## VERMONT SUPERIOR COURT WASHINGTON UNIT, CIVIL DIVISION

STATE OF VERMONT,

Plaintiff,

v.

ATLANTIC RICHFIELD COMPANY, et al.,

Defendants.

2014 AUG 21 P 3: 09

Docket No. 340-6-14 Wncv

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## TOTAL PETROCHEMICALS & REFINING USA, INC.'S MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION

1. Pursuant to V.R.C.P. 12(b)(2), and the Parties' Joint Stipulation to Extend Time for Filing Responsive Pleading, Defendant Total Petrochemicals & Refining USA, Inc. ("TPRI") submits this Motion to Dismiss Plaintiff's Original Complaint for Lack of Personal Jurisdiction, and would respectfully show the Court as follows:

## I. INTRODUCTION

2. Plaintiff's Complaint should be dismissed with prejudice because Plaintiff has failed to allege any facts that would support this Court's exercise of personal jurisdiction over TPRI. In its seventy-five page Complaint, Plaintiff's factual allegations relating to TPRI are limited to the following:

[TPRI] is a Delaware corporation with its principal place of business at: 1201 Louisiana Street, Suite 1800, Houston, Texas 77002. TPRI may be served with process through General Counsel for Total Petrochemicals & Refining USA, Inc., 1201 Louisiana Street, Suite 1800, Houston, Texas 77002.

Complaint at  $\P$  16(x). The remainder of Plaintiff's Complaint lumps TPRI with the other twenty-eight named Defendants and fails to articulate any facts regarding TPRI's purported connection to either the State of Vermont or the causes of action asserted. Specifically, "[n]o allegation links [TPRI] to the refining, supplying, marketing or addition of MTBE to gasoline in

[Vermont]." In re MTBE Products Liability Litig., No. 14 CIV. 1014, 2014 WL 1778984, at \*3 (S.D.N.Y. May 5, 2014).

3. Plaintiff's broad-sweeping, cursory attempt to establish personal jurisdiction over all Defendants is patently insufficient:

[T]his Court may exercise jurisdiction over Defendants because they either are or at the relevant time were: authorized to do business in Vermont, registered with the Vermont Secretary of State, transacting sufficient business with sufficient minimum contacts in Vermont, or otherwise intentionally availing themselves of the Vermont market through the sale, manufacturing, distribution, and/or processing of petroleum-related products in Vermont to render the exercise of jurisdiction over Defendants by the Vermont courts consistent with traditional notions of fair play and substantial justice.

Complaint at ¶ 20. Setting aside the legal insufficiency of attempting to plead personal jurisdiction by lumping all Defendants together, Plaintiff's baseless and conclusory allegations are wholly inaccurate as they pertain to TPRI.

- 4. TPRI is a Delaware corporation headquartered in Houston, Texas. Affidavit of Kim Arterburn, attached hereto as Exhibit 1, at ¶ 2. TPRI is not currently, nor has it ever been, qualified to do business in Vermont or registered with the Vermont Secretary of State. *Id.* at ¶ 4. Further, it has never sold, manufactured, distributed, or processed any gasoline containing MTBE in the State of Vermont. *Id.* at ¶ 3. In fact, TPRI has never participated in the Vermont market for the retail or wholesale distribution of gasoline and thus has not "availed [itself] of the Vermont market . . . to render the exercise of jurisdiction . . . by the Vermont courts consistent with traditional notions of fair play and substantial justice." Complaint at ¶ 20.
- 5. Despite the defective nature of Plaintiff's Complaint, TPRI's motion should be granted without leave to amend because any such opportunity would be futile. Plaintiff would never be capable of pleading any facts to support the exercise of either general or specific jurisdiction over TPRI under Vermont's long arm statute. General jurisdiction does not exist as

any contacts TPRI has with the State of Vermont are *de minimis* and fall far short of the kind of continuous and systematic contacts with the forum state that are necessary to render the defendant essentially "at home" in the jurisdiction. TPRI cannot be subject to specific jurisdiction either because TPRI has never refined, manufactured, blended, distributed or sold MTBE or any gasoline containing MTBE in Vermont, and thus has no connection to the causes of action asserted in the Complaint. TPRI must therefore be dismissed with prejudice.

