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 Motion Sequence No. 7

DEFENDANTS' JOINT MEMORANDUM OF LAW IN SUPPORT OF THE MOTION TO DISMISS PLAINTIFF NOREX PETROLEUM LIMITED'S COMPLAINT

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MISCELLANEOUS

Defendants[1] respectfully submit this joint memorandum of law in support of their motion to dismiss with prejudice the Revised First Amended Complaint ("Complaint" or "Compl.") of Norex Petroleum Limited ("Norex") under N.Y. C.P.L.R. ("CPLR") §§ 327(a), 3211(a)(1), (5) and (7).

PRELIMINARY STATEMENT

Norex's Complaint must be dismissed because after 11 years and dozens of Russian court proceedings and a U.S. federal action, Norex has either litigated or had ample opportunities to litigate its loss of control of Yugraneft—a Russian oil company doing business in Russia. The Complaint is classic claim-splitting, long prohibited in New York. As Justice Cardozo stated: "A judgment in one action is conclusive in a later one not only as to any matters actually litigated therein, but also as to any that might have been so litigated . . . ." Schuykill Fuel Corp. v. B. & C. Neiberg Realty Corp., 250 N.Y. 304, 306 (1929). "The reason for the rule lies in the necessity for preventing vexatious and oppressive litigation, and its purpose is accomplished by forbidding division of a single cause of action so as to maintain several suits when a single suit will suffice." Kennedy v. City of New York, 196 N.Y. 19, 22 (1909). As shown below, Norex may not rely on CPLR § 205(a) (Compl. ¶ 30) to save its claims because the Complaint (i) is time-barred under CPLR § 202 (the borrowing statute); (ii) does not otherwise fall within CPLR § 205(a) because of the prior federal proceeding; (iii) is barred by the prior Russian and U.S. proceedings; (iv) otherwise fails to state a claim; and (v) should, if anywhere, proceed in Russia.

[1] This Joint Memorandum of Law, and the accompanying affirmation of Milana Salzman ("Salzman Aff.") and affidavits of Dmitry Dyakin ("DD Aff."), Boris Karabelnikov ("BK Aff."), and Bradley Nemetz ("Nemetz Aff."), are submitted by Defendants OAO Tyumen Oil Company and TNK-BP Limited (the "TNK Defendants") on behalf of all other Defendants—Leonard Blavatnik, Victor Vekselberg, Simon Kukes, Access Industries, Inc., Alfa Group Consortium, and Renova, Inc. (collectively, the "Defendants"). The Salzman Affirmation contains copies of the underlying federal decisions and miscellaneous other unpublished pleadings and decisions. The Dyakin, Karabelnikov, and Nemetz affidavits relate to Russian and Canadian law that is applicable here.

FACTS

Norex is a non-U.S. company headquartered in Canada whose principal is a Canadian national. See Norex Petroleum Ltd. v. Access Indus. Inc., 416 F.3d 146, 150 (2d Cir. 2005); Compl. ¶ 4.[2] Norex is suing over its loss of majority control over a Russian oil company, Yugraneft. Norex, 416 F.3d at 151; Compl. ¶¶ 1-3. Norex primarily points to one Russian court case—the so-called "Know-How Case"—by which the TNK Defendants gained majority control of Yugraneft. Norex alleges that the Know-How Case was corrupted by the Defendants (Norex, 416 F.3d at 152; Compl. ¶¶ 42-46), although no facts are pled in the Complaint to support that allegation. Norex's Complaint ignores, however, 11 years of litigation in Russian and U.S. federal courts where Norex actively litigated to gain or maintain control of Yugraneft—and lost. The results of those cases demonstrate that Norex has taken advantage of multiple opportunities to litigate about Yugraneft, and that Norex has had every opportunity to assert elsewhere the claims it now is trying to assert in this Court.[3]

1. Norex's Russian Litigation with TNK

Russian Lawsuits Over Norex's Claim to Over 97% of Yugraneft. Yugraneft was founded in Russia in 1991 by Norex and a Russian state-owned oil company called Chernogorneft. (DD Aff. ¶ 14). Based largely on an alleged contribution of technical know-how, Norex received 60% of Yugraneft's charter capital and Chernogorneft held 40%. (Compl. ¶ 31; DD Aff. ¶ 14).

[2] The federal decisions are cited to show that Norex's claims here are based on the same facts and circumstances, even if Norex now chooses to omit certain facts from its Complaint. Norex's federal complaint was averred, and its admissions in the federal action are binding here. See Matter of Union Idem. Ins. Co., 89 N.Y.2d 94, 103 (1996) ("An admission in a pleading in one action is admissible against the pleader in another suit, provided it is 'shown by the signature of the party, or otherwise, that the facts were inserted with his knowledge, or under his direction, and with his sanction'") (citation omitted); Kaisman v. Hernandez, 61 A.D.3d 565, 566 (1st Dep't 2009) (plaintiff's admission in an affidavit in a prior lawsuit was properly considered on a motion to dismiss).

[3] As shown below, Norex's assertion that the "matter was litigated briefly in Russian courts" is unfounded. Transcript of August 29, 2011 Telephone Hr'g with Justice Bransten 9:3. (Salzman Aff. Ex. B).

In 1998, Chernogorneft filed for bankruptcy in Russia. (DD Aff. ¶ 21). In 1999, using a tactic later invalidated by Russian courts, Norex held a series of shareholder meetings to pass resolutions so as to gain control of over 97% of Yugraneft, thereby stripping Chernogorneft's 40% share down to less than 3%. (Compl. ¶ 36; DD Aff. ¶¶ 15-18). In November 1999, the Russian bankruptcy court oversaw the auction of Chernogorneft's assets, and a subsidiary of the TNK Defendants purchased Chernogorneft, including its interest in Yugraneft. (DD Aff. ¶¶ 16, 21).

TNK then sued in Russian courts to reacquire Chernogorneft's 40% stake in Yugraneft (the "TNK-NV I Action"). Norex appeared in that action through Yugraneft (which at the time it controlled) and litigated the case. (Id. ¶ 16). The Russian court rejected Norex's attempts to gain control of most of the Yugraneft shares through shareholder resolutions and readjusted Chernogorneft's (now TNK's) interest in Yugraneft back to 40%. (Id. ¶ 17). Norex appealed this decision and lost. (Id.)[4]

Notwithstanding its loss in the TNK-NV I Action, Norex refused to carry out the Russian court's ruling by properly registering TNK's shareholder interest in Yugraneft. As a result, TNK had to file another lawsuit to compel the Norex-controlled management of Yugraneft to register its shares (the "TNK-NV II Action"). (Id. ¶ 18). In March 2001, the Russian courts ruled in TNK's favor. (Id.) Norex does not cite this case in its Complaint. Also not mentioned is that even after these two actions, Norex continued to use shareholder meetings at Yugraneft to keep its officers in place, even after a Russian court attached some of Norex's shares. (Id. ¶ 19). Ultimately, after yet another round of litigation in the Russian courts with Norex (the "Shareholders Meeting Litig."), TNK prevailed in having its shares properly registered and

[4] As shown by the Russian rulings, all of the TNK Defendants' interests in Yugraneft were held through TNK-NV, a non-party to this action. For ease of reference, that will be referred to in this Memorandum as "TNK."

recognized at Yugraneft shareholders meetings. (Id. ¶ 20). This also is not cited in Norex's Complaint, nor does Norex mention that it never—in any of these Russian proceedings or in its federal action—pled that these Russian proceedings were affected by corruption.

Russian Lawsuits by Norex to Control 100% of Yugraneft. In 2000 and 2002, Norex filed lawsuits in Russia claiming that it had a right to own 100% of Yugraneft (the "Chernogorneft Bankr. Sale Litig. III and IV"). (DD Aff. ¶¶ 24-28). Norex argued in two separate lawsuits that it held a right of first refusal to buy Yugraneft shares from Chernogorneft and/or that TNK's purchase of those shares through the Chernogorneft bankruptcy was improper. These lawsuits paralleled two Russian lawsuits by other parties which believed they had pre-emptive rights to purchase assets in the Chernogorneft bankruptcy. (Id. ¶¶ 22-24). The Russian courts disagreed with Norex (and the other parties), holding that Chernogorneft was properly sold to TNK, including as to its interest in Yugraneft. (Id. ¶ 22-25). Norex appealed one of these decisions and lost. (Id. ¶ 26). Norex never claimed that these actions were affected by corruption, nor does Norex cite this in its Complaint.

Valuing Norex's Interest in Yugraneft: The Know-How Case. At the heart of Norex's current Complaint is the so-called "Know-How Case." In June 2001, TNK asked a Russian court to value Norex's original know-how contribution to Yugraneft. (DD Aff. ¶ 30). TNK commenced the case by seeking a prejudgment attachment over some of Norex's shares in Yugraneft to prevent Norex from transferring those shares during the case. Consistent with Russian procedure, the hearing on that motion was ex parte. At the hearing, the Russian court set a date to consider appointing an independent expert to value Norex's know-how contribution and enjoined Norex from disposing of or voting some of its Yugraneft shares. (Id. ¶ 31). Norex acknowledges receiving actual notice of this proceeding. (Compl. ¶ 46).

