SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

NOREX PETROLEUM LIMITED, Plaintiff, v. LEONARD BLAVATNIK; VICTOR VEKSELBERG; SIMON KUKES; ACCESS INDUSTRIES, INC.; ALFA GROUP CONSORTIUM; RENOVA, INC; OAO TYUMEN OIL COMPANY; TNK-BP LIMITED; and BP PLC, Defendants.	Index No. 650591/2011 I.A.S. Part 3 Honorable Eileen Bransten Motion Sequence No. 9

BP P.L.C.'S MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS

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Defendant BP p.l.c. ("BP") respectfully submits this memorandum in support of its motion, pursuant to CPLR 3211(a)(5) and 3211(a)(7), to dismiss the First Amended Complaint (the "Complaint") filed by plaintiff Norex Petroleum Limited ("Norex" or "plaintiff").

PRELIMINARY STATEMENT

Plaintiff fails to allege a single instance of wrongful conduct by BP. The gravamen of all of plaintiff's causes of action is the alleged "Illegal Takeover" of Norex's interest in a Russian oil company, ZAO Yugraneft ("Yugraneft"), by defendants Access Industries, Inc., Renova, Inc., Alfa Group Consortium, Leonard Blavatnik, Victor Vekselberg, OAO Tyumen Oil Company ("TNK") and Simon Kukes (collectively, the "AAR/TNK Defendants"). Plaintiff does not – because it cannot – allege that BP had *any* involvement in the alleged Illegal Takeover. (*See* Compl. ¶¶ 33-51.) Instead, plaintiff alleges in a single paragraph only that BP "joined forces" with the AAR/TNK Defendants to form a new company, defendant TNK-BP Limited ("TNK-BP"), several years after the alleged Illegal Takeover. (*Id.* ¶ 52.)

In the absence of any other factual allegations concerning BP, plaintiff resorts to wholly conclusory allegations that BP "conspired" with the other defendants and "joined" the alleged Illegal Takeover two years after its alleged completion. (*Id.* ¶¶ 1, 53, 56, 62.) Plaintiff thus seeks to hold BP jointly and severally liable for the AAR/TNK Defendants' alleged misappropriation of Norex's interest in Yugraneft based solely on BP's subsequent entry into a legitimate, wholly-separate business venture with the AAR/TNK Defendants that resulted in the creation of one of the largest oil companies in the world, TNK-BP. Neither New York nor Russian law permits such an imposition of liability on a party that plaintiff admits did not engage in any wrongful conduct. The Complaint should be dismissed in its entirety and with prejudice as to BP.

First, plaintiff has failed to plead any substantive cause of action against BP under New York or Russian law. As explained below, plaintiff's allegations are grossly insufficient to state any of its six New York law causes of action as to BP. And, as explained in the Affidavit of Valerii Musin, head of the Civil Procedure Department of the St. Petersburg University School of Law ("Musin Aff."), filed herewith, the two Russian law causes of action are likewise unsustainable as to BP under the Russian Civil Code.

Second, plaintiff has utterly failed to plead any *facts* establishing the existence of a conspiracy linking BP to any of the causes of action plaintiff attempts to plead against the other defendants. Plaintiff has not alleged facts demonstrating that BP entered into a conspiratorial agreement, intentionally participated in furtherance of a conspiracy or engaged in any independent culpable behavior. All three defects are independently fatal to plaintiff's attempt to connect BP to the other defendants' alleged historical tortious conduct.

Moreover, all of plaintiff's causes of action arising from the alleged Illegal Takeover are time-barred as to BP by the applicable Alberta (Canada) and New York statutes of limitations. As explained in the Affidavit of Michael A. Thackray, Q.C., Partner, McMillan LLP ("Thackray Aff."), filed herewith, the two-year Alberta statute of limitations began to run as to BP in 2003 and expired in 2005, nearly six years before plaintiff filed this action in March 2011. Similarly, under New York law, plaintiff's causes of action accrued when the alleged Illegal Takeover was completed in June 2001, Compl. ¶¶ 46-48, or earlier, and the applicable statutes of limitations (ranging from two to six years) expired long before March 2011.

In addition to the unique grounds for dismissal of the Complaint as to BP addressed in this Memorandum, Norex's causes of action involving alleged tortious conduct by Russian entities against a Cypriot company headquartered in Canada and involving exclusively

Russian assets do not belong in the New York Courts and BP adopts, to the extent they are applicable to BP, the additional grounds for dismissal urged in the Memorandum of Law filed by Leonard Blavatnik, *et al.*, dated today (the "Defendants' Jt. Mem.").

BACKGROUND[1]

A. Plaintiff's Dispute with the AAR/TNK Defendants.

Plaintiff alleges that over a decade ago in Russia, the AAR/TNK Defendants conspired to and did misappropriate part of its interest in a Russian company, Yugraneft. The AAR/TNK Defendants allegedly did so through a series of wrongful acts dubbed the "Illegal Takeover." (Compl. ¶¶ 33-51.) Those actions culminated in the entry of a judgment against *plaintiff* by a Russian court in January 2002 reducing its equity interest in Yugraneft to 20%. (Compl. ¶ 51.) BP is not alleged to have had any interest in Yugraneft or in the Russian litigation involving plaintiff's interest in Yugraneft.

B. Plaintiff Sues the AAR/TNK Defendants in U.S. Federal Court.

After extensive litigation in Russia, in February 2002, plaintiff brought a civil RICO claim against the AAR/TNK Defendants and others in federal court in New York seeking redress for the same alleged conduct constituting the alleged Illegal Takeover (the "Original RICO Complaint"). (Compl. ¶ 23.) BP was not a defendant in that action. *Norex Petroleum Ltd.* v. *Access Indus., Inc.*, No. 02-1499 (S.D.N.Y. Feb. 26, 2002) (Compl.) (Viapiano Aff. Ex. A). Rather, plaintiff described BP as a victim harmed by the AAR/TNK Defendants' alleged wrongdoing in Russia. (*Id.* ¶¶ 99-100, 103, 341-42.) In 2004, the federal district court dismissed the Original RICO Complaint on *forum non conveniens* grounds, finding that the "central premise upon which all of Plaintiff's allegations of actionable harm rest is the allegation that

[1] The following allegations are drawn from the Complaint. Their use here is not intended as an admission of their truth by BP.