#### JURISDICTIONAL FACTS

- 6. Plaintiff, the State of Vermont, generally alleges that all Defendants, including TPRI, "refined, marketed, and/or otherwise supplied (directly or indirectly) MTBE and/or gasoline containing MTBE that each such Defendant knew or should have known would be delivered into areas affecting that State's property and waters, or otherwise did business in the State." Complaint at ¶ 16. Plaintiff does not support this broad-sweeping allegation with any material facts regarding TPRI. Plaintiff accurately indicates that TPRI is a Delaware corporation that maintains its principal place of business in Houston, Texas. *Id.* at ¶ 16(x).
- 7. Plaintiff also correctly notes that TPRI was served through its General Counsel at its headquarters in Houston, Texas, but fails to admit that service of process in Houston was necessary as TPRI does not currently, nor has it ever, maintained a registered agent to accept service of process in the State of Vermont. Ex. 1 at ¶ 10.
- 8. TPRI has never been qualified to do business in Vermont, nor has it ever been registered with the Vermont Secretary of State. *Id.* at ¶ 4. Furthermore, TPRI has never owned or leased any real estate in Vermont; (iii) maintained an office in Vermont; (iv) had officers or directors in Vermont; or (v) maintained a bank account, telephone number, or physical address in Vermont. *Id.* at ¶¶ 5, 8, 9 and 11.

- 9. TPRI never refined gasoline containing MTBE, manufactured MTBE, blended MTBE, supplied gasoline containing MTBE, or otherwise made, marketed, advertised, stored, or sold any product containing MTBE in Vermont. *Id.* at ¶ 3. TPRI has never owned, operated, or leased any gasoline service stations, terminals, underground storage tanks, or other gasoline distribution facilities in Vermont. *Id.* at ¶ 6. Additionally, TPRI has never entered into any contractual relationship with any jobber or other distributor for the delivery of MTBE or gasoline containing MTBE to gasoline service stations or other gasoline distribution or storage facilities located in Vermont. *Id.* at ¶ 7.
- 10. Since 2006, TPRI's only contacts with Vermont consist of the temporary storage of \$120,126 of polypropylene at the end of 2012 due to an in-transit rail car and limited sales of polypropylene, which comprise less than 0.002% of TPRI's total sales revenue for that time period. *Id.* at ¶ 13.

## II. <u>LEGAL STANDARD</u>

11. On a Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction, Plaintiff bears the burden of proof. See e.g., Robinson v. Overseas Military Sales Corp., 21 F.3d 502, 507 (2d Cir. 1994) ("The burden of proving jurisdiction is on the party asserting it."). To establish jurisdiction over a nonresident defendant, "the plaintiff must show that the Vermont long arm statute reaches the defendant, and that jurisdiction over [the defendant] may be maintained without offending the Due Process Clause of the Fourteenth Amendment of the United States Constitution." N. Aircraft, Inc. v. Reed, 572 A.2d 1382, 1385 (Vt. 1990). To meet this burden, plaintiff must make a prima facie showing of jurisdiction "based upon evidence of specific facts set forth in the record." Schwartz v. Frankenhoff, 733 A.2d 74, 81 (Vt. 1999). "Lumping all the defendants together for the purposes of alleging personal jurisdiction is patently insufficient."

Savage v. Galaxy Media & Mktg. Corp., No. 11 Civ. 6791(NRB), 2012 WL 2681423, at \*6 n.13 (S.D.N.Y. July 5, 2012) (internal punctuation omitted); see also Schwartz, 733 A.2d at 80 (quoting Calder v. Jones, 465 U.S. 783, 790 (1983) for the proposition that "each defendant's contacts with the forum State must be assessed individually"). In Vermont, a plaintiff seeking to establish personal jurisdiction is "require[d] . . . to go beyond the pleadings and make affirmative proof." Schwartz, 733 A.2d at 81 (internal citation omitted).