Norex chose not to appeal the attachment. (DD Aff. ¶¶ 30-33). Norex did, however, attempt to intervene in the Know-How Case on behalf of Yugraneft through its appointed representative at Yugraneft. The Russian courts rejected this intervention (and the attempted actions of Norex's appointed representative) based on prior rulings by Russian courts in earlier cases (which rulings Norex was continuing to ignore). (Id. ¶ 34). Norex, through its chairman and attorneys, also corresponded with the Russian court as to the address where service should be directed. In July 2001, the court appointed an independent expert to value Norex's purported know-how contribution to Yugraneft in preparation for a hearing on the merits. In November and December 2001, Norex received notices of all this from both the Russian court and TNK—receipts of which were filed with the court. Norex's newly appointed counsel then signed court dockets allowing him to see and review the court files. (Id. ¶¶ 37-38). Norex's Complaint, while asserting that Norex had no notice of the proceeding, ignores all this. (See Compl. ¶ 42).

In January 2002, the Russian court, having rescheduled the merits hearing to ensure that Norex was served, ruled that Norex had been served. (DD Aff. ¶ 41). Norex does not mention this either. The court then ruled, based on independent expert findings, that Norex had not contributed know-how to Yugraneft sufficient to justify its 60% share ownership. Based on the expert findings, the court ruled that Norex was entitled to 20% of Yugraneft's shares. (Id. Ex. 40).

Even though it had ignored the proceedings, Norex could have appealed the Know-How Case in Russia on the merits or based on the allegations made here—that it was improperly served. (Id. ¶ 52; BK ¶ 49). But, Norex did not do that. Norex also could have challenged the Know-How Case in Russia on the basis of corruption—but, Norex also did not do that. (DD Aff.

¶¶ 53, 85). Rather, two days after its initial time to appeal lapsed, Norex filed its federal action in New York. (Compl. ¶ 23).

Lawsuit Over Norex's Right to Yugraneft Dividends. While pursuing its U.S. federal action, Norex was also actively defending an unjust enrichment action in Russia. Based on the result in the Know-How Case, Yugraneft claimed for money paid to Norex in dividends between 1992 and 2002 based on Norex's improper 60% interest in Yugraneft. (DD Aff. ¶ 54). In February 2004, a Russian appeals court affirmed the holding that Norex was not entitled to receive dividends on more than 20% of Yugraneft's shares. (Id. ¶ 58). Thus, the Russian courts, in a proceeding in which Norex actively participated, decided the dividends to which Norex is entitled based on its interest in Yugraneft. Norex does not cite this case in its Complaint.

2. Norex's U.S. Lawsuit Over Yugraneft

In February 2002, Norex filed a federal complaint against the Defendants in this action, amongst others. The allegations were identical to those here. Compare Norex, 416 F.3d at 152-53 with (Compl. ¶¶ 1-3, 33-53). Defendants moved to dismiss on multiple grounds, and in February 2004, the case was dismissed for forum non conveniens.[5] Focusing on the locus of Norex's claim being in Russia, the District Court held:

> The central premise upon which all of [Norex's] allegations of actionable harm rest is the allegation that 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. This is clearly a matter that is principally of Russian concern; the viability of [Norex's] contention that illegally-obtained assets have been concealed and manipulated through offshore [entities] . . . is obviously largely dependent on a demonstration that activities which took place in Russia were illegitimate.

[5] Defendants had moved to dismiss for lack of subject matter jurisdiction, failure to state a claim, res judicata, comity, "Act of State" Doctrine, lack of standing, and because they were barred under Russian law. The District Court held that its dismissal on forum non conveniens mooted these other grounds. Norex Petroleum Ltd. v. Access Indus., Inc., 304 F. Supp. 2d 570, 584 (S.D.N.Y. 2004), vacated and remanded, 416 F.3d 146 (2d Cir. 2005).

Norex, 304 F. Supp. 2d at 581. With regard to Norex's attempt to manufacture a U.S.-based conspiracy, the court noted that the conspiracy allegations were "conclusory" and did not alter the analysis. Id. at 580-81. The court also ruled that most documents and witnesses would be located in Russia:

> the underlying "Illegal Scheme" largely involved Russian individuals and entities, and would have generated documents that likely remain in Russia, including documents created in connection with allegedly corrupt bankruptcies, allegedly corrupt Russian court decisions, and the June 2001 Yugraneft shareholders meeting and subsequent events.

Id. at 581-82. Contrary to Norex's Complaint (Compl. ¶ 23), on appeal, the Second Circuit did not hold that New York was the appropriate forum. Rather, while agreeing that "Russia has a greater interest in the subject matter of this dispute than the United States" (Norex, 416 F.3d at 156), the court vacated the dismissal due to the unavailability of an adequate alternative forum (i.e., Norex had allowed its time to appeal to run in the Know-How Case). Id. at 159. Also contrary to the Complaint (Compl. ¶ 24), the court did not hold that Norex had been denied its rights in the Know-How Case or that other Russian decisions could not be given preclusive effect. Rather, the court expressly reserved these issues for the lower court. Id. at 162.[6]

Norex then amended its complaint. Not limiting itself to federal claims, Norex pled pendent Russian law claims. Norex chose to omit any New York law claims. (See Salzman Aff. Ex. C). In September 2007, the case was again dismissed, but now for lack of subject matter jurisdiction. (Id. Ex. F). In 2010, the Second Circuit affirmed, but contrary to Norex's Complaint (Compl. ¶ 25), did so under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. Norex Petroleum Ltd. v. Access Indus. Inc., 631 F.3d 29, 33 (2d Cir. 2010).[7] Even

[6] As shown in Point IV, infra, New York's rules relating to forum non conveniens are different from those of the Second Circuit. Most importantly, New York does not require an adequate alternative forum, especially where a party has acted to create the lack of that forum.

[7] Norex even filed a petition for certiorari, which it then withdrew. (See Salzman Aff. Ex. H).

though Norex argued that it pled a domestic fraud scheme with particularity, the Second Circuit held that "[t]he slim contacts with the United States alleged by Norex are insufficient to support extraterritorial application of the RICO statute," and that it "considered the remainder of Norex's claims and [found] them without merit." Id.

3. Norex's New York State Action

Following its losses in Russia and federal court, Norex began this action. Norex concedes, as it must, that its current claims "are based upon the same transaction or occurrence or series of transactions or occurrences Norex pled in its federal action" (Compl. ¶ 30), but substitutes for the failed RICO claims, New York tort claims, claims for unjust enrichment and money had and received. Norex's Complaint also restates the Russian claims asserted in the federal action. (Compl. ¶¶ 54-88).

ARGUMENT

In reviewing the Complaint under CPLR § 3211, the court need not credit bare assertions of legal conclusions and formulaic recitations of the elements of a cause of action. See O'Donnell, Fox & Gartner, P.C. v. R-2000 Corp., 198 A.D.2d 154, 154 (1st Dep't 1993). Moreover, the Court should take notice of public judicial proceedings and foreign law involving the parties.[8] See CPLR § 4511(b); see also Gevinson v. Kirkeby-Natus Corp., 26 A.D.2d 71, 73 (1st Dep't 1996). Based on those U.S. and Russian proceedings, Norex's Complaint should be dismissed as a matter of law.

[8] Dismissal based on a foreign proceeding falls under CPLR § 3211(a)(1). See Heaney v. Purdy, 29 N.Y.2d 157, 159 (1971) (foreign judgment was sufficient documentary evidence for dismissal under CPLR § 3211(a)(1)). CPLR § 4511(b) provides that New York courts "shall" take judicial notice of foreign law "if a party requests it," gives prior notice to its adversary of its intention to do so, and "furnishes the court sufficient information to enable it to comply with the request." This notice can be made at any time, including on a motion to dismiss. Wells v. State of N.Y., 130 Misc. 2d 113, 121 (Sup. Ct. Steuben Co. 1985) (citing Pfleuger v. Pfleuger, 304 N.Y. 148 (1952)).

I. PLAINTIFF'S CLAIMS ARE TIME-BARRED

A. New York's Borrowing Statute Requires Reference to Canadian Law

Norex relies on CPLR § 205(a) to save its decade-old claims from the statute of limitations. (Compl. ¶ 30). Under CPLR § 205(a), Norex's Complaint could be treated as if filed in 2002 (when Norex began the federal action) if Norex can show, inter alia, that its prior action was not ended due to voluntary discontinuance, lack of personal jurisdiction, failure to prosecute, or a final judgment upon the merits, and that its new action arises from the "same transaction or occurrence or series of transactions or occurrences" as its prior action and was served within six months of the termination of the prior action. Norex's problem, however, is that CPLR § 205(a) cannot be read in isolation from other applicable provisions of the CPLR. Here, for example, CPLR § 205(a) cannot "save" an action like Norex's which is both untimely under applicable law, and which was previously ended by a dismissal for failure to state a claim under federal law.

CPLR § 202—New York's "borrowing statute"—applies here and bars Norex's claims. When a nonresident, like Norex, brings a claim in New York, the cause of action must be timely under the limitation periods of both New York and the jurisdiction where the cause of action accrued. CPLR § 202; Portfolio Recovery Assoc. LLC v. King, 14 N.Y.3d 410, 416 (2010). By "borrowing" the shorter of the two limitations periods, CPLR § 202 discourages forum shopping. See Global Fin. Corp. v. Triarc Corp., 93 N.Y.2d 525, 528 (1999). Accordingly, New York courts borrow all of a foreign state's laws on limitations, including any relevant rules on tolling.[9] See Portfolio, 14 N.Y.3d at 416.

