC's claims for constructive fraudulent transfer (N.J.S.A. § 25:2-25(b)) were extinguished four years after each transfer. N.J.S.A. § 25:2-31(b). OCC's claims for intentional fraudulent transfer (§ 25:2-25(a)) were extinguished on the later of four years from each transfer or one year from when each transfer could reasonably have been discovered.¹ N.J.S.A. § 25:2-31(a) (2001); *Intili v. DiGiorgio*, 693 A.2d 573, 577-78 (N.J. Super Ch. Div. 1997). This time limitation is a statute of repose which must be applied strictly as it extinguishes a party's right to bring the claim. *Daidone v. Buterick Bulkheading*, 924 A.2d 1193, 1198 (N.J. 2007). The alleged transfers at issue by Maxus to YPF indisputably occurred between 1995 and 1998, **nine years before** OCC first filed its Motion to File Cross-Claims. Each of these transfers was promptly announced in Maxus' and YPF's public filings, including SEC filings cited in the Cross-

¹ The November 2002 Amendment to that statute, which changed the date on which the one year discovery period begins to run to "after the transfer or obligation was discovered by the claimant," has no applicability to OCC's claims that were extinguished prior to its effective date. See *Goldstein v. Deichl*, No. SOM-C 12009-05, 2005 WL 1017614, *5 (N.J. Sup. Ct. Ch. Div. March 4, 2005).


Claims. Those public filings put OCC, as an alleged creditor of Maxus at that time, on notice of those transfers. See, e.g. SASCO 1997 NI, LLC v. Zudkewich, 787 A.2d 469, 474-476 (N.J. 2001). In addition, OCC challenges Repsol's alleged transfers of assets from Maxus and YPF in 1999, 2001, 2002 and 2006. While the 2006 transfer might survive a statute of repose challenge, the others clearly will not.

To the extent its fraudulent transfer claims fail, OCC's claim for declaratory judgment on alter ego liability, which relies entirely on its fraudulent transfer claims, fails as well. Bd. of Trs. of Trucking Emps. of N.J. Welfare Fund, Inc.-Pension Fund v. Able Truck Rental Corp., 822 F. Supp. 1091, 1095 (D.N.J. 1993). Similarly, OCC's breach of fiduciary duty and aiding and abetting claims, which also rely entirely on its fraudulent transfers claims (Cross-Claims ¶¶ 126, 134), must be dismissed. OCC had six years from the date it reasonably should have learned of these transfers to bring these claims. See N.J.S.A. § 2A:14-1; Lopez v. Swyer, 300 A.2d 563, 565 (N.J. 1973). The vast majority of these transfers became public more than six years before OCC's June 29, 2007² Motion to File Cross-Claims.

OCC's claim for tortious interference with Maxus' indemnity obligations and unjust enrichment claim are also subject to a six year statute of limitations. N.J.S.A. § 2A:14-1. Being unable to establish any cumulative injurious effect, OCC's untimely tortious interference claims are not subject to the continuing tort doctrine as a matter of law, and began to run when Maxus' purported obligations first arose years prior to June 2001. See In re Casini, 307 B.R. 800, 813 (Bankr. D.N.J. 2004). OCC's unjust enrichment claim also is untimely at it accrued when YPF was allegedly enriched at OCC's expense beginning in 1995. Baer v. Chase, 392 F.3d 609, 622-24 (3d Cir. 2004).

Anticipated benefits. A resolution of YPF's motion to dismiss will provide two significant benefits. First, the possible elimination of a significant number of claims will save the Court enormous discovery, summary judgment and trial work, and substantially reduce the parties' litigation costs. Second, the possible elimination of these claims will clarify the parties' litigation risks which will greatly assist them in their ongoing settlement analyses. While OCC may point to the fact that the State (which generally has a longer limitations period) has asserted the same claims, in the event a global settlement cannot be reached, eliminating OCC's claims may enhance the attractiveness to YPF of settling with the State alone.

Respectfully yours,



Thomas J. Hall

cc: All Counsel

² YPF will assert in its motion to dismiss that, as OCC first filed those claims on September 26, 2012 and those claims do not relate back to OCC's earlier Cross-Claims, the operative filing date for statute of limitations purposes is the date they were first asserted on September 26, 2012.