- 12. Vermont's long arm statute confers jurisdiction over nonresident defendants to the full extent permitted by the Due Process Clause. Vt. Stat. Ann. tit. 12, §§ 855 and 913 (2003); *Artec Distrib., Inc. v. Video Playback, Inc.*, 799 F. Supp. 1558, 1559-60 (D. Vt. 1992); *Schwartz*, 733 A.2d at 79 n.1. Accordingly, the jurisdictional analysis in this case is a single inquiry: whether the exercise of personal jurisdiction over TPRI offends due process. *Id*.
- A court's exercise of personal jurisdiction over an out-of-state defendant comports with due process only "if the defendant has certain minimum contacts with the State such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." Daimler AG v. Bauman, 134 S. Ct. 746, 754 (2014) (citing Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)) (internal citation and punctuation omitted); see also Schwartz, 733 A.2d at 79 ("[T]he question of whether a Vermont court has jurisdiction over [a] defendant[] is a question of federal constitutional law requiring the court to decide whether the defendant[] seeking dismissal [has] had sufficient 'minimum contacts' with Vermont . . . ." (citation omitted)). The "critical determination" for deciding whether a defendant has minimum contacts with the State is "whether the defendant's conduct and connection with the forum State are such that [it] should reasonably anticipate being haled into court there." Lisenko v. Osadchuk, No. 2007-487, 2008 WL 3976569, at \*2 (Vt. Aug. Term, 2008) (citation omitted); see

also World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980). "It is essential to a finding of personal jurisdiction that a defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." Schwartz, 733 A.2d at 79 (internal citation omitted).

14. The minimum contacts analysis requires the Court to distinguish between the two forms of jurisdiction, specific and general. See Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2853 (2011); Porina v. Marward Shipping Co., Ltd., 521 F.3d 122, 127-28 (2d Cir. 2008). To establish specific jurisdiction, the suit must "arise out of or relate to" the defendant's contacts with the forum. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985). General jurisdiction, on the other hand, requires the defendant's "affiliations with the State [to be] so continuous and systematic as to render [it] essentially at home in the forum State." Daimler, 134 S. Ct. at 761 (citing Goodyear, 131 S. Ct. at 2851); see also Sonera Holding B.V. v. Cukurova Holding A.S., 750 F.3d 221, 223 (2d Cir. 2014), cert. denied, 134 S. Ct. 2888 (2014) ("[G]eneral jurisdiction extends beyond an entity's state of incorporation and principal place of business only in the exceptional case where its contacts with another forum are so substantial as to render it 'at home' in that state." (citing Daimler, 134 S. Ct. 746)).

#### III. ARGUMENT

### A. TPRI Does Not Have Minimal Contacts with Vermont

15. TPRI's contacts with Vermont fall well short of the minimum contacts required to establish personal jurisdiction. *See Daimler*, 134 S. Ct. at 754. Specific jurisdiction does not exist because the allegations giving rise to this lawsuit are entirely unrelated to TPRI's contacts with Vermont. General jurisdiction does not exist because TPRI's nominal contacts with

Vermont are not so "continuous and systematic" as to render TPRI "essentially at home" in Vermont. See id.; Sonera Holding, 750 F.3d at 223.

- (i) TPRI is Not Subject to Specific Jurisdiction Because this Lawsuit Does Not Arise Out of or Relate to TPRI's Contact With Vermont.
- 16. To establish specific jurisdiction, "the defendant must have 'purposefully directed' its activities at the forum" and "the litigation must 'arise out of or relate to' at least one of those activities." Dearwater v. Bond Mfg. Co., No. 1:06-CV-154, 2007 WL 2745321, at \*4 (D. Vt. Sept. 19, 2007) (emphasis added) (citing Burger King, 471 U.S. at 472); see also Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414 (1984)). This lawsuit arises out of Plaintiff's unsupported allegation that all Defendants refined, manufactured, blended, and/or supplied MTBE or gasoline containing MTBE to Vermont, and that MTBE contaminated the State's waters. Complaint at ¶¶ 1, 5.
- 17. It is impossible that any of the underlying allegations arise out of or relate to any activity that TPRI "purposefully directed" at Vermont because TPRI never refined, manufactured blended, distributed, supplied or sold either MTBE or gasoline containing MTBE in Vermont. Ex. 1 at ¶ 3. Further, TPRI has never entered into any contractual relationship with any jobber or other distributor for the delivery of MTBE or gasoline containing MTBE to service stations or other gasoline distribution or storage facilities located in Vermont. *Id.* at ¶ 7. TPRI has never owned, operated, or leased any gasoline service stations, terminals, underground storage tanks, or any other gasoline distribution or storage facilities in Vermont from which any MTBE or gasoline containing MTBE may have been released into the environment. *Id.* at ¶ 6.
- 18. Plaintiff's allegations regarding "indirect" sales of gasoline containing MTBE that may have reached Vermont are vague, factually unsupported, and in any event legally insufficient to establish personal jurisdiction over TPRI. Complaint at ¶ 16. A "defendant's