[9] New York courts, however, will not borrow a foreign state's choice of law principles renvoi so as not to allow a party to circumvent the borrowing statute. Ledwith v. Sears, Roebuck & Co., 231 A.D.2d 17, 24 (1st Dep't 1997).

Under CPLR § 202, a cause of action accrues at the place of injury. Global Fin., 93 N.Y.2d at 529. Here, that would be Canada where Norex has its principal place of business and is headquartered because the alleged harm is economic and the place of injury is where Norex resides and sustains the economic impact of the loss. Id. at 529; Pryor Cashman v. Tract Manager, Inc., 2007 NY Slip Op 31332(U) (2007) ("A corporation suffers its injury where its principal place of business is located because that is where its damages are felt.") (citing Brinckerhoff, et al. v. JAC Holding Corp., 263 A.D.2d 352 (1st Dep't 1999)); McMahan & Co. v. Donaldson, Lufkin & Jenrette Secs. Corp., 727 F. Supp. 833, 834 (S.D.N.Y. 1989) (although plaintiff was incorporated in New York, it resided in Connecticut for purposes of CPLR § 202).[10]

B. Norex's Claims are Barred Under Alberta Law

Alberta's limitations period for the causes of action asserted by Norex are shorter than those of New York. The limitations period under Alberta law for the claims at issue is two years. (Nemetz Aff. ¶ 6). By contrast, the applicable New York limitations periods would be three to six years.[11] Significantly, Alberta law focuses on the discoverability of the injury, not the discoverability of a cause of action arising from that injury. (Id. ¶ 6). The two-year limitation period runs from the date Norex knew, or reasonably ought to have known (i) of the injury for

[10] Under CPLR § 202, the action accrues at the plaintiff's principal place of business even when jurisdiction is unobtainable over the defendants in that location. Ins. Co. of N. Am. v. ABB Power Generation Inc., 91 N.Y.2d 180, 187-88 (1997). Apparently attempting to avoid Canadian law, Norex's Complaint minimizes its Canadian contacts by pleading that Norex only maintains a "representative office" in Canada. (Compl. ¶ 4). As noted above, however, supra note 2, Norex is bound by its sworn admissions in its prior federal action, which included that it is headquartered and has its principal place of business in Alberta, Canada. (See Salzman Aff. Ex. C).

[11] See CPLR § 214(4); Buller v. Giorno, 57 A.D.3d 216, 216 (1st Dep't 2008) (tortious interference with contract action must be commenced within three years); Thome v. Alexander & Louisa Calder Found., 70 A.D.3d 88, 108 (1st Dep't 2009) (tortious interference with prospective business relations action must be commenced within three years); Sports Legends Inc. v. Carberry, 61 A.D.3d 449, 449-50 (1st Dep't 2009) (conversion action must be commenced within three years); IDT Corp. v. Morgan Stanley Dean Witter & Co., 12 N.Y.3d 132, 139-40 (2009) (breach of fiduciary duty action must be commenced within three years); Sirico v. F.G.G. Prods., Inc., 71 A.D.3d 429, 434 (1st Dep't 2010) (unjust enrichment action must be commenced within six years); Akinrosotu v. Kellman, 289 A.D.2d 112, 133 (1st Dep't 2001) (money had and received action must be commenced within six years). Since statute of limitations are viewed as procedural, even the claims Norex frames as under Russian law (unjust enrichment and tortious conduct) are governed by New York limitations periods. See Portfolio, 14 N.Y.3d at 416.

which a remedy is sought; (ii) that the injury was attributable to conduct of the defendant; and (iii) that the injury warrants bringing a proceeding. (Id. ¶ 20). Alberta's statute of limitations contains no tolling provision or savings clause like CPLR § 205(a). (Id. ¶ 6, 29).

By its own admission, Norex was aware of its alleged injury by June 28, 2001, when it learned that a Russian court had enjoined its shares in the Know-How Case. (See Compl. ¶ 46). At the latest, Norex was aware of its alleged injury by February 26, 2002, when it filed its federal complaint. As such, Norex's rights under the Alberta statute of limitations ran sometime in 2003 or 2004, and all of Norex's claims are time-barred and should be dismissed.[12]

C. CPLR § 205(a) Cannot Override the Borrowing Statute

CPLR § 205(a) must be read in harmony with CPLR § 202. Yatauro v. Mangano, 2011 NY Slip Op 06364 (2011) ("Courts must harmonize the various provisions of related statutes and construe them in a way that renders them internally compatible."). Given that Norex is a non-resident and its claims and injury arise elsewhere, CPLR § 202 applies. The New York Court of Appeals has held that under CPLR § 202 a New York court must borrow all of the other state's law relating to statute of limitations, including any tolling provisions. Portfolio, 14 N.Y.3d at 416. Hence, the borrowing statute is applied notwithstanding CPLR § 205(a), and here points to Alberta law, which provides a shorter limitations period and contains no savings or other tolling provision, which excuses Norex's decision to pursue claims in federal court.

D. In Any Event, CPLR § 205(a) Does Not Save Norex's Claims

Norex also cannot take advantage of CPLR § 205(a) because its federal action was dismissed on the merits. Under New York law, federal law governs the effect of federal judgments. See Extebank v. Finkelstein, 188 A.D.2d 513 (2d Dep't 1992); Peros v. Cia De Nav

[12] Norex bears the burden of proving facts to establish that its action is timely—which it cannot do. See Texeria v. BAB Nuclear Radiology, P.C., 43 A.D.3d 403, 405 (2d Dep't 2007).

Mar Netumar, 75 Misc. 2d 913 (1973). Here, in affirming the dismissal of Norex's claims, the Second Circuit held that the dismissal was under Federal Rule 12(b)(6), which is a failure to state a claim upon which relief may be granted. Moreover, the court did consider the merits of Norex's claims. Even though Norex argued that it pled a domestic fraud scheme with particularity, the Second Circuit held that "[t]he slim contacts with the United States alleged by Norex are insufficient to support extraterritorial application of the RICO statute. We have considered the remainder of Norex's claims and find them without merit." Norex, 631 F.3d at 33. In federal court, this dismissal was a final judgment on the merits. See Nowak v. Ironworkers Local 6 Pension Fund, 81 F.3d 1182, 1188 (2d Cir. 1996) (citation omitted); see also McKinney v. City of New York, 78 A.D.2d 884, 195 n.2 (2d Dep't 1980) (Rule 12(b)(6) dismissal is a final judgment on the merits).

The effect of a Rule 12(b)(6) dismissal is consistent with the purpose of CPLR § 205(a), which is designed to save actions that fail due to a technical defect (e.g., a lack of diversity of citizenship). That is not the case here. Norex had its day in court, actually pled pendent non-federal claims identical to some pled now, and was dismissed on the substantive ground that it could not state a claim. CPLR § 205(a) was not designed to "save" claims for state court after multiple unsuccessful actions elsewhere. See U.S. Fidelity & Guar. Co. v. E.W. Smith Co., 46 N.Y.2d 498, 505 (1979) (CPLR § 205(a) serves the purpose of preventing a timely commenced action from being dismissed due to a technical defect). The federal rule on dismissals prevents abuse of CPLR § 205(a) by recognizing that "once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy." (emphasis in original). See Yonkers Contracting Co. v. Port Auth. Trans-Hudson Corp., 93 N.Y.2d 375, 380 (1999) (quoting O'Brien

v. City of Syracuse, 54 N.Y.2d 353, 357 (1981)). As such, all claims flowing from the transactions Norex pled in the federal action, including other state law claims that Norex could have asserted, are barred by the federal dismissal and are not saved by CPLR § 205(a).

II. NOREX'S CLAIMS ARE BARRED DUE TO THE PRECLUSIVE EFFECTS OF RUSSIAN JUDGMENTS AND THE FEDERAL ACTION

The Court of Appeals has made clear the importance of res judicata even where a party, like Norex, attempts to assert facts that show error by prior courts.

> Res judicata is designed to provide finality in the resolution of disputes to assure that parties may not be vexed by further litigation. The policy against relitigation of adjudicated disputes is strong enough generally to bar a second action even where further investigation of the law or facts indicates that the controversy has been erroneously decided, whether due to oversight by the parties or error by the courts.

Matter of Reilly v. Reid, 45 N.Y.2d 24, 28 (1978) (citation omitted). New York applies a transactional approach to res judicata, barring "all other claims arising out of the same transactions or series of transactions . . . even if based upon different theories or if seeking a different remedy." See also O'Brien, 54 N.Y.2d at 357; Icahn v. Lions Gate Entm't Corp., 31 Misc. 3d 1205(A), 2011 NY Slip Op 50502(U), *8 (2011).

The legal and factual issues underlying Norex's claims were litigated to final judgment in numerous Russian proceedings years ago and again in federal court over the last decade. Norex brought claims in Russia and chose not to bring other claims. Norex defended claims in Russia, and also chose not to defend others. Those claims decided all of Norex's shareholder rights in Yugraneft and to dividends from Yugraneft. Norex then litigated the same transactions in federal court and lost again. Those prior judgments bar Norex's claims.