Defendants have gained control of Russian entities and Russian company assets improperly, through frauds and violence carried out in Russia and involving Russian persons and institutions." *Norex Petroleum Ltd.* v. *Access Indus., Inc.*, 304 F. Supp. 2d 570, 581 (S.D.N.Y. 2004), *rev'd*, 416 F.3d 146 (2d Cir. 2005). The Second Circuit vacated and remanded not because it disagreed that Russia had a greater interest in the subject matter of this dispute than the United States, but because the district court had failed to properly assess the availability of an adequate alternative forum in its *forum non conveniens* analysis. *Norex Petroleum Ltd.* v. *Access Indus., Inc.*, 416 F.3d 146, 156 (2d Cir. 2005).

C. Plaintiff Sues BP Notwithstanding Its Lack of Involvement in the Alleged Illegal Takeover.

On remand to the district court in December 2005, plaintiff filed an amended complaint adding BP and others as defendants (the "Amended RICO Complaint"). *Norex Petroleum Ltd.* v. *Access Indus., Inc.*, No. 02-1499 (S.D.N.Y. Dec. 21, 2005) (Compl.) (Viapiano Aff. Ex. B). The gravamen of plaintiff's claims remained the same—the alleged Illegal Takeover of its interest in Yugraneft. Like the Original RICO Complaint, the Amended RICO Complaint did not allege any involvement by BP in the alleged Illegal Takeover. Rather, as here, plaintiff sought to hold BP liable for the AAR/TNK Defendants' alleged actions solely because in the period between the filing of the Original and the Amended RICO Complaints, BP had entered into an agreement with the AAR/TNK Defendants to form a new company, TNK-BP. BP joined the other defendants in moving to dismiss on myriad grounds, including on the basis that, given the absence of any alleged conduct by BP relating to plaintiff's claims involving Yugraneft, plaintiff had failed to state a claim against BP and that plaintiff's claims were time-barred as to BP. In 2007, the federal district court dismissed the Amended RICO Complaint for lack of subject matter jurisdiction and in doing so did not reach the issue of whether plaintiff had

stated a timely claim against BP based on alleged historical conduct by the other defendants. *Norex Petroleum Ltd.* v. *Access Indus., Inc.*, 540 F. Supp. 2d 438 (S.D.N.Y. 2007). The Second Circuit affirmed on the ground that plaintiff had failed to state a RICO claim, concluding that the "slim contacts with the United States" were "insufficient to support extraterritorial application of the RICO statute." *Norex Petroleum Ltd.* v. *Access Indus., Inc.*, 631 F.3d 29, 33 (2d Cir. 2010). Plaintiff thereafter sought review of the Second Circuit's decision by the U.S. Supreme Court.

D. Plaintiff Tries Yet Again in New York State Court.

In March 2011, plaintiff filed its initial complaint in this action, alleging for the first time in nearly a decade of litigation concerning the alleged Illegal Takeover various violations of New York law. In addition, plaintiff asserted two Russian law claims. In June, while its petition for review by the U.S. Supreme Court of the dismissal of its federal action was pending and while this action was stayed pursuant to an order of this Court, plaintiff filed an amended complaint, the operative pleading and plaintiff's fourth complaint in the United States seeking redress for the alleged Illegal Takeover. Like the two federal complaints and the original complaint in this action, the Complaint does not allege that BP had *any* involvement in the alleged Illegal Takeover. Instead, plaintiff again alleges only that BP "joined forces" with the AAR/TNK Defendants several years after the alleged Illegal Takeover of Yugraneft to form a new company, TNK-BP. (Compl. ¶ 52.) The Complaint does not contain *any* other factual allegations concerning BP.

Notwithstanding the fact that the crux of plaintiff's causes of action is the alleged Illegal Takeover of a Russian oil company in Russia by Russian entities and others, plaintiff purports to assert six causes of action under New York law: tortious interference with contract and with prospective business relations, conversion, breach of fiduciary duties, unjust enrichment

and money had and received. Plaintiff also purports to assert two causes of action under Russian law: unjust enrichment and intentional tortious conduct.

STANDARD ON THIS MOTION

In reviewing a motion to dismiss under CPLR 3211(a), this Court must "determine if, assuming the truth of the facts alleged, the complaint states the elements of a legally cognizable cause of action." *1199 Hous. Corp.* v. *Int'l Fid. Ins. Co.*, 788 N.Y.S.2d 88, 89 (1st Dep't 2005). The Court should disregard allegations that consist of "bare legal conclusions." *Franklin* v. *Winard*, 606 N.Y.S.2d 162, 163 (1st Dep't 1993). In addition, to state a cognizable claim, plaintiff's allegations must be "sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action." CPLR 3013. Under this standard, "[a] complaint is insufficient if based solely on conclusory statements, unsupported by factual allegations." *Melito* v. *Interboro-Mutual Indem. Ins. Co.*, 423 N.Y.S.2d 742, 744 (4th Dep't 1979); *Johnson* v. *Goord*, 736 N.Y.S.2d 284, 285 (3d Dep't 2002) ("conclusory and generalized statements . . . unsupported by any specific factual allegations [] fall far short of meeting the requirements of CPLR 3013").

ARGUMENT

I. PLAINTIFF HAS FAILED TO ALLEGE A SINGLE FACT CONNECTING BP TO THE ALLEGED TORTIOUS INTERFERENCE CAUSES OF ACTION AND THUS ITS FIRST AND SECOND CAUSES OF ACTION MUST BE DISMISSED.

To plead tortious interference with contract under New York law, plaintiff must allege: (1) the existence of a valid contract between it and a third party; (2) defendant's knowledge of that contract; (3) defendant's intentional procurement of the third-party's breach of the contract without justification; (4) breach of the contract; and (5) resulting damages. *Lama Holding Co.* v. *Smith Barney Inc.*, 88 N.Y.2d 413, 424 (1996). To plead tortious interference

with prospective business relations, plaintiff must allege that defendant (1) intentionally and (2) through wrongful acts (3) prevented a third party from extending a contractual relationship to the plaintiff. *WFB Telecomms., Inc.* v. *NYNEX Corp.*, 590 N.Y.S.2d 460, 461 (1st Dep't 1992). Plaintiff has not alleged a single fact even suggesting that BP procured any breach of the Yugraneft shareholder agreement or prevented any party from extending a contractual relationship to plaintiff. Accordingly, plaintiff's causes of action for tortious interference with contract and with prospective business relations must be dismissed as to BP.

II. PLAINTIFF HAS FAILED TO PLEAD A CAUSE OF ACTION FOR CONVERSION AS TO BP UNDER NEW YORK LAW AND THUS ITS THIRD CAUSE OF ACTION MUST BE DISMISSED.