transmission of goods permits the exercise of jurisdiction only where the defendant can be said to have *targeted the forum*; as a general rule, it is not enough that the defendant might have predicted that its goods will reach the forum State." *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2788 (2011) (emphasis added) (further noting that "[i]t is a defendant's actions, not his expectations, that empower a State's courts to subject him to judgment"). The *McIntyre* court reasoned that a rule allowing for the consideration of foreseeability would result in "undesirable consequences[;] . . . . The owner of a small Florida farm might sell crops to a large nearby distributor . . . who might then distribute them to grocers across the country. If foreseeability were the controlling criterion, the farmer could be sued in Alaska or any number of other States' courts without ever leaving town." *Id.* at 2790.

19. Placing a product into the "stream of commerce" that eventually arrives in the forum state is not sufficient to establish jurisdiction. *Volkswagen*, 444 U.S. at 298 (nonresident defendant was not subject to jurisdiction where its product arrived in the forum state after being placed in the stream of commerce); *O'Brien v. Comstock Foods, Inc.*, 194 A.2d 568, 571 (Vt. 1963) ("The bare allegation that a [nonresident] defendant . . . put its product 'into the stream of commerce,' without more, is insufficient to show a voluntary contact or an intentional participation in Vermont. The fact that the [product] was ultimately purchased and consumed [in Vermont] does not cure the defect."). Plaintiff has not pleaded any facts to suggest that TPRI ever "directly or indirectly" sold any MTBE or gasoline containing MTBE that ultimately reached the State of Vermont. Furthermore, whether TPRI ever maintained the reasonable

<sup>&</sup>lt;sup>1</sup> TPRI is unaware of any gasoline containing MTBE it either refined, manufactured or ever held title to that ever entered the State of Vermont. Ex. 1 at ¶ 7. However, to the extent any such gasoline did enter Vermont, it did so entirely at the discretion and direction of third parties. *Id.* at ¶¶ 3, 7. Under these facts, personal jurisdiction does not exist. *See McIntyre*, 131 S. Ct. at 2788. For example, in *In re MTBE Product Liability Litigation*, the court found that a Texas-based defendant was not subject to personal jurisdiction in Puerto Rico even though its MTBE was blended and distributed in Puerto Rico because the defendant never manufactured, marketed, delivered, sold,

expectation that its products could potentially reach Vermont is legally insufficient to support personal jurisdiction under binding Supreme Court precedent. Actions, not expectations, remain the deciding factor.

20. Under the facts set forth above, specific jurisdiction cannot exist in this case as no part of TPRI's conduct either occurred in Vermont or bears any connection to the facts underlying the causes of action asserted. *See Walden*, 134 S. Ct. at 1118 (declining to permit the exercise of specific personal jurisdiction where "[n]o part of petitioner's course of conduct occurred in the [forum], and he maintained no jurisdictionally relevant contacts with that forum'); *see also Helicopteros*, 466 U.S. at 414 (holding specific jurisdiction does not exist where the claims do not arise out of, and are not related to defendant's contacts with the forum); *Dearwater*, 2007 WL 2745321, at \*5 (finding specific jurisdiction did not exist because defendant's "presence in Vermont [did] not meet the relatedness part of the specific jurisdictional inquiry").