A. Norex's Claims Were Thoroughly Litigated to Conclusion in Russia

In 2000-2001, the Russian courts invalidated shareholder resolutions which would have awarded Norex over 97% of Yugraneft's shares. In separate proceedings, the Russian courts also denied Norex's claims to invalidate the bankruptcy sale by which TNK had acquired shares in Yugraneft. In yet another series of proceedings, the Russian courts rejected Norex's efforts to ignore the prior rulings regarding TNK's rights in Yugraneft. (DD Aff. ¶¶ 18, 19-20; BK Aff. ¶¶ 19, 24-26). Norex litigated these claims, engaged in appeals, and lost.

In the Know-How Case, Norex has admitted knowing of the proceeding (Compl. ¶ 46), and the court records establish both that Norex's designated representative at Yugraneft attempted to intervene in the proceeding and that Norex's counsel monitored the proceedings. The court records also show that the Russian court and TNK served Norex with notices of the merits hearing which would determine the value of Norex's know-how contribution to Yugraneft. (DD Aff. ¶¶ 36, 39-40). Norex did not attend the hearing, and chose not to appeal the result—either as to service, the merits, or alleged corruption. Instead, Norex launched a U.S. action just two days after its initial time to appeal in Russia had lapsed.

Then, while the federal action was pending, Norex actively litigated in Russia an unjust enrichment claim to determine what dividends were owed to Norex from Yugraneft. (Id. ¶¶ 54-55). In these Russian proceedings, Norex did not attempt to challenge the Know-How Case, nor did it bring the allegations of corruption now advanced in this Court. That litigation determined the dividends due to Norex based on its adjudicated shareholdings in Yugraneft. (Id. ¶ 60)

B. The Russian Judgments Preclude Norex's Claims Here

In New York, "[a] judgment in one action is conclusive in a later one not only as to any matters actually litigated therein, but also as to any that might have been so litigated, when the

two causes of action have such a measure of identity that a different judgment in the second would destroy or impair rights or interests established by the first." Robbins v. Growney, 229 A.D.2d 356, 357 (1st Dep't 1996) (quoting Schuylkill, 250 N.Y. at 306-07).[13]

This Court recognizes foreign judgments and proceedings, especially when a plaintiff voluntarily avails itself of the foreign courts before coming to New York to complain about the foreign forum.[14] For example, in Blacklink Transp. Consultants PTY Ltd. v. Von Summer, 18 Misc. 2d 1113(A), 2008 NY Slip Op 50017(U) (2008), plaintiff sought to enforce an Australian court award of attorneys fees against defendant (von Summer) even though von Summer prevailed on the merits at trial. Von Summer argued that the Australian judgment was punitive and contrary to due process. Id. at *1.

Rejecting these contentions and giving effect to the Australian ruling, the court noted that New York will give effect to foreign rulings even where the result would be different in a U.S. court. Id. at *2. The record showed that von Summer (i) started proceedings in Australia; (ii) was represented by counsel; and (iii) was aware of Australian rules and procedures, including as to appellate review—which von Summer did not seek. Id. at *1-3. On this record, the court held that von Summer could not avoid the effect of the Australian litigation.

> Whether or not defendant sought review or appeal in Australia, she may not ask this Court to engage in the review process that an Australian court might have performed. Neither may she ask this Court to second-guess the Australian court whether using New York or Australian law.
>
> Having knowingly and voluntarily played the game under Australian rules, [defendant] may not now cry foul. She 'received the basic requisites of notice and the opportunity to be heard. . . .'

[13] New York's "'transactional' approach to res judicata is arguably broader than the principles adopted by the federal courts." Ins. Co. of the State of Pa. v. HSBC Bank USA, 10 N.Y.3d 32, 38 fn. 3 (2008).
[14] See Heaney v. Purdy, 29 N.Y.2d 157, 159 (1971) (foreign judgment was sufficient documentary evidence for dismissal under CPLR § 3211(a)(1)).

Id. at *2-3. Here, as in Blacklink, there is no question that Russian courts had jurisdiction over Norex and the disputes over Yugraneft. Norex actively litigated cases attempting to take control of Yugraneft and to prevent TNK from exercising its shareholder rights. As in Blacklink, Norex eschewed its right to appeal the Know-How Case in Russia, turning instead to a U.S. court.[15] The issues and parties remain the same before this Court—Norex continues to claim that it is the majority holder of Yugraneft with shareholder rights superior to TNK's. If Norex prevails here, it will effectively negate the rulings of numerous Russian courts which determined that TNK owns 80% of Yugraneft and what dividends were due to Norex.

1. Norex May Not Relitigate the Know-How Case Here

Norex may not use this Court to relitigate the Know-How Case. New York courts give full effect to default judgments as long as the foreign court had jurisdiction. Ionescu v. Brancoveanu, 246 A.D.2d 414, 416 (1st Dep't 1998) ("So long as jurisdiction has been obtained, a defendant's default in the rendering [court] will not nullify the res judicata effect of the judgment…."); see also Robbins, 229 A.D.2d at 357 ("The doctrine of res judicata is applicable to a judgment taken by default which has not been vacated . . . as well as to defenses . . . which, though not raised, could have been.") (citation omitted). Significantly, in Robbins, the Appellate Division, First Department held that a defaulting party's later attempt to challenge the default judgment by claiming that it "was procured by fraud and illegal behavior should have been

[15] The court in Icahn similarly refused to allow plaintiffs to re-litigate issues that were litigated in Canada. There, in a corporate takeover suit akin to this action, plaintiffs instituted suits in both Canada and New York as to actions by the defendant's board of directors that allegedly resulted in a decrease in plaintiffs' ownership interest in defendant. Icahn, 2011 NY Slip Op 50502(U), *2-6 (2011). After the Canadian court dismissed the claims, defendants moved to dismiss the New York action on grounds of res judicata, among others. Id. at *6. Plaintiffs argued that they could not have brought certain claims (for breach of contract and tortious interference) in Canada. In dismissing plaintiffs' claims, the Icahn court held that plaintiffs' claims were barred by res judicata given that: (1) the Canadian action was adjudicated on the merits; (2) the Canadian action involved the same parties and operative facts as the New York action; (3) plaintiffs' claims were based on the same series of transactions in both cases; and (4) plaintiffs could have raised the breach of contract and tortious interference claims in the Canadian action. Id. at *9.

dismissed as barred by the doctrines of res judicata and collateral estoppel." Robbins, 229 A.D.2d at 357.

A Russian court can assert jurisdiction over a defendant when the defendant possesses property in Russia. (DD Aff. ¶ 65). Norex was and is a shareholder in a Russian company—Yugraneft—and TNK was litigating with Norex over those shareholdings in the Know-How Case. Thus, Norex was subject to the jurisdiction of the Russian court.[16] (See id.). Moreover, a Russian court held that Norex was properly served: Norex "declined to participate [in the Know-How case] despite having been notified of the place and time of the hearing in compliance with article 10 of the Hague Convention of 1965."[17] Article 10 of the Hague Service Convention expressly allows judicial documents to be served via mail.[18] Norex was in fact served twice by TNK under the Hague Convention after December 1, and was served at least three times in the Know-How Case, such that the Russian court's finding on service has all the indicia of fairness. Indeed, Norex learned of the Know-How Case in June 2001 (Compl. ¶ 46):

- Norex communicated with the Russian court as to where it could be served. (DD Aff. ¶ 43).
- Norex had its appointed officer at Yugraneft attempt to intervene in the case—a tactic litigated and rejected by the Russian court. (Id. ¶ 34).
- Norex appointed an attorney on the very day it received notice from the Russian court, and that attorney then monitored the case file. (Id. ¶¶ 37-38).

[16] This jurisdictional basis is consistent with grounds for personal jurisdiction over non-domiciliaries under New York law. See CPLR § 302. Also, contrary to Norex's allegations (Compl. ¶ 43), the initial ex parte hearing on interim measures in the Know-How Case was consistent with Russian procedures. (DD Aff. ¶ 30).

[17] (DD Aff. ¶ 46, Ex. 40) (ruling in Know-How Case). The Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters ("Hague Convention") (Salzman Aff. Ex. I) came into effect in Russia on December 1, 2001. (DD Aff. ¶ 47).

[18] Article 10 of the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, November 15, 1965. Cyprus has stated that it has "[n]o opposition to the methods of transmission of documents provided" under Article 10. Hague Conf. on Priv. Int'l L., Decl. by the Gov't. of Cyprus, Jan. 5, 1984, available at http://www.hcch.net/index_en.php?act=status.comment&csid=29&disp=resdn (last accessed Aug. 16, 2011) (Salzman Aff. Ex. J).

- Norex signed receipts of service at its address in Cyprus (where it had directed notice be sent) as to three notices sent by the court (once) and TNK (twice after December 1)—which receipts were filed with the court (and presumably reviewed by Norex's attorney who monitored the case file). (Id. ¶¶ 36, 38-39).

On this record, after adjourning the matter to ensure that Norex was served, the Russian court held that Norex had been served, and ruled in the Know-How Case. Even after failing to appear, Norex still could have appealed that ruling, including as to service or on other grounds, such as alleged corruption. (DD Aff. ¶ 53). Norex did not – filing its federal action instead.