To plead conversion, plaintiff must "show legal ownership or an immediate superior right of possession to a specific identifiable thing, and must show that the defendant exercised an unauthorized dominion over the thing in question to the exclusion of the plaintiff's rights." *Fiorenti* v. *Cent. Emergency Physicians*, 762 N.Y.S.2d 402, 403-04 (2d Dep't 2003). Where the allegedly converted property is money, it must be specifically identifiable and subject to an obligation to be returned or otherwise treated in a particular manner. *Republic of Haiti* v. *Duvalier*, 626 N.Y.S.2d 472, 475 (1st Dep't 1995).

Plaintiff has not pled a single fact demonstrating that BP has exercised unlawful dominion over a specific identifiable thing (*e.g.*, Yugraneft's assets) or specifically identifiable funds (*e.g.*, dividends from Yugraneft) allegedly belonging to plaintiff. Plaintiff only alleges that BP, as a shareholder of TNK-BP, received dividends from TNK-BP, Compl. ¶ 53, but alleges no facts connecting BP and specifically identifiable funds *belonging to plaintiff*. The fact that TNK-BP may have generated some revenue from Yugraneft's assets and then paid BP dividends out of *all of* the revenue it generated from many other assets is insufficient to state a cause of action for conversion against BP. The law requires much more detailed specification of the funds allegedly

belonging to plaintiff if a cause of action for conversion of money is to be sustained. *See Interior By Mussa, Ltd.* v. *Town of Huntington*, 664 N.Y.S.2d 970, 972 (2d Dep't 1997) ("If the allegedly converted money is incapable of being described or identified in the same manner as a specific chattel, it is not the proper subject of a conversion action."); *Montalvo* v. *J.P. Morgan Chase & Co.*, 906 N.Y.S.2d 781 (Sup. Ct. 2009) (table) ("funds identified in a bank account [were] not sufficiently specific and identifiable, in relation to the bank's other funds, to support a claim for conversion against the bank"). At most, plaintiff may or may not have a claim for the payment of some dividends from Yugraneft, but the mere contractual right to payment cannot be the basis of a cause of action for conversion. *Id.*; *see also Daub* v. *Future Tech Enter., Inc*., 885 N.Y.S.2d 115, 118 (2d Dep't 2009) (affirming dismissal of conversion cause of action based upon "an alleged contractual right to payment where the plaintiff never had ownership, possession, or control of the disputed funds"). Accordingly, plaintiff's cause of action for conversion must be dismissed as to BP for failure to plead that BP possesses specifically identifiable funds belonging to plaintiff or that BP has exercised "unlawful dominion" over something belonging to plaintiff.

III. PLAINTIFF HAS FAILED TO ALLEGE THAT BP OWED IT FIDUCIARY DUTIES UNDER NEW YORK LAW AND THUS ITS FOURTH CAUSE OF ACTION MUST BE DISMISSED.

It is well settled that a complaint alleging a cause of action for breach of fiduciary duties must comply with the heightened pleading standard of CPLR 3016. *See, e.g.*, *DeRaffele* v. *210-220-230 Owners Corp.*, 823 N.Y.S.2d 202, 203 (2d Dep't 2006); *Dove* v. *L'Agence, Inc.*, 671 N.Y.S.2d 661, 662 (1st Dep't 1998). That rule requires plaintiff to "state[] in detail" the "circumstances constituting the wrong." CPLR 3016(b).

To plead a cause of action for breach of fiduciary duties, plaintiff must, as a threshold matter, allege the existence of such duties, either by virtue of an express agreement or

"special circumstances" that give rise to a fiduciary relationship. *V. Ponte & Sons, Inc.* v. *Am. Fibers Int'l*, 635 N.Y.S.2d 193, 194 (1st Dep't 1995); *Pappas* v. *Passias*, 707 N.Y.S.2d 178, 179 (2d Dep't 2000); *Dove*, 671 N.Y.S.2d at 662. Plaintiff has pled neither.

Plaintiff's sole allegation concerning fiduciary duties states, "Defendants owed Norex fiduciary duties . . . due to the nature of their ownership and control of [Chernogorneft], Norex's business partner in the joint-venture Yugraneft." (Compl. ¶ 71.) First, such a conclusory allegation fails to satisfy CPLR 3016(b). Second, to the extent plaintiff's allegation as to the "defendants" generally is intended to include BP, plaintiff knows full well that *BP* had no control of Chernogorneft or Yurgraneft, as is made clear by the other allegations in the complaint. (*Id*. ¶ 35 (alleging that "the Billionaire Oligarchs, Alfa and TNK" – not BP – "assumed full control of [Chernogorneft's] assets, including its minority interest in Yugraneft" by September 1999).) Plaintiff alleges no other special circumstances existing between it and BP that would give rise to a fiduciary relationship. Absent an express agreement providing for fiduciary duties or some other allegations of special circumstances, BP did not and could not have owed fiduciary duties to plaintiff. *L. Magarian & Co.* v. *Timberland Co.*, 665 N.Y.S.2d 413, 414 (1st Dep't 1997).

IV. PLAINTIFF HAS FAILED TO STATE CAUSES OF ACTION FOR UNJUST ENRICHMENT AND MONEY HAD AND RECEIVED UNDER NEW YORK LAW AGAINST BP.

A. Plaintiff Has Failed to Adequately Allege the Elements of Unjust Enrichment and Money Had and Received as to BP.

To plead unjust enrichment under New York law, plaintiff must allege that (1) defendant was enriched, (2) at plaintiff's expense and (3) it is against equity and good conscience to permit defendant to retain what plaintiff seeks to recover. *Mandarin Trading Ltd.* v. *Wildenstein*, 16 N.Y.3d 173, 182 (2011). In addition, a claim for unjust enrichment "will not be supported if the connection between the parties is too attenuated." *Id.* Again, plaintiff has not

alleged *any* facts demonstrating that BP was enriched at its expense, that it would be against equity and good conscience to permit BP to retain dividends received from TNK-BP, or even that there is a relationship between plaintiff and BP, let alone one sufficient to support a cause of action for unjust enrichment.