# (ii) <u>TPRI is Not Subject to General Jurisdiction Because its Contacts with Vermont are Virtually Inexistent.</u>

21. The general jurisdiction analysis is a stringent test allowing jurisdiction to "extend[] beyond an entity's state of incorporation and principal place of business only in the exceptional case where its contacts with another forum are so substantial as to render it 'at home' in that state." Sonera Holding, 750 F.3d at 223 (citing Daimler, 134 S. Ct. 746)

solicited or advertised its MTBE in Puerto Rico; rather, it merely sold MTBE to third parties in a series of spot sales. 2014 WL 1778984, at \*2-4 (quoting Walden v. Fiore 134 S. Ct. 1115, 1122-23 (2014) for the proposition that the jurisdictionally relevant relationship "must arise out of contacts the 'defendant himself' creates with the forum[;]... a defendants' relationship with a plaintiff or third party, standing alone, is an insufficient basis for jurisdiction" (emphasis in original)). In re MTBE is directly analogous to the present case and in line with the well-established law of Vermont and the United States Supreme Court.

<sup>&</sup>lt;sup>2</sup> In determining whether a court has general jurisdiction, it will "examine a defendant's contacts with the forum state over a period that is reasonable under the circumstances—up to and including the date the suit was filed." *Porina v. Marward Shipping Co., Ltd.*, 521 F.3d 122, 128 (2d Cir. 2008). The number of years a court will consider is highly fact-intensive and can range from approximately three to seven years. *Helicopteros*, 466 U.S. at 409-411

(emphasis added)); see also Upshaw v. WMB Const., Inc., No. 2:13-CV-76, 2013 WL 4874169, at \*3 (D. Vt. Sept. 12, 2013) ("Because the contacts that establish general jurisdiction are unrelated to the events giving rise to the lawsuit, courts impose a 'more stringent' version of the minimum contacts test for general jurisdiction than for specific jurisdiction." (citing In re Terrorist Attacks on Sept.11, 2001, 714 F.3d 659, 674 (2d Cir. 2013))). Indeed, the United States Supreme Court recently made "clear that even a company's 'engage[ment] in a substantial, continuous, and systematic course of business is alone insufficient to render it at home in a forum[.]" Sonera Holding, 750 F.3d at 226 (quoting Daimler, 134 S. Ct. at 761).

22. TPRI's contacts with Vermont do not come close to the "systematic and continuous" contacts required to render it "at home" in the state. See Daimler, 134 S. Ct. at 761-62; Sonera Holding, 750 F.3d at 226. As referenced above, TPRI is a Delaware corporation headquartered in Houston, Texas. Ex. 1 at ¶ 2. It has never been qualified to do business in Vermont. Id. at ¶ 4. It has never owned real estate or maintained an office in Vermont. Id. at ¶¶ 5, 8. It has never had any officers, directors, or agents for service of process in Vermont. Id. at ¶¶ 9-10. And it has never maintained a bank account, phone number or physical address in Vermont. Id. at ¶ 11. Under these facts, general jurisdiction does not exist. See Dearwater, 2007 WL 2745321, at \*1 (finding general jurisdiction did not exist where defendant did not own property in Vermont, was not registered to do business in Vermont, did not advertise in Vermont-based publications, and did not have sales personnel in Vermont); Bechard v. Constanzo, 810 F. Supp. 579, 585 (D. Vt. 1992) (finding general jurisdiction did not exist when defendant physicians did not maintain an office in Vermont, were not licensed to practice in

<sup>(</sup>considering contacts going back six years); *Metro. Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 569 (2d Cir. 1996) (considering contacts going back six years); *Learjet Corp. v. Jensen*, 743 F.2d 1325, 1329-31 (9th Cir. 1984) (considering contacts going back three years).

Vermont, did not own property in Vermont, and did not solicit business or actively pursue business contacts in Vermont).