Having received multiple notices, attempted to intervene, and had its lawyer monitor the case file, Norex chose not to appear in or appeal the Know-How Case. This does not allow Norex to relitigate the Know-How Case in this Court. Not only did the Russian court have jurisdiction, but the decision of the Russian court on service accorded with Russian law and was fair under New York standards.

In New York, "the requirements of due process are satisfied where 'notice [is] reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" Matter of Harner v. County of Tioga, 5 N.Y.3d 136, 140 (2005) (quoting Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950)). "Due process is not, however, a mechanical formula or a rigid set of rules." Dobkin v. Chapman, 21 N.Y.2d 490, 502 (1968). Thus, the Court of Appeals has recognized that "unquestionably, mailed notice may suffice." Matter of Beckman v. Greentree Sec., Inc., 87 N.Y.2d 566, 570 (1996) (citation omitted); see also Dobkin, 21 N.Y.2d at 502 ("Our law has long been comfortable with many situations in which it was evident, as a practical matter, that parties to whom notice was ostensibly addressed would never in fact receive it.").

The filing of a certificate of service creates a strong presumption that service has been completed. See Crespo v. Kynda Cab Corp., 299 A.D.2d 295 (1st Dep't 2002) (a principle that

comports with Russian law; (DD Aff. ¶ 51). Bare denials of receipt of the summons and complaint will not rebut the presumption of proper service. Crespo, 299 A.D.2d at 295. Here, Norex has offered nothing more than a claim that it "was never properly served with the complaint in that action." (Compl. ¶ 42). Norex's Complaint nowhere mentions the notice from the Russian court, TNK's notices, Norex's attempt to intervene in the case through Yugraneft,[19] or Norex's letter to the Russian court regarding where it could be served. Norex's Complaint also ignores that Norex had a lawyer in the Know-How Case who limited himself to examining the case file (which involved counsel signing the file). (DD Aff. ¶ 38). Under these circumstances, Norex's bare denial of receipt of the complaint in the Know-How Case would not stand under New York law. See Crespo, 299 A.D.2d at 295. As such, the Know-How Case judgment is res judicata and prevents Norex from suing Defendants for damages tied to its loss of shares in Yugraneft. See Ionescu, 246 A.D.2d at 416; Robbins, 229 A.D.2d at 357.

2. Norex's Allegations of Corruption Cannot Be Litigated Here

Norex also attacks the Know-How Case by vaguely alleging that it was influenced by bribes and corruption. (Compl. ¶¶ 2, 43-45). No specific facts are alleged to support that claim. But in any event, these allegations of corruption do not overcome the res judicata effect of the Know-How Case. Robbins, 229 A.D.2d at 357. The First Department has repeatedly instructed that "[a] litigant's remedy for alleged fraud in the course of a legal proceeding 'lies exclusively in that lawsuit itself, i.e., by moving . . . to vacate the civil judgment due to its fraudulent procurement, not a second plenary action collaterally attacking the judgment in the original action.'" Vinokur v. Penny Lane Owners Corp., 269 A.D.2d 226, 226 (1st Dep't 2000) (quoting Yalkowsky v. Century Apartments Assoc., 215 A.D.2d 214, 215 (1st Dep't 1995)). Thus, as in

[19] Under New York law, a party submits to jurisdiction in New York courts when they move to intervene in a case. See Matter of Resnick v. Town of Canaan, 38 A.D.3d 949, 951 (3d Dep't 2007).

Blacklink, Norex may not litigate here claims relating to how the Russian court system should have worked, but should have litigated those claims in Russia as it is allowed to do:

> Under the guise of a due process analysis applicable to a punitive damages award and not applicable to the situation presented, defendant is attempting to relitigate matters that were appropriately decided by the Australian courts, or to litigate issues that she could have raised there. Due process does not require a transoceanic second bite of the proverbial apple.

2008 NY Slip Op 50017(U), *3 (2008).

Norex failed to raise allegations of corruption in any Russian proceeding, including the Know-How Case, and decided against appealing that case in favor of a U.S. action. Norex even chose not to raise corruption allegations in a later Russian proceeding relating to dividends paid to Norex by Yugraneft which Norex litigated during the federal action. (DD Aff. ¶ 85). Norex had Russian counsel, and made its choices knowing the courts it was in and its rights in those courts, and has waived any right to assert corruption here. See Gerzof v. Gulotta, 57 A.D.2d 821, 822 (1st Dep't 1977) ("By failing to raise [a particular] defense in the [first] proceeding, the plaintiff waived it and he is now barred from adjudicating that matter in this . . . action."). The consequences of Norex's choices are not changed by Norex now characterizing its claims as sounding in tort because any ruling for Norex here would require repudiation of multiple Russian court holdings. See O'Brien, 54 N.Y.2d at 357 ("[O]nce a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy.").

C. Norex's Claims Are Barred by the Federal Action

The federal courts have held that the preclusive effect to a prior judgment depends on three factors: (1) whether the prior action was concluded by a final judgment on the merits; (2) whether the claims raised in the subsequent action were or could have been raised in the prior action; and (3) whether the parties to the prior action are the same or in privity with the parties in

the subsequent action. Monahan v. New York City Dep't of Corrections, 214 F.3d 275, 285 (2d Cir. 2000).[20] All three factors are satisfied here and mandate dismissal of the Complaint based on the outcome of the federal action.

1. Norex's Federal Action was Dismissed by a Final Judgment on the Merits

New York courts apply federal law to determine the preclusive effect of federal judgments. Peros, 75 Misc. 2d at 913; see also Gelb v. Royal Globe Insurance Co., 798 F.2d 38, 41-42 (2d Cir. 1986). Under federal law, an action dismissed under Rule 12(b)(6)—for "failure to state a claim upon which relief can be granted"—is a final judgment upon the merits. Nowak, 81 F.3d at 1188 (quoting Bell v. Hood, 327 U.S. 678, 682-83 (1946)); Sadler v. Brown, 793 F. Supp. 87, 90 (S.D.N.Y. 1992); Overview Books, LLC v. United States, 755 F. Supp. 2d 409, 415-16 (E.D.N.Y. 2010). This principle also has been recognized by New York courts. See McKinney, 78 A.D.2d at 886 n.2. The Second Circuit expressly stated that its ruling was a dismissal for failure to state a claim under Rule 12(b)(6). Norex, 631 F.3d at 32. Thus, the first requirement needed to grant preclusive effect to Norex's federal judgment has been satisfied.

2. Norex's New Claims Could Have Been Raised in the Federal Action

Norex concedes that its current claims "are based upon the same transaction or occurrence or series of transactions or occurrences Norex pled in its federal action." (Compl. ¶ 30). All the claims raised in this action could have been asserted in Norex's federal action under pendent jurisdiction. 28 U.S.C. § 1367.[21] Indeed, two of Norex's current claims under Russian law were asserted as pendent claims in the federal action. (See Salzman Aff. Ex. C). As such,

[20] Federal law governs the preclusive effect of federal judgments. PRC Harris, Inc. v. Boeing Co., 700 F.2d 894, 896 n.1 (2d Cir. 1983).

[21] Section 1367 "confers supplemental jurisdiction 'over all…claims that are so related to claims in the action within…[the court's] original jurisdiction that they form part of the case or controversy under Article III of the United States Constitution.'" Semi-Tech Litig. LLC, v. Bankers Trust. Co., 234 F. Supp. 2d 297, 299 (S.D.N.Y. 2002) (quoting 28 U.S.C. § 1367(a)).

the state action will require all of the same evidence as would have been needed in the federal action. See Monahan, 214 F.3d at 285. If Norex wanted the courts to determine whether Defendants committed a tort under the laws of New York, Russia, or any other jurisdiction, it had ample opportunity to assert such claims in the federal action. Norex did not, its claims were dismissed for failure to state a claim, and no new claim is permitted. See Smith v. Russell Sage Coll., 54 N.Y.2d 185, 194 (1981).

3. The Parties Here Match Those in the Federal Action

Federal courts do not require complete identity of parties or those in privity to apply res judicata principles. Monahan, 214 F.3d at 285. Rather, the goal is to ensure that the party to be bound in the later action had its interests adequately represented so that it may be bound by the prior judgment. Alpert's Newspaper Delivery Inc. v. New York Times Co., 876 F.2d 266, 270 (2d Cir. 1989); Monahan, 214 F.3d at 285. Here, most importantly, the plaintiff is the same—and all the Defendants here were named in the federal action. As such, the third element for preclusive effect of the federal ruling is satisfied and Norex's Complaint should be dismissed.

D. Collateral Estoppel Bars Norex from Relitigating Issues Resolved in Russia

In addition to the preclusive effect of prior Russian court rulings, collateral estoppel precludes Norex from relitigating here issues decided against Norex (or those in privity with it) in Russia. See Buechel v. Bain, 97 N.Y.2d 295, 303-05 (2001). The doctrine applies when, as here, an issue decided in a prior action is to be determined in the present action and the party to be precluded had a full and fair opportunity to contest the issue in an earlier proceeding. See id. at 303-04; Fofana v. 41 W. 34th St., LLC, 71 A.D.3d 445, 448-49 (1st Dep't 2010) (applying estoppel against a party that "had the opportunity to litigate [an] issue, and yet declined"); Harvester Chem. Corp. v. Aetna Cas. & Sur. Co., 212 A.D.2d 392, 393-94 (1st Dep't 1995).