First, plaintiff has not alleged any facts demonstrating that BP was enriched at plaintiff's expense. Plaintiff does not allege that BP received any of plaintiff's interest in Yugraneft or any of Yugraneft's assets. The only thing the Complaint alleges that BP has received is dividends from TNK-BP. (Compl. ¶ 53.) But the fact that BP, as a shareholder in TNK-BP, received dividends from TNK-BP and some unidentified portion of TNK-BP's revenue may have come from Yugraneft's assets does not mean that BP was enriched at plaintiff's expense. *Martes* v. *USLIFE Corp.*, 927 F. Supp. 146, 149 (S.D.N.Y. 1996) (dismissing unjust enrichment claim against former shareholder of entity that issued insurance policy to plaintiff because there "is no basis here for any suggestion that [shareholder] received or possesses anything that belongs to plaintiff."). In fact, the Appellate Division's dismissal of an unjust enrichment cause of action in *Levin* v. *Kitsis* forecloses plaintiff's attempt to plead such a cause of action against BP. The *Levin* court dismissed an unjust enrichment cause of action against an individual that "owned and controlled" the allegedly enriched corporation. 920 N.Y.S.2d 131, 134 (2d Dep't 2011). In the absence of any basis for piercing the corporate veil, the court found the allegations of unjust enrichment insufficient as to the individual-shareholder. *Id.* Here, BP owns just 50% of TNK-BP, the allegedly enriched company, and plaintiff has pled no fact suggesting a basis for piercing the corporate veil. *See also Old Republic Nat'l Title Ins. Co.*, v. *Cardinal Abstract Corp.*, 790 N.Y.S.2d 143, 145 (2d Dep't 2005) (holding allegation that defendants "received benefits, standing alone" insufficient to plead unjust enrichment claim).

Second, plaintiff has not alleged any fraudulent or tortious conduct, or even *any* conduct, by BP demonstrating that it is against equity and good conscience to allow BP to retain dividends received from TNK-BP. BP is alleged to have done nothing more than enter into the TNK-BP Agreement and receive dividends owed to it as a TNK-BP shareholder, allegedly with knowledge of plaintiff's allegations as to the loss of its interest in Yugraneft. *See Paramount Film Distrib. Corp.* v. *New York,* 30 N.Y.2d 415, 421 (1972) ("Generally, courts will look to see . . . whether the defendant's conduct was tortious or fraudulent.").

Third, plaintiff has not pled any relationship between it and BP. The Court of Appeals and the Appellate Division frequently affirm dismissals of unjust enrichment claims when the plaintiff has failed to plead a sufficient relationship between it and the defendant. For example, in *Georgia Malone & Co.* v. *Rieder*, the Appellate Division upheld this Court's dismissal of an unjust enrichment claim on the ground of lack of relationship between plaintiff and defendants, and rejected the argument that an unjust enrichment cause of action can be based solely on defendant's knowledge that plaintiff had not been paid or on the fact that defendant may have profited in some way from plaintiff's work. 926 N.Y.S.2d 494, 498 (1st Dep't 2011). And, in *Sperry* v. *Crompton Corp.*, the Court of Appeals affirmed the dismissal of an unjust enrichment claim because "the connection between the purchaser of tires and the producers of chemicals used in the rubber-making process [wa]s simply too attenuated." 8 N.Y.3d 204, 215 (2007). The alleged relationship between plaintiff and BP is even more attenuated. The only factual allegation in the Complaint involving BP is that BP knowingly entered into a joint venture agreement with entities the plaintiff alleges committed historic unlawful or tortious acts. Under New York law, this is simply insufficient. Plaintiff does not allege any actual relationship between it and BP: indeed, Norex's Complaint makes clear that BP had *no* relationship with

Norex in the context of the alleged Illegal Takeover of Yugraneft, or otherwise. The fact that the AAR/TNK Defendants may have contributed Yugraneft's assets to TNK-BP, and BP may have received some incremental benefit therefrom, does not create a relationship between BP *and plaintiff*. *See Denenberg* v. *Rosen*, 897 N.Y.S.2d 391, 396 (1st Dep't 2010) ("[w]hatever benefits [defendant] may have received were too attenuated from the conduct alleged and from [its] relationships with plaintiff.").

To plead a cause of action for money had and received, plaintiff must allege that "(1) the defendant received money belonging to [the] plaintiff, (2) the defendant benefited from receipt of the money, and (3) under principles of equity and good conscience, the defendant should not be permitted to keep the money." *In re Estate of Witbeck*, 666 N.Y.S.2d 315, 317 (3d Dep't 1997). The cause of action is available "if one man has obtained money from another, through the medium of oppression, imposition, extortion, or deceit, or by the commission of a trespass." *Parsa* v. *State*, 64 N.Y.2d 143, 148 (1984). As explained above, plaintiff has not alleged any conduct by BP that even suggests that "principles of equity and good conscience" require BP to pay to plaintiff funds it received as dividends from TNK-BP.

B. Plaintiff May Not Pursue Quasi-Contract Causes of Action While Simultaneously Alleging the Existence of a Contract Covering the Instant Dispute.

Unjust enrichment and money had and received are quasi-contract causes of action viable only in the absence of a written contract. *Clark-Fitzpatrick, Inc.* v. *Long Island R.R. Co.*, 70 N.Y.2d 382, 388-89 (1987) ("a quasi-contractual obligation is one imposed by law *where there has been no agreement or expression of assent, by word or act, on the part of either party involved*.") (internal quotation omitted). "It is impermissible . . . to seek damages in an action sounding in quasi contract where the suing party has fully performed on a valid written

agreement, the existence of which is undisputed, and the scope of which clearly covers the dispute between the parties." *Id.* at 389.

Plaintiff is attempting the impermissible: to maintain causes of action for unjust enrichment and money had and received, while simultaneously alleging the existence of a contract – the Yugraneft shareholder agreement – that covers this dispute. Ultimately, plaintiff seeks recognition of its alleged interest in Yugraneft and the payment of dividends allegedly owed. (Compl. ¶¶ 1 (alleging theft of interest in Yugraneft); 58 (alleging breach of the Yugraneft shareholder agreement); 86 (seeking payment of dividends).) Plaintiff's interest in Yugraneft and its entitlement to dividends are questions of contract interpretation governed by the Yugraneft shareholder agreement. As such, plaintiff cannot allege quasi-contract causes of action and its unjust enrichment and money had and received causes of action should be dismissed. *See Kassover* v. *Prism Venture Partners, LLC*, 862 N.Y.S.2d 493, 449 (1st Dep't 2008) (affirming dismissal of unjust enrichment cause of action "because the Merger Agreement covers the same subject matter"). The fact that BP was not a party to the Yugraneft shareholder agreement is irrelevant so long as it governs the dispute. *Vitale* v. *Steinberg*, 764 N.Y.S.2d 236, 239 (1st Dep't 2003).[2]

V. PLAINTIFF HAS FAILED TO ADEQUATELY ALLEGE A CONSPIRACY INVOLVING BP UNDER NEW YORK LAW AND THUS ALL OF ITS NEW YORK LAW CAUSES OF ACTION MUST BE DISMISSED AS TO BP FOR FAILURE TO STATE A CAUSE OF ACTION.