- 23. The only contacts TPRI has ever had with Vermont consist of extremely limited sales and the temporary storage of polypropylene in an in-transit rail car at the end of 2012. TPRI's revenue from sales of polypropylene in Vermont since 2006 are as follows: \$104,184 in 2006; \$1,432 in 2007; \$2,383 in 2008; \$88,345 in 2009; \$0 in 2010; \$170,925 in 2011; \$221,800 in 2012; and \$568,783 in 2013; and \$139,320 to date in 2014. These revenues represent 0.0011%, 0.0000%, 0.0000%, 0.0012%, 0.0000%, 0.0013%, 0.0017%, and 0.0044% of TPRI's total sales for each year from 2006 through 2013, respectively. Ex. 1 at ¶ 13. These percentages are miniscule. Even sizable sales into a state do not establish general jurisdiction, let alone de minimis sales such as these. Daimler, 134 S. Ct. at 761-62 (finding that asserting general jurisdiction in every state in which a defendant's "sales are sizable" would be an "exorbitant exercise[]" that "would scarcely permit out-of-state defendants 'to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit" (citing Burger King, 471 U.S. at 472)); Johnston v. Multidata Sys. Int'l Corp., 523 F.3d 602, 612 (5th Cir. 2008) (finding sales to the forum state for "four out of five years [that] accounted for 1.7%, 0.5%, 1.1%, and 2.5%" of the defendant's global sales did not amount to "substantial, systematic, and continuous contacts"); Dearwater, 2007 WL 2745321, at \*1 (finding defendant's sales to customers in Vermont over a seven year period representing between 2.3% and 0.03% of its yearly total sales did not establish general jurisdiction).
- 24. Consequently, because TPRI's contacts with Vermont do not approach the "continuous and systematic" contacts required to render a nonresident defendant "at home" in the forum, TPRI is not subject to general jurisdiction in Vermont. *See Daimler*, 134 S. Ct. at

761-62; *Helicopteros*, 466 U.S. at 416 (finding general jurisdiction did not exist even where defendant purchased significant equipment and services from the forum state, sent its personnel to train in the forum state, and sent its CEO to negotiate in the forum state). TPRI's contacts with the State of Vermont are precisely the type of "random, fortuitous, [and] attenuated" contacts that are insufficient to establish personal jurisdiction. *See Burger King*, 471 U.S. at 475.

## B. <u>Asserting Jurisdiction Over TPRI Would Violate Traditional Notions of Fair Play and Substantial Justice</u>

- 25. Because TPRI's contacts with Vermont do not satisfy the minimum contacts requirement for personal jurisdiction, the Court need not consider whether the exercise of personal jurisdiction would nevertheless be reasonable. *Porina*, 521 F.3d at 129; *Dearwater*, 2007 WL 2745321, at \*8. However, even were Plaintiff capable of establishing the requisite minimum contacts, this motion should still be granted because asserting jurisdiction over TPRI would offend traditional notions of fair play and substantial justice. *Asahi Metal Indus. Co., Ltd. v. Super. Ct. of Cal., Solano Cnty.*, 480 U.S. 102, 113-14 (1987).
- 26. Courts consider the following factors when determining the reasonableness of the exercise of jurisdiction: (i) "the burden on the defendant;" (ii) "the interests of the forum State;" (iii) "the plaintiff's interest in obtaining relief;" (iv) "the interstate judicial system's interest in obtaining the most efficient resolution of controversies;" and (v) "the shared interest of the several States in furthering fundamental substantive social policies." *Id.* at 113 (quoting *Volkswagen*, 444 U.S. at 292). In this case, TPRI would be significantly and unduly burdened by being forced to litigate in Vermont. It has no presence in Vermont and all of its officers are located almost 2,000 miles away in Houston, Texas. Notwithstanding, the exercise of personal jurisdiction over TPRI would be improper:

[T]he Due Process Clause does not contemplate that a state may make binding a judgment in personam against [a] corporate defendant with which the State has no contacts, ties, or relations. Even if the defendant would suffer minimal or no

inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy;

even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes

act to divest the State of its power to render a valid judgment.

Volkswagen, 444 U.S. at 294. Moreover, Vermont's interest in resolving this dispute will not be

prejudiced by the dismissal of TPRI because TPRI never refined, manufactured, distributed,

marketed, or sold either MTBE or gasoline containing MTBE in Vermont, and therefore has no

connection to the allegations underlying Plaintiff's causes of action. Accordingly, asserting

jurisdiction over TPRI under the circumstances of this case would be unreasonable and a

violation of TPRI's due process rights. See Asahi, 480 U.S. at 115-16; Upshaw, 2013 WL

4874169, at \*4.