Norex's Complaint raises specific issues that were litigated to final judgment in Russia in proceedings where Norex (and its representatives) had a full and fair opportunity to contest those issues (or raise issues of corruption or other alleged fraud, if they existed). (DD Aff. ¶¶ 53, 85, 87). For example, Norex's Complaint makes allegations on the following issues which ignore or contradict the prior decisions of Russian courts:

- Compl. ¶¶ 35-37 (allegations about Norex's and TNK's ownership stake in Yugraneft): These paragraphs directly contradict issues resolved by Russian courts in multiple cases which held that TNK rightfully purchased and legally came to own 40% of Yugraneft's shares and ordered Yugraneft to recognize this ownership. (DD Aff. ¶¶ 17-18; BK Aff. ¶¶ 17-19).

- Compl. ¶ 46 (allegations about TNK's standing and rights as a Yugraneft shareholder): This paragraph directly contradicts decisions in multiple Russian cases. Well before the June 28, 2001 shareholder meeting cited in Norex's Complaint, Norex and Yugraneft were under Russian court orders to recognize TNK as a Yugraneft shareholder. (BK Aff. ¶¶ 23-25). Norex tried to ignore these rulings when its representatives tried to intervene in the Know-How Case, just as it tries to ignore these rulings in its Complaint.

- Compl. ¶¶ 46, 48, 51 (allegations about the June 28, 2001 Yugraneft shareholders meeting): The results of this shareholders meeting and the validity of the meeting minutes were litigated in Russia in proceedings separate and apart from the Know-How Case. Russian courts held that TNK's minutes were not false or fabricated and Norex lost its attempts to prevent TNK from voting its shares. (BK Aff. ¶¶ 33, 36).

- Compl. ¶ 53 (allegation that Norex is entitled to dividends based on a majority interest in Yugraneft): Dividends due to Norex were litigated in Russia and the courts decided that Norex was not entitled to dividends based on a majority interest. Norex litigated that suit while its federal action was pending. (DD Aff. ¶¶ 54, 57-60).

Norex would have this Court destroy or impair rights and interests established by the Russian courts. Norex's Complaint would require this Court to decide anew TNK's and Norex's rights in Yugraneft and adjudicate dividends—all issues litigated and decided in Russia. The doctrine of collateral estoppel precludes Norex from placing these issues before the Court.

E. The Court Should Defer To The Russian Rulings as a Matter of Comity

The doctrine of comity "refers to the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states." Byblos Bank Europe S.A. v. Sekerbank Turk Anonym Syrketi, 10 N.Y.3d 243, 247 (2008) (citation omitted). New York courts applying comity abstain from exercising jurisdiction over a proceeding that is appropriately the authority of a foreign forum. See Nam Tai Electronics, Inc. v. UBS Painewebber Inc., 2005 WL 6214749 (Sup. Ct. N.Y. Co. Oct. 6, 2005) (Comity may "take the form of 'a discretionary act of deference by a national court to decline to exercise jurisdiction in a case properly adjudicated in a foreign state.'") (citation omitted).

Byblos noted that New York courts have recognized foreign judgments absent a showing of fraud or that recognition would violate New York's public policy. 10 N.Y.3d at 247; see also Icahn, 2011 NY Slip Op 50502(U), *7. New York courts also consider whether the foreign court had jurisdiction, and whether recognition would unfairly prejudice a U.S. citizen. See Bertisch v. Drory, 4 Misc. 3d 1023(A), 2004 NY Slip Op 51005(U), *2 (2004); Icahn, 2011 NY Slip Op 50502(U), *7. The need for comity is strong where one state's interest in applying its law is particularly strong. See In re Maxwell Commc'n Corp., 93 F.3d 1036, 1048 (2d Cir. 1996).

Here, as discussed above, the jurisdiction of the Russian courts is undisputed given that shareholder rights in a Russian company located in Russia are at issue and Norex litigated those rights in Russia under Russian law. Norex is not a U.S. citizen, and the conflict created by Norex's Complaint is fundamental: Norex would have this Court overturn or ignore multiple Russian proceedings in which Norex participated and lost. These proceedings confirm that Russian law is applicable to Norex's claims relating to its shareholdings in Yugraneft. As the Second Circuit stated in dismissing claims on comity grounds in favor of Indian courts:

> It is hard to imagine any more direct affront to comity than the relief sought herein with respect to the settlement fund in India. As we have said, … "It is not the business of our courts to assume the responsibility for supervising the integrity of the judicial system of another sovereign nation. Such an assumption would directly conflict with the principle of comity…."

Chesley v. Union Carbide Corp., 927 F.2d 60, 66 (2d Cir. 1991) (quoting Jhirad v. Ferrandina, 536 F.2d 478, 484-85 (2d Cir. 1976). This Court should similarly abstain from substituting its judgment for that of Russian courts that fully adjudicated all of Norex's rights as to Yugraneft.

New York courts are more likely to apply comity where, as here, a party could have pursued its claims abroad. See Bertisch, 2004 NY Slip Op 51005(U), *4 (dismissing plaintiff's complaint on comity grounds where plaintiff had "ample opportunity to pursue [its] claim" in a foreign proceeding). Norex actively litigated its ownership claims as to Yugraneft in Russia—and could have asserted all its present claims in Russia. (DD Aff. ¶ 65-76). That Norex made a strategic choice to pursue claims here does not mean that this court should serve as a forum of last resort for relitigating matters resolved in Russian courts. Under similar circumstances, the court in von Spee v. von Spee, 514 F. Supp. 2d 302 (D. Conn. 2007), rejected claims which had been the subject of multiple German proceedings.

> In light of the fifteen reasoned decisions, reached at multiple levels of the German courts, this Court's decision to exercise its jurisdiction would reflect disrespect for the German court's decisions and rulings. Plaintiffs have been litigating in Germany for at least the past three years and have familiarity with and ties to the country which exceed the burden upon defendants to now litigate issues in Connecticut that they have been litigating in Germany.

Id. at 318. Here, this Court is a similarly inappropriate venue for litigating claims that have been considered and decided by multiple Russian courts. See also Icahn, 2011 NY Slip Op 50502(U), *7 (extending comity to Canadian final judgment and barring plaintiffs from bringing claims in New York State action that could have been brought in the Canadian proceeding).

Finally, Norex's conclusory allegations of corruption in the Russian courts should carry little weight here. It is well-settled that a court must be cautious before finding incompetence or corruption in another nation's judicial system. Niv v. Hilton Hotels Corp., 710 F. Supp. 2d 328, 337-38 (S.D.N.Y. 2008) (citing Monegasque De Reassurances S.A.M. (Monde Re) v. Nak Naftogaz of Ukraine, 311 F.3d 488, 499 (2d Cir. 2002) (noting the Second Circuit's reluctance to find foreign courts corrupt or biased)). That is particularly true where, as here, a party chose to actively litigate in and avail itself of another legal system.

Norex began this saga by attempting to improperly use shareholder meetings and resolutions to grab almost all of Yugraneft's shares. When that gambit was rejected by the Russian courts, Norex attempted to prevent TNK from exercising its rights as a shareholder in Yugraneft. The record is replete with Russian proceedings in which Norex's representatives appear and claim to act for Yugraneft, ignoring rulings by Russian courts regarding who owns the company and who has what authority. Even in the Know-How Case, Norex's representative attempted to intervene in the proceedings to prevent TNK from pressing the case. That attempt was rebuffed based on prior rulings. Norex conducted business in Russia and availed itself of the Russian court system. It cannot now claim that another court system halfway around the world may review that legacy of litigation by simply brandishing allegations of corruption. See Monde Re, 311 F.3d at 499 (rejecting claims of corruption as basis for holding Ukraine as an inadequate forum because plaintiff "voluntarily conducted business with [Ukrainian company], and must have anticipated the possibility of litigation in Ukraine").

III. NOREX CANNOT PLEAD RUSSIAN LAW CLAIMS

A. Russian Law Applies To Norex's Claims

As to its disputes over shares in (and the attendant dividends from) a Russian oil company located in Russia, Russian law will apply to all of Norex's claims. Cooney v. Osgood

Mach., Inc., 81 N.Y.2d 66, 72 (1993) (where claims are conduct regulating, "the law of the jurisdiction where the tort occurred [i.e., Russia] will generally apply because that jurisdiction has the greatest interest in regulating behavior within its borders"); Zurich Ins. Co. v. Shearson Lehman Hutton, Inc., 84 N.Y.2d 309, 317-18 (1994) (detailing choice of law factors for contract claims, all of which here point to Russia); BBS Norwalk One, Inc. v. Raccolta, Inc., 60 F. Supp. 2d 123, 129 (S.D.N.Y. 1999) (under New York law "a claim of breach of fiduciary duty owed to a corporation is governed by the law of the state of incorporation").[22]

B. Norex Cannot State a Claim Under Russian Law

Russian law does not recognize claims for tortious interference with a contract, tortious interference with a prospective business relationship or conversion. (DD ¶¶ 62, 68-69). Moreover, while Russian law recognizes certain obligations running from a company to its shareholders, those obligations are owed only by the corporate directors or managers. It is not imposed upon shareholders and under Russian law shareholders owe no fiduciary duty to each other. (DD Aff. ¶ 75). Here, no Defendant has any relationship to Norex other than through TNK's shareholdings in Yugraneft. As such, any claim predicated on a breach of fiduciary duty fails as a matter of Russian law. Moreover, while Norex's remaining tort or unjust enrichment claims might arguably be reformulated under Russian Civil Code ("RCC") Article 1064 or 1102, as pled, those claims, likewise, do not state a claim under Russian law. (DD Aff. ¶¶ 71, 74).