Because plaintiff has failed to allege a single fact connecting BP to its New York law causes of action, plaintiff attempts to link BP to the alleged historical tortious conduct of the other defendants by asserting that BP "joined forces" with the other defendants, Compl. ¶ 52, and

[2] Plaintiff's unjust enrichment cause of action also should be dismissed because it is "indistinguishable from [plaintiff's] other . . . causes of action, and therefore insufficient." *Fallon* v. *McKeon*, 230 A.D.2d 629, 630 (1st Dep't 1996) (affirming dismissal of unjust enrichment cause of action where plaintiff "simply claims damages identical to" those asserted in its other causes of action).

conclusorily asserting that all "defendants" engaged in a "conspiracy." Such a conclusory assertion as to BP is plainly inadequate under New York law. To plead a conspiracy under New York law, plaintiff must allege, in addition to the elements of an underlying tort: (1) a corrupt agreement, *i.e.*, an agreement to engage in specific tortious conduct, among two or more parties; (2) an overt act in furtherance of the agreement; (3) each party's intentional participation in furtherance of the agreed-to common purpose; and (4) damages. *Abacus Fed. Sav. Bank* v. *Lim*, 905 N.Y.S.2d 585, 588 (1st Dep't 2010); *L.B.* v. *Town of Chester*, 232 F. Supp. 2d 227, 239 (S.D.N.Y. 2002); *Linens of Europe, Inc.* v. *Polo Linen Serv., Inc.*, No. 05-5102, 2005 U.S. Dist. LEXIS 35581, at *5 (S.D.N.Y. Dec. 21, 2005) (Viapiano Aff. Ex. C). "Conclusory claims of conspiracy that are not pleaded with sufficient factual grounding should be dismissed." *Donini Int'l, S.P.A.* v. *Satec (U.S.A.), LLC*, No. 03-9471, 2004 U.S. Dist. LEXIS 13148, at *9 (S.D.N.Y. July 13, 2004) (Viapiano Aff. Ex. D); *see also Stachura* v. *O'Connell*, 63 N.Y.S.2d 611, 614 (3d Dep't 1946) ("It is a familiar rule that general allegations of . . . conspiracy are of no value in stating a cause of action.").

"[M]ore than a conclusory allegation of conspiracy or common purpose is required to state a cause of action against [a] nonactor." *Schwartz* v. *Soc'y of the N.Y. Hosp.*, 605 N.Y.S.2d 72, 73 (1st Dep't 1993). Rather, plaintiff must plead that the non-actor "engaged in some independent culpable behavior." *Lipin* v. *Hunt*, 538 F. Supp. 2d 590, 602 (S.D.N.Y. 2008) (internal quotation omitted). Plaintiff's single factual allegation concerning non-actor BP – that it entered into a joint venture with some of the other defendants two years after the alleged Illegal Takeover, Compl. ¶ 52 – does not come close to adequately alleging a conspiracy involving BP. Plaintiff has failed to plead that BP entered into a corrupt agreement, intentionally participated in furtherance of a common purpose or engaged in independent culpable behavior.

A. Plaintiff Has Not Alleged that BP Entered Into Any Corrupt Agreement.

In order to plead a conspiracy, plaintiff must allege facts demonstrating that BP entered into an agreement to "engage in the specified tortious conduct." *Linens of Europe*, 2005 U.S. Dist. LEXIS 35581, at *5. The only possible conspiratorial agreement alleged in the Complaint is an agreement among some defendants other than BP, the purpose of which was "to divest Norex of its majority interest in Yugraneft and take complete control of the company and its valuable oil field." (Compl. ¶ 40; *see also id.* ¶¶ 1-2.) Plaintiff does not allege *a single fact* demonstrating that BP participated in such an agreement.

Instead, plaintiff alleges only that BP and the AAR/TNK Defendants entered into a wholly separate joint venture agreement to form TNK-BP (the "TNK-BP Agreement"). Plaintiff does not allege that the TNK-BP Agreement was part of or in furtherance of any conspiratorial agreement to misappropriate plaintiff's interest in Yugraneft. Indeed, BP entered into the TNK-BP Agreement *nearly two years after* the objectives of the conspiratorial agreement were allegedly realized. (Compl. ¶¶ 51-52). Entering into an agreement to form a new company, even with entities that allegedly agreed to engage in tortious conduct several years before, is not the same as entering into the conspiratorial agreement itself. *See Linens of Europe*, 2005 U.S. Dist. LEXIS 35581, at *5 (dismissing tort claims against defendants allegedly involved in a larger conspiracy because "plaintiff does not contend that any agreement between defendants and the other alleged conspirators to engage in the specified tortious conduct existed"); *see also Reo* v. *Shudt*, 534 N.Y.S.2d 553, 554-55 (3d Dep't 1988) (dismissing tort causes of action because plaintiff failed to show that defendants "planned and perpetrated the acts in concert" and thus failed to satisfy the agreement element of conspiracy) (internal quotation omitted). Plaintiff's allegations thus fall well short of pleading that BP entered into a

corrupt agreement to engage in the specified tortious conduct—the alleged Illegal Takeover of plaintiff's interest in Yugraneft.[3]

B. Plaintiff Has Not Alleged that BP Intentionally Participated in Some Action in Furtherance of the Alleged Conspiracy.

In order to plead a conspiracy, plaintiff must also allege facts demonstrating BP's intentional participation in some action in furtherance of the conspiracy's purpose. *See Rusyniak* v. *Gensini*, 629 F. Supp. 2d 203, 227-28 (N.D.N.Y. 2009) (rejecting plaintiff's attempt to connect individual defendant to other defendants' alleged torts via conspiracy allegations because "[w]hat is conspicuously lacking from Plaintiffs' pleadings is any factual allegation plausibly suggesting that [the individual] participated in [actions giving rise to the alleged torts]"). Plaintiff does not allege any participation by BP in any action that allegedly contributed to the takeover of plaintiff's interest in Yugraneft. (*See* Compl. ¶¶ 33-51.)