IV. CONCLUSION

Based on the foregoing, Plaintiff has not met its burden of establishing personal 27.

jurisdiction over TPRI, and any attempt to amend the Complaint would be futile. TPRI therefore

respectfully requests that this Court issue an order dismissing Plaintiff's Complaint against TPRI

with prejudice.

Dated: August 21, 2014

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Respectfully submitted,

RYAN SMITH & CARBINE, LTD.

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Counsel for Total Petrochemicals & Refining USA, Inc.

Harry R. Ryan

## **CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of Total Petrochemicals & Refining USA, Inc.'s Motion to Dismiss for Lack of Personal Jurisdiction was served upon counsel for Plaintiff and all other counsel of record via first class or electronic mail on the 21st day of August, 2014.

## VERMONT SUPERIOR COURT WASHINGTON UNIT, CIVIL DIVISION

STATE OF VERMONT, Plaintiff,

٧.

ATLANTIC RICHFIELD COMPANY, et al.,

Defendants.

Docket No. 340-6-14 Wncv

## AFFIDAVIT OF KIM ARTERBURN

BEFORE ME, the undersigned authority, on this day personally appeared Kim Arterburn, a person known to me, who being duly sworn, did depose and say:

- 1. I am over eighteen (18) years of age, I have never been convicted of a felony, and I am fully competent to make this affidavit. I have personal knowledge of the matters stated herein, and they are true and correct.
- 2. I reside in Houston, Texas. I am employed as Senior Manager, Financial Accounting for Total Petrochemicals & Refining USA, Inc. ("TPRI"), a corporation engaged in petroleum refining and the manufacture of petrochemicals with facilities in Texas, Louisiana, Colorado, Connecticut, and Alabama. TPRI is a Delaware corporation headquartered in Houston, Texas.
- 3. TPRI never refined gasoline containing MTBE, manufactured MTBE, blended MTBE, supplied gasoline containing MTBE, or otherwise made, marketed, advertised, stored, or sold any product containing MTBE in Vermont.
- 4. TPRI is not now, and never has been, qualified to do business in Vermont, and has never been registered with the Vermont Secretary of State.
  - 5. TPRI has never owned or leased any real estate in Vermont.

- 6. TPRI has never owned, operated, or leased any gasoline service stations, terminals, underground storage tanks, or any other gasoline distribution or storage facilities located in Vermont.
- 7. TPRI has never entered into any contractual relationship with any jobber or other distributor for the delivery of MTBE or gasoline containing MTBE to gasoline service stations or other gasoline distribution or storage facilities located in Vermont. TPRI is unaware of any third party who delivered MTBE or gasoline containing MTBE to Vermont that TPRI ever refined or manufactured, or to which it ever held title.
  - 8. TPRI has never maintained an office in Vermont.
  - 9. TPRI has never had officers or directors in Vermont.
  - 10. TPRI has never had an agent for service of process in Vermont.
- 11. TPRI has never maintained a bank account, phone number, or physical address in Vermont.
- 12. For the time period 2006 through the present, TPRI has received a total of \$1,297,172 in revenue from sales in Vermont, representing 0.0013% of TPRI's total revenue of \$96,800,594,039 for that time period. A breakdown of this revenue is below. None of this revenue represents the sale of gasoline or any other motor fuel. All sales in Vermont were of polypropylene. TPRI has never sold motor fuel in Vermont.
  - a. 2006: Revenue from Vermont: \$104,184. Percentage of Total Revenue: 0.0011%.
  - b. 2007: Revenue from Vermont: \$1,432. Percentage of Total Revenue: 0.0000%.
  - c. 2008; Revenue from Vermont: \$2,383. Percentage of Total Revenue: 0.0000%.
  - d. 2009: Revenue from Vermont: \$88,345. Percentage of Total Revenue: 0.0012%.
  - e. 2010: Revenue from Vermont: \$0. Percentage of Total Revenue: 0.0000%.

- f. 2011: Revenue from Vermont: \$170,925. Percentage of Total Revenue: 0.0013%.
- g. 2012: Revenue from Vermont: \$349,378. Percentage of Total Revenue: 0.0026%.
- h. 2013: Revenue from Vermont: \$441,205. Percentage of Total Revenue: 0.0034%.
- i. 2014: Revenue from Vermont to date: \$139,320.
- 13. TPRI had \$120,126 of polypropylene temporarily stored in an in-transit rail car located in Vermont at the end of 2012.