1. Norex Cannot State a Claim For Tort Liability Under Russian Law

In order to plead a tort claim for money damages under Russian law (RCC Article 1064), Norex would have to show (1) harm; (2) unlawful behavior; (3) causation; and (4) intent of the tortfeasor. (DD Aff. ¶ 70). Norex cannot allege the necessary elements.

[22] Even if New York law applied, which it does not, Norex's Complaint fails because, as BP has shown, Norex cannot state a New York cause of action either. See BP P.L.C.'s Memorandum in Support of its Motion to Dismiss.

For example, Norex cannot allege unlawful behavior by the Defendants. The Complaint alleges conduct regarding TNK's acquisition of shares in Yugraneft, including as to Defendants seeking to invalidate shareholder resolutions and charter amendments by Norex that reduced TNK's shareholdings in Yugraneft to 2.7%, or to have TNK vote its shares at the Yugraneft June 2001 shareholder meeting. (Compl. ¶¶ 33-40, 46).[23] But, as shown above, all of this conduct was the subject of litigation in Russian courts, and in every instance the matters were decided against Norex. Nowhere does the Complaint assert that these proceeding were "corrupted." These proceedings render TNK's actions as a Yugraneft shareholder lawful and prevent Norex from stating a claim for tort liability under Russian law.

The allegations regarding the Know-How Case are no better pled. As shown above, the prior decisions of the Russian courts in the long-running dispute between the parties, including the Know-How Case, were proper and permitted TNK to lawfully vote its shares at the Yugraneft shareholders meeting and assume control of Yugraneft. (DD Aff. ¶ 29; BK Aff. ¶¶ 54-55). Norex was aware of, and—through its hand-picked Yugraneft representative—even tried to intervene in the Know-How case, but opted not to appeal the final adverse ruling. Norex cannot now escape that ruling's preclusive effect by filing a new case years later in this Court and asserting claims based on what happened in that case. (DD Aff. ¶ 77). In addition, Norex also cannot plead causation, as required under Russian law. The Russian court decisions were rendered in accordance with Russian procedural and substantive law. (DD Aff. ¶¶ 29, 60-61). As such, no purported wrongful activity by Defendants in the course of those proceedings

[23] Norex also makes claims based on a purported failure by Yugraneft to pay dividends and the "stripping" of Yugraneft's assets. (Compl. ¶ 51). But those claims are either against Yugraneft (for not paying dividends) or belong to Yugraneft (asset stripping). Norex may not assert those claims against Defendants. (DD Aff. ¶ 76). Also, under Russian law, a shareholder may only sue to recover dividends if the dividends have been properly authorized by a shareholders meeting and then not paid. (Id.) That claim, however, would be against the corporation, not its shareholders. (Id.) Thus, Norex cannot under Russian law plead these claims against the Defendants.

proximately caused harm to Norex. As important, Norex chose not to exercise its remedies under Russian law if it thought that any proceeding had been corrupted—an act which by itself would break any causal link to Defendants. (DD Aff. ¶¶ 90, 92). Norex may disagree with the rulings against it in Russia, but that does not state a cause of action under Russian law.

2. Norex Cannot State A Claim For Unjust Enrichment Under Russian Law

While claims for unjust enrichment under RCC Art. 1102 are cognizable under Russian law, the Complaint fails to state such a claim. Under Russian law, unjust enrichment means the "acquisition or retention of property without valid or proper legal grounds." (DD Aff. ¶ 74). As above, the Complaint does not allege that TNK obtained its shares in Yugraneft without valid or proper legal grounds. Indeed, TNK obtained its shares through open and legitimate means—lawful steps that have been reviewed and found proper in multiple Russian court proceedings in which Norex participated to one degree or another. (DD Aff. ¶ 29; BK ¶¶ 54-55). Most important, the Complaint makes no claim that the original shareholder litigations were corrupted, further precluding a claim for unjust enrichment under Russian law.[24]

IV. DISMISSAL FOR FORUM NON CONVENIENS IS APPROPRIATE

Forum non conveniens, as codified in CPLR § 327(a), "permits a court to stay or dismiss [an action] where it is determined that the action, although jurisdictionally sound, would be better adjudicated elsewhere." Islamic Rep. of Iran v. Pahlavi, 62 N.Y.2d 474, 478-79 (1984). The Court should apply that doctrine here.

[24] In addition, even if New York law applied, Norex's unjust enrichment claims, which are entirely derivative and duplicative of its tort claims (i.e., based on TNK's allegedly wrongful control of Yugraneft), should be dismissed under CPLR § 3211(a)(7). See Fallon v. McKeon, 230 A.D.2d 629, 630 (1st Dep't 1996) (dismissing unjust enrichment claim which "simply claims damages identical to the other four causes of action," and was therefore "indistinguishable" from them). See also Town of Wallkill v. Rosenstein, 40 A.D.3d 972, 974 (2d Dep't 2007) (unjust enrichment claim properly dismissed as "merely duplicative" of failed legal malpractice claim which arose from the same facts and did not allege distinct and different damages); Spector v. Wendy, 63 A.D.3d 820, 822 (2d Dep't 2009) (unjust enrichment claims should have been dismissed given dismissal of underlying fraud claim because absent alleged fraud, defendant could not have been unjustly enriched).

The courts consider several factors when weighing forum non conveniens, including (i) the action's nexus with New York and whether the cause of action arose from transactions occurring primarily in a foreign jurisdiction; (ii) whether the foreign forum has a substantial interest in deciding the action; (iii) the likelihood that foreign law will apply to the dispute; (iv) whether documents and witnesses are abroad or unavailable; (v) whether the parties are nonresidents; and (vi) the unavailability of an alternative forum for plaintiff's claims. See Pahlavi, 62 N.Y.2d at 479-480; Shin-Etsu Chem. Co. Ltd. v. 3033 ICICI Bank Ltd., 9 A.D.3d 171, 176-79 (1st Dep't 2004). Significantly, "[n]o one factor is controlling." Shin-Etsu, 9 A.D.3d at 176. Here, multiple factors demonstrate that Norex's original forum choice—Russia—is the correct forum.

A. There Is No Sufficient Nexus To New York

"New York courts have regularly dismissed actions on the grounds that they have an insufficient nexus with New York and would thus place an undue burden on the courts." Wyser-Pratte Mgmt. Co. v. Babcock Borsig AG., 7 Misc. 3d 1012(A), 2004 NY Slip Op 51877(U), *4 (2004). Nor are New York courts under a "compulsion to add to their heavy burden by accepting jurisdiction" of a case "having no substantial nexus with New York." Id. at *6 (citation omitted).

The gravamen of Norex's Complaint is that "Defendants accomplished their illegal takeover of Yugraneft . . . by corrupting Russian court proceedings and government officials. . . forging documents, and ultimately sending armed private militiamen . . . to storm Yugraneft's corporate offices and oil field [located in Russia] in June 2001." (Compl. ¶ 2). Indeed, every event alleged, as with Norex's three prior U.S. complaints, occurred in Russia. (Compl. ¶¶ 44, 45, 51, 57 (as to bribery in Russia), ¶¶ 41-43; 46 (as to Yugraneft shareholder meetings in Russia), ¶¶ 33-36 (as to Chernogorneft's Russian bankruptcy), and ¶¶ 47-50 (as to a purported illegal takeover in Russia)). On the same facts, the federal district court held that "[t]his is

clearly a matter that is principally of Russian concern." Norex, 304 F. Supp. 2d at 581. See Wyser-Pratte, 2004 NY Slip Op 51877(U), *5 (dismissing claims against a German company where the claims "[arose] nearly entirely from transactions and events that took place outside of New York and mainly in Germany").