Again, the only "action" by BP alleged in the Complaint is its entry into the TNK-BP Agreement. Plaintiff does not – because it cannot – allege a single fact demonstrating that the formation of TNK-BP was in furtherance of the alleged Illegal Takeover. To the extent that plaintiff is attempting to connect BP to the conspiracy via its conclusory allegation that defendants withheld dividends from plaintiff, Compl. ¶ 53, such attempt must fail because the Complaint nowhere alleges any *facts* demonstrating BP's involvement in the determination or payment of such dividends. Plaintiff has not adequately pled the intentional participation element of conspiracy.

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[3] The allegation that BP had "full knowledge" of the alleged misappropriation of plaintiff's interest in Yugraneft when it entered into the TNK-BP Agreement, Compl. ¶ 52, does not alter the legal conclusion that no facts have been pled demonstrating that BP entered into any alleged conspiratorial agreement or engaged in conduct to further its alleged ends. Mere knowledge of alleged, historical conduct by a joint venture partner is nowhere near enough to allege conspiracy under New York law. *See Ballantine* v. *Ferretti*, 28 N.Y.S.2d 668, 691 (Sup. Ct. 1941) ("[m]ere knowledge of the common design, or even acquiescence therein or approval thereof . . . does not make the doer of such act jointly and severally liable for all damage resulting from the conspiracy.").

Moreover, plaintiff has failed to allege that BP engaged in any independent culpable behavior connecting it to the alleged tortious conduct. Absent such an allegation, the Complaint fails to allege a conspiracy involving BP. *Schwartz*, 605 N.Y.S.2d at 73 (denying leave to amend complaint to add conspiracy allegations because "bare allegation that [two non-speaking] defendants were acting in concert with [the speaker] without any allegation of independ[e]nt culpable behavior on their part was clearly insufficient to link them to the allegedly defamatory remarks."); *Treppel* v. *Biovail Corp.*, No. 03-3002, 2005 U.S. Dist. LEXIS 18511, at *19 (S.D.N.Y. Aug. 30, 2005) (dismissing claims against defendants because conclusory allegation that they "participated in a conspiracy and concerted actions to defame and otherwise tortiously harm plaintiff" was insufficient to state a conspiracy claim; it did not "establish that these defendants engaged in any independent culpable behavior connecting them to the underlying torts") (internal quotation omitted) (Viapiano Aff. Ex. E).[4]

VI. PLAINTIFF HAS FAILED TO ADEQUATELY PLEAD CAUSES OF ACTION AGAINST BP FOR UNJUST ENRICHMENT OR INTENTIONAL TORTIOUS CONDUCT UNDER RUSSIAN LAW.

Plaintiff purports to allege two causes of action under Russian law against BP. Just like the New York law causes of action, plaintiff's claims under Russian law must be dismissed because plaintiff's allegations as to BP are insufficient. As explained in the Musin Affidavit, plaintiff has failed to adequately set forth the grounds for its causes of action under Russian law because (1) its allegations are nakedly conclusory and (2) it fails to identify particular wrongful acts in which BP is alleged to have engaged with the level of specificity required by Russian law. (Musin Aff. ¶ 10.) Finally, because the concept of conspiracy liability

[4] Even affording plaintiff "great latitude" in pleading conspiracy, *Goldstein* v. *Siegel*, 244 N.Y.S.2d 378, 382 (1st Dep't 1963) (quoting 15 C.J.S. Conspiracy § 25), the Complaint still fails to allege that BP entered into a conspiratorial agreement or intentionally participated in any act in furtherance thereof because, as *Goldstein* recognized, plaintiff must "allege at least some of the facts of agreement or separable acts, if any, of the alleged co-conspirators in order to support the responsibility of each for the acts of all the others. Otherwise, the allegation remains the barest of legal conclusions." *Id.*

does not exist under Russian law, plaintiff may not attempt to connect BP to the other defendants' alleged violations of Russian law on that basis. (*Id.* ¶ 11.)

VII. ALL OF PLAINTIFF'S CAUSES OF ACTION ARE BARRED BY THE APPLICABLE STATUTES OF LIMITATIONS.

CPLR 3211(a)(5) requires dismissal on motion where a plaintiff's causes of action are barred by the applicable statutes of limitations. Although plaintiff commenced this action nearly 10 years after the allegedly tortious conduct in Russia of which it complains, plaintiff incorrectly asserts that its causes of action are not time-barred under the tolling provision of CPLR 205(a). (Compl. ¶ 30.) Plaintiff is incorrect and all of its causes of action are time-barred as to BP.

A. All of Plaintiff's Causes of Action (Whether Pled Under New York or Russian Law) Must Be Timely Under the Limitations Laws of Both Alberta and New York.

Because statutes of limitations are "procedural," New York courts will apply New York limitations rules to plaintiff's causes of action regardless of whether they are brought under New York or foreign law; thus, as discussed below, the statutes of limitation of Alberta (or New York) apply to all of plaintiff's causes of action, even its claims under Russian law. *Portfolio Recovery Assocs., LLC* v. *King*, 14 N.Y.3d 410, 416 (2010).

Under CPLR 202, an action accruing outside of New York must be timely commenced under New York law *and* the law of the place where the cause of action accrued. In tort actions such as this, causes of action accrue for purposes of CPLR 202 "at the time and in the place of the injury." *Global Fin. Corp.* v. *Triarc Corp.*, 93 N.Y.2d 525, 529 (1999). "When an alleged injury is purely economic, the place of injury usually is where the plaintiff resides and sustains the economic impact of the loss." *Id.* "A corporation suffers its injury where its principal place of business is located because that is where its damages are felt." *Pryor Cashman Sherman & Flynn* v. *Tractmanager, Inc.*, No. 603515/2005, 2007 N.Y. Misc. LEXIS

9024, at *14 (Sup. Ct. May 18, 2007) (citing *Brinckerhoff* v. *JAC Holding Corp.*, 692 N.Y.S.2d 381 (1st Dep't 1991)) (Viapiano Aff. Ex. F).

Plaintiff alleges purely economic injury. (Compl. ¶¶ 59, 65, 69, 74, 77, 80, 83 (alleging damages in excess of $1 billion), 88 (alleging failure to pay dividends).) Although plaintiff is incorporated under the laws of Cyprus, its principal place of business is in the Canadian province of Alberta where it maintains an office in the City of Calgary. (*Id.* ¶ 4.) Plaintiff is also owned and controlled by a Canadian national. *Norex Petroleum Ltd.*, 416 F.3d at 150; *see also Norex Petroleum Ltd.* v. *Access Indus., Inc.*, No. 02-1499 (S.D.N.Y. Dec. 21, 2005) (Compl. ¶ 4 (stating that plaintiff conducts its business in Calgary, Alberta, Canada through affiliates)) (Viapiano Aff. Ex. B). Thus, plaintiff sustained economic loss, if any, in Alberta, Canada and its causes of action must be timely under Alberta law.

B. All of Plaintiff's Causes of Action Are Untimely as to BP Under Alberta Law.

The statute of limitations for tort causes of action in Alberta is two years. (Thackray Aff. ¶ 8.) Causes of action accrue under Alberta law when plaintiff knows, or ought to know, that an injury occurred, was attributable to defendant's conduct and warranted bringing a proceeding. (*Id*.) Plaintiff knew of BP's entry into the TNK-BP Agreement – BP's alleged connection to the alleged Illegal Takeover – by August 2003, and thus any causes of action against BP were time-barred as of August 2005, months before the filing of the Amended RICO Complaint against BP in December 2005. (*Id.* ¶ 10.) In any event, Alberta law does not toll statutes of limitations during the pendency of related actions. (*Id.* ¶ 11.) Accordingly, all of plaintiff's causes of action are clearly untimely as to BP under Alberta law.

Because the statute of limitations of Alberta apply to plaintiff's claims, CPLR 205(a) is of no consequence. *Icelandic Airlines, Inc.* v. *Canadair, Ltd.*, 428 N.Y.S.2d 393, 398 (Sup. Ct. 1980) (applying two-year Canadian statute of limitations to negligence cause

of action pursuant to CPLR 202 and dismissing cause of action even though CPLR 205(a) would have saved plaintiff's claim had New York's statute of limitations applied). It is well-settled New York law that when a foreign state's statute of limitations is borrowed pursuant to CPLR 202, the entire body of limitations' law is borrowed, including any tolling provisions. *Antone* v. *Gen. Motors Corp.*, 64 N.Y.2d 20, 31 (1984) ("in 'borrowing' a Statute of Limitations of another State, a New York court will also 'borrow' the other State's rules as to tolling"); *see also* 1 Weinstein, et al., *New York Civil Practice* § 202.02 (2011) ("The court will hold the action barred if it is not timely under the whole body of limitations law of either state."). Conversely, if the foreign state's limitation's law contains no such tolling provisions, none will apply. *See GML, Inc.* v. *Cinque & Cinque, P.C.*, 9 N.Y.3d 949, 951 (2007). Thus, all of plaintiff's causes of action should be dismissed as untimely as to BP.

C. All of Plaintiff's Causes of Action Are Untimely as to BP Under New York Limitations Law Because Plaintiff May Not Avail Itself of CPLR 205(a).

Were the Court to apply New York limitations laws – as opposed to those of Alberta – plaintiff's causes of action still must be dismissed as untimely and plaintiff's reliance on the tolling provision of CPLR 205(a) is unavailing.

CPLR 205(a) provides:

> If an action is timely commenced and is terminated in any other manner than by a . . . final judgment upon the merits, the plaintiff . . . may commence a new action upon the same transaction or occurrence or series of transactions or occurrences within six months after the termination provided that the new action would have been timely commenced at the time of commencement of the prior action . . . .

Plaintiff has not satisfied at least two prerequisites to the application of CPLR 205(a): (i) the prior action was terminated by a final judgment on the merits; and (ii) five of the eight causes of

action alleged under New York and Russian law would not have been timely commenced at the time of the commencement of the prior action.[5]

1. A Final Judgment on the Merits Terminated the Amended RICO Complaint.

CPLR 205(a) "expressly excludes the availability of the toll where the first action was dismissed by 'a final judgment on the merits.'" *Yonkers Contracting Co.* v. *Port Auth. Trans-Hudson Corp.*, 93 N.Y.2d 375, 379-380 (1999).

The Second Circuit affirmed the dismissal of the Amended RICO Complaint on the ground that plaintiff had failed to state a claim upon which relief could be granted, a dismissal pursuant to Fed. R. Civ. P. 12(b)(6), *Norex Petroleum Ltd.*, 631 F.3d at 32-33, and concluded that "the remainder of Norex's claims" were "without merit," *id*. Such a dismissal "operates as an adjudication on the merits" unless the dismissal order states otherwise. Fed. R. Civ. P. 41(b). The dismissal order did not state otherwise and was thus a judgment on the merits. *See also Berrios* v. *N.Y. City Hous. Auth.*, 564 F.3d 130, 134 (2d Cir. 2009) ("the dismissal for failure to state a claim is a final judgment on the merits") (internal citation omitted). Therefore, plaintiff may not avail itself of CPLR 205(a).[6]

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[5] Plaintiff likely may not avail itself of CPLR 205(a) for a third reason—its complaint against BP in the federal RICO action was not timely. *Kramer* v. *Herrera*, 592 N.Y.S.2d 196 (4th Dep't 1992) ("[T]he timely commencement of the prior action is a condition precedent to the invocation of CPLR 205(a)."). Civil RICO claims are subject to a four-year statute of limitations that begins to run when "a plaintiff knew or should have known of his [RICO] injury." *Rotella* v. *Wood*, 528 U.S. 549, 553 (2000). Plaintiff has repeatedly acknowledged that it was aware of the alleged Illegal Takeover of Yugraneft by August 2001 at the latest. (Am. Federal Compl. ¶¶ 152-64; Original Federal Compl. ¶¶ 227-52; *see also* Compl. ¶¶ 46-50.) To recover damages from BP for the other defendants' alleged RICO violations, plaintiff must have sued BP within four years of its injury, *i.e.*, by August 2005, months before it filed the Amended RICO Complaint in December 2005. BP has always maintained that the Amended RICO Complaint was untimely and failed to state a claim as to BP and accordingly moved to dismiss on both grounds, but the federal district court did not reach those issues, instead dismissing the complaint for lack of subject matter jurisdiction. *Norex Petroleum Ltd.*, 304 F. Supp. 2d at 584. Thus, the Amended RICO Complaint failed to state a timely claim as to BP and should not serve as a basis for invoking the tolling provision of CPLR 205(a).

[6] Whether the dismissal of a federal complaint is a "final judgment on the merits" is a question of federal law. *See Gelb* v. *Royal Globe Ins. Co.*, 798 F.2d 38, 41 (2d Cir. 1986) ("A state court must apply federal law to determine the preclusive effect of a prior federal question judgment."). Were this Court nevertheless

2. The Causes of Action for Tortious Interference, Conversion and Breach of Fiduciary Duties Under New York Law and for Tortious Interference Under Russian Law Would Not Have Been Timely Commenced Against BP in December 2005.