To manufacture a New York nexus, Norex uses conclusory allegations that some alleged acts were orchestrated by "Billionaire Oligarchs from their offices in New York" (Compl. ¶ 3), and involved the wiring of money from New York (Compl. ¶ 51). But, conclusory allegations that Defendants "conspired from New York" (Compl. ¶ 33) to do things in Russia are derivative of the underlying allegations concerning a dispute in Russia over the fate of a Russian company. The federal court rejected these bootstrapping allegations, and New York courts should as well. See Norex, 304 F. Supp. 2d at 580-81 (alleged New York activities were "largely dependent on a demonstration that the activities which took place in Russia were illegitimate"); Fin. & Trading Ltd. v. Rhodia S.A., 28 A.D.3d 346, 346 (1st Dep't 2007) (affirming dismissal where New York nexus based on alleged meetings in New York "failed to rise to a 'substantial' level" where the underlying transaction occurred primarily in a foreign jurisdiction).[25]

B. Russia's Significant Interest in this Case Outweighs New York's

The federal courts held that "Russia has a greater interest in the subject matter of this dispute than the United States." Norex, 416 F.3d at 156. "[W]here a foreign forum has a substantial interest in adjudicating an action, such interest is a factor weighing in favor of dismissal." Shin-Etsu, 9 A.D.3d at 178 (finding error where lower court failed to recognize

[25] See A & M Exps., Ltd. v. Meridien Int'l Bank, Ltd., 207 A.D.2d 741, 741(1st Dep't 1994) (affirming dismissal where transactions giving "rise to the controversy occurred in Liberia" even though some activity occurred in New York); Globalvest Mgmt. Co. L.P. v. Citibank, N.A., 7 Misc. 3d 1023(A), 2005 NY Slip Op 50712(U), *6 (2005) (allegation that defendant's employee "'directed' [from defendant's New York office] the commencement of 'the frivolous Brazilian Lawsuit,'" was "irrelevant" given that "the sole tortious act alleged by [plaintiff] . . . occurred in Brazil"); Wyser-Pratte, 2004 NY Slip Op 51877(U), *5 (alleged misstatements at New York meeting "insufficient to establish a sufficient New York nexus, particularly when compared to the overwhelming nexus with Germany").

interest of "Indian courts . . . in governing the affairs of [India's] financial institutions…").[26] Here, Norex alleges that Defendants gained control of a Russian company's shares in Russia through fraud and violence in Russia, by and against Russians—i.e., "by corrupting Russian court proceedings and government officials." (Compl. ¶¶ 2, 43-51). TNK, the company which took over Yugraneft, is a Russian oil company, as was Chernogorneft, the company from which TNK acquired its interest in Yugraneft. (Compl. ¶ 17; DD Aff. ¶ 12-13). Yugraneft, the asset at the heart of this dispute, is a Russian company operating in Russia. (Compl. ¶ 31; DD Aff. ¶ 14). As shown above, allegations that some Defendants are in New York or conclusory allegations of conspiracy cannot change the Russian focus of this case.

C. The Resolution of Plaintiff's Claims Requires Application of Russian Law

Norex actively litigated and defended claims regarding Yugraneft in Russia under Russian law. Moreover, under New York's balancing of interests test, a dispute in Russia over the shares in a Russian company and involving alleged bad acts in Russia would be governed by Russian law. See Cooney, 81 N.Y.2d at 72 (1993); Zurich Ins. Co., 84 N.Y.2d at 317-18; BBS Norwalk One, Inc., 60 F. Supp. 2d at 129. That this Court would have to apply Russian law to resolve Norex's claims weighs in favor of dismissal. See Tilleke & Gibbins Int'l, Ltd. v. Baker & McKenzie, 302 A.D.2d 328 (1st Dep't 2003) (an action requiring the application of Thai law would place an inordinate burden upon a New York court).

D. Relevant Witnesses and Documents Are Located in Russia

Dismissal also is warranted because, as the District Court found, most, if not all, of the key witnesses live in Russia, beyond the reach of New York's subpoena power; and the vast

[26] See also Imaging Holdings I, LP v. Isr. Aerospace Indus. Ltd., 26 Misc. 3d 1226(A), 2009 NY Slip Op 52749(U), *5 (2009) (recognizing Israel's "strong stake in insuring that the affairs of [the Israeli company] are conducted with integrity"); Union Homes Sav. & Loans Ltd. v. Afri-Finance LLC, 16 A.D.3d 291, 291 (1st Dep't 2005) (Nigeria, not New York, had a "compelling interest in resolving the matter pursuant to its laws" "in light of the allegations of illegal activity by a large Nigerian financial institution…").

majority of documentary evidence is located abroad. See Norex, 304 F. Supp. 2d at 581-82; Globalvest, 2005 NY Slip Op 50712(U), *7 (Citibank's likely inability to compel "critical witnesses to testify in New York . . . will unfairly prejudice Citibank's ability to defend against Globalvest's charges").[27] For example, the unnamed "Russian officials" allegedly bribed are in Russia as are those who bribed them (Compl. ¶¶ 41-45, 51, 57) and cannot be called to testify.

E. Some Defendants Being In New York Is Not Dispositive

Under CPLR § 327(a), "[t]he domicile or residence in this state of any party to the action shall not preclude the court from . . . dismissing the action." Norex is a foreign corporation doing business outside of New York and the locus of its claims is Russia. That some Defendants are New York residents cannot outweigh the importance of the non-New York factors at the heart of this dispute. See Silver v. Great Am. Ins. Co., 29 N.Y.2d 356, 361-62 (1972) (residence in New York is not dispositive where it is clear that another forum is more appropriate); Wyser-Pratte, 2005 NY Slip Op 50712(U), *5 (five of nine defendants were German residents).

F. Russia As An Adequate Alternative Forum

The availability of Russia as an adequate alternative forum is not a required or dispositive step under New York law. Pahlavi, 62 N.Y.2d at 478-79 (dismissing "even though it appears that there may be no other forum in which plaintiff can obtain the relief"); see also Shin-Etsu, 9 A.D.3d at 178-79 (noting that New York does not follow the federal precedents on this point); A & M Exps., 207 A.D.2d at 622 (even if Liberia was "not a viable alternative forum," that factor was "not dispositive" given a "marginal" New York connection).[28]

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[27] See also Nicholson v. Pfizer, Inc., 278 A.D.2d 143, 143 (1st Dep't 2000) (reversing denial of dismissal where key witnesses were "beyond the reach of New York's subpoena power"); Garmendia v. O'Neill, 46 A.D.3d 361, 362 (1st Dep't 2007) (affirming dismissal where "much of the evidence" was located abroad).

[28] In vacating the dismissal of this action, the Second Circuit found that Defendants' inability to demonstrate that Russia provided an adequate alternative forum (because Norex had allowed the appeal period to lapse in the Know-How Case) was "fatal" to the forum non conveniens analysis. Norex, 416 F.3d at 158-60. By contrast, under New York law (i) no one factor is dispositive; (ii) an adequate alternative forum is not required; and (iii) plaintiff bears

"[A]n alternative forum is considered 'adequate' if the defendant is amenable to process in that jurisdiction and the alternative forum permits litigation of the subject matter of the dispute." Gryphon Domestic VI, LLC v. APP Int'l Fin. Co., B.V., 41 A.D.3d 25, 37 (1st Dep't 2007) (citation omitted); Shin-Etsu, 9 A.D.3d at 78-9. Here, Defendants are amenable to service in Russia and willing to consent to the jurisdiction of Russian courts. Russian law also permits litigation of the subject matter of the dispute. (DD Aff. ¶ 68-76). Indeed, Norex "demonstrated that it considers [Russia] to be an adequate forum" by commencing multiple actions in Russia based on the facts at issue here. See Wyser-Pratte, 2004 NY Slip Op 51877(U), *6. Norex's actions show that Russia is the appropriate forum, and this Court should dismiss the Complaint.

CONCLUSION

For all of the foregoing reasons, this Court should grant Defendants' Motion to Dismiss with prejudice and dismiss Norex's Revised First Amended Complaint in its entirety.

Dated: New York, New York
September 16, 2011

/s/ Owen C. Pell
White & Case LLP
Owen C. Pell
Scott E. Hershman
Milana Salzman
Brian E. Fritz
1155 Avenue of the Americas
New York, New York 10036
(212) 819-8200

Attorneys for the TNK Defendants

/s/ Kim Koopersmith
Akin Gump Strauss Hauer & Feld
Kim Koopersmith
W. Randolph Teslik
Ashley F. Waters
Elizabeth Tobio
One Bryant Park
New York, New York
(212) 872-1000

Attorneys for Alfa Group Consortium

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the burden of demonstrating that Russia is an inadequate forum. See Pahlavi, 62 N.Y.2d at 481. Norex cannot meet this burden simply by alleging that it is likely to lose in Russia.

_/s/ Turner P. Smith _____
Curtis, Mallet-Prevost,
Colt & Mosle LLP
Turner P. Smith
Myles K. Bartley
101 Park Avenue
New York New York 10178
(212) 696-6000

Attorneys for Access Industries and Leonard Blavatnik

_/s/ Fredric S. Newman_____
Hoguet Newman Regal & Kenney LLP
Fredric S. Newman
Sheryl B. Galler
10 East 40th Street
New York, New York 10016
(212) 689-8808

Attorneys for Simon Kukes

_/s/ Herbert F. Kozlov_____
Reed Smith LLP
Herbert F. Kozlov (Partner)
Lawrence J. Reina (Counsel)
599 Lexington Avenue, 22nd Floor
New York, New York 10022
(212) 521-5400

Attorneys for Victor Vekselberg

_/s/ Janis M. Meyer_____
Dewey & LeBoeuf
Janis M. Meyer
Henry J. Ricardo
George E. Mastoris
1301 Avenue of the Americas
New York, New York 10019
(212) 259-8000

Attorneys for Renova, Inc.

_/s/ Robert Juman_____
Quinn Emanuel Urquhart & Sullivan LLP
Faith Gay
Robert Juman
Corey Worcester
51 Madison Avenue, 22nd Floor
New York, New York 10010
(212) 849-7000

Attorneys for Access Industries and Leonard Blavatnik