Plaintiff also may not avail itself of CPLR 205(a) because its first, second, third, fourth and seventh Causes of Action would not have been timely asserted in December 2005.

Tortious Interference and Intentional Tortious Conduct. As discussed above, under New York limitations law the statutes of limitations for plaintiff's New York and Russian law tortious interference causes of action are three years. CPLR 214(4); *Kronos, Inc.* v. *AVX Corp.*, 81 N.Y.2d 90 (1993). The causes of action accrue when plaintiff first sustains damages. *Id.* Plaintiff sustained damages no later than June 2001 when the AAR/TNK Defendants allegedly illegally took control of Yugraneft. (Compl. ¶ 51.)[7] Thus, plaintiff's tortious interference claims were time-barred as of June 2004.

Conversion. The statute of limitations for conversion is three years running from the date of the alleged conversion. CPLR 214(4); *Vigilant Ins. Co. of Am.* v. *Hous. Auth. of the City of El Paso, Tex.*, 87 N.Y.2d 36, 44 (1995). The alleged conversion of plaintiff's interest in

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to apply New York law to the question, the result would be the same. CPLR 5013 provides that a "judgment dismissing a cause of action before the close of the proponent's evidence is not a dismissal on the merits *unless it specifies otherwise*." (emphasis added). A court need not use the precise words "on the merits" to specify that a decision is actually on the merits. *Strange* v. *Montefiore Hosp. & Med. Ctr.*, 59 N.Y.2d 737, 739 (1983). Rather, it is sufficient that the dismissal be "with prejudice" and "bring the action to a final conclusion against the plaintiff." *Yonkers Contracting Co.*, 93 N.Y.2d at 380; *see also Strange*, 59 N.Y.2d at 739 ("it suffices that it appears from the judgment that the dismissal was on the merits"). The district court's dismissal of the Amended RICO Complaint was clearly with prejudice and intended to bring the action to a final conclusion—it did not allow plaintiff to re-plead and directed the clerk to close the case. *Norex Petroleum Ltd.*, 540 F. Supp. 2d at 449. Similarly, the Second Circuit's affirmance of the dismissal was with prejudice—it did not remand, but affirmed the dismissal without leave to re-plead. *Norex Petroleum Ltd.*, 631 F.3d at 32-33.

[7] Plaintiff certainly sustained damages no later than February 26, 2002, the date it filed the Original RICO Complaint seeking damages for the Takeover. *See IDT Corp.* v. *Morgan Stanley Dean Witter & Co.*, 12 N.Y. 3d 132, 139-40 (2009) ("The exact date of the injury is not alleged but must have been before May 25, 2001, when [plaintiff] commenced the arbitration against [non-party], alleging that it had sustained a loss of some $3.15 billion as a result of [non-party's] breach of their binding agreement.").

Yugraneft was complete by June 2001, Compl. ¶¶ 46-48, or at the latest, by January 2002, Compl. ¶ 52, and thus a conversion cause of action was time-barred as of June 2004.

Breach of Fiduciary Duties. The statute of limitations for a cause of action for breach of fiduciary duties seeking only money is three years. CPLR 214(4); *IDT Corp.*, 12 N.Y. 3d at 139-40. The cause of action accrues when plaintiff suffers damages as a result of the alleged breach. *Id.* at 140. Plaintiff suffered alleged damages no later than June 2001 when the AAR/TNK Defendants allegedly illegally took control of Yugraneft. *See id.* at 140-41 (plaintiff suffered damages as a result of an alleged breach of fiduciary duty at the time a third party breached a contract). Thus, the breach of fiduciary duties cause of action was time-barred as of June 2004.

3. Plaintiff Should Not Be Permitted to Use CPLR 205(a) to Have "Multiple Bites at the Apple."

The Court should not permit plaintiff to rely on CPLR 205(a) to save its ten-year old, time-barred causes of action because doing so would be inconsistent with the policy underlying the rule. CPLR 205(a) exists to prevent inequitable results when actions are "dismissed due to a technical defect which can be remedied in a new action." *Goldstein* v. *N.Y. State Urban Dev. Corp.*, 13 N.Y.3d 511, 545 (2009). CPLR 205(a) does not exist to reward forum shopping and to provide a plaintiff, like Norex, with yet another bite at the apple after a dismissal on the merits resulting from its tactical choices of which claims to assert and what court to assert them in. S*ee Winston* v. *Freshwater Wetlands Appeals Bd.*, 224 A.D.2d 160, 164 (2d Dep't 1996) (CPLR 205(a) should be "interpreted so as to allow the litigant to enjoy its core purpose, a genuine bite at the apple.").

D. The New York and Russian Law Causes of Action for Unjust Enrichment and the New York Law Cause of Action for Money Had and Received Are Not Timely.

The statutes of limitations for unjust enrichment and money had and received are six years. CPLR 213(1). Because a New York court applying Russian law must use the New York limitations period, the six-year period applies to both plaintiff's New York and Russian law unjust enrichment claims. *Portfolio Recovery Assocs.*, 14 N.Y.3d at 416. A cause of action for unjust enrichment accrues "upon the occurrence of the wrongful act giving rise to a duty of restitution." *Coombs* v. *Jervier*, 906 N.Y.S.2d 267, 269 (2d Dep't 2010) (internal quotation omitted). A cause of action for money had and received accrues when the alleged wrongful payment is made. *N. Salem Cent. Sch. Dist.* v. *Mahopac Cent. Sch. Dist.*, 768 N.Y.S.2d 11, 12 (2d Dep't 2003). Both claims accrued no later than June 2001, when the defendants (other than BP) allegedly diverted profits and dividends from Yugraneft to themselves and to which plaintiff claims it is entitled. Although these two causes of action would have been timely commenced in December 2005, they still must be dismissed as untimely because, as demonstrated above, plaintiff cannot avail itself of CPLR 205(a) for two independent reasons—(i) the dismissal of the that complaint was a final judgment on the merits and (ii) the Amended RICO Complaint was not timely commenced against BP. Thus, the six-year statutes of limitations for these claims have long since run by March 2011.

CONCLUSION

The Court should dismiss the Complaint in its entirety and with prejudice as to BP.

Respectfully submitted,

/s/ Daryl A. Libow

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