Signature of Affiant, Kim Arterburn

SUBSCRIBED AND SWORN TO BEFORE ME on the 21st day of August, 2014, to certify which witness my hand and seal of office.

MCHELE ROLL OF TERS OF

Notary Public in and for the State of 1043

Printed Name 144 16019

My commission expires 1644

# VERMONT SUPERIOR COURT WASHINGTON UNIT, CIVIL DIVISION

STATE OF VERMONT,

Plaintiff,

v.

ATLANTIC RICHFIELD COMPANY, et al.,

Defendants.

Docket No. 340-6-14 Wncv

## CERTIFICATE OF SERVICE

Pursuant to V.R.C.P. Rule 5(d), on the 21st day of August, 2014, I served the following:

• Defendant Total Petrochemicals & Refining USA, Inc.'s *Motion to Dismiss* For Lack of Personal Jurisdiction

on all parties by emailing copies of the same upon:

All Local Counsel of Record

DATED at Rutland, Vermont this 21st day of August, 2014.

TOTAL PETROCHEMICALS & REFINING USA, INC.

/s/ Harry R. Ryan

By: \_

Harry R. Ryan, III, Esq. Ryan Smith & Carbine, Ltd. P.O. Box 310 Rutland, Vermont 05702-0310 (802) 786-1040

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9366-001/547818

#### STATE OF VERMONT

Civil Division.

Docket No. 340-6-14 Wncv

Superior Court Washington Unit
State of Vermont
v.
Atlantic Richfield Co., et al.

# State of Vermont's Opposition to TPRI's Motion to Dismiss

Plaintiff, the State of Vermont, opposes Defendant Total

Petrochemicals & Refining USA, Inc.'s Motion to Dismiss for Lack of

Personal Jurisdiction ("Motion"), filed August 21, 2014. In support of its

opposition, the State submits the following memorandum of law.

## INTRODUCTION

The State filed suit to recover damages arising from widespread contamination of Vermont's groundwater, public trust resources, public water wells, private water wells, and underground storage tank ("UST") sites with methyl tertiary butyl ether ("MTBE"). MTBE is a chemical that was blended into gasoline sold in certain areas of the United States from approximately 1980 to 2006. The State sued the oil companies that manufactured MTBE, produced gasoline containing MTBE, and/or blended

MTBE into gasoline that was supplied in the State. One of those companies is Defendant Total Petrochemicals & Refining USA, Inc. ("TPRI"). The State's Complaint alleges that TPRI "refined, marketed and/or otherwise supplied (directly or indirectly) MTBE and/or gasoline containing MTBE" that contaminates "the State's property and waters." See Plaintiff's Original Complaint ("Complaint") at ¶16.

TPRI now moves to dismiss the State's complaint under Rule 12(b)(2) on the ground that the Court lacks personal jurisdiction. TPRI argues that it is not subject to jurisdiction in Vermont courts because it did not physically make or personally sell MTBE or MTBE-containing gasoline in Vermont. It therefore claims not to have the "minimum contacts" with Vermont required to satisfy due process concerns.

This theory is not new; it has been advanced and rejected repeatedly. Indeed, it has been rejected specifically as to Vermont municipal plaintiffs (Craftsbury Fire District and the Town of Hartland). In the MTBE Multi-District Litigation ("MDL"),¹ the federal district court applied the World-Wide Volkswagen standard to deny similar motions to dismiss filed by other non-resident gasoline refiners who argued that jurisdiction was improper in several states including Vermont. In addition, although TPRI was a named

<sup>&</sup>lt;sup>1</sup> The federal MDL procedure allows for the consolidation in one district court of federal civil cases that involve common questions of law or fact, even if those cases were filed in different districts. See 28 U.S.C. §1407. Transferred cases remain in the MDL for all pretrial proceedings and are then remanded to their original courts for trial. In 2004, more than 150 municipal plaintiffs' MTBE cases then pending in 17 states were consolidated in the MTBE MDL in the Southern District of New York, where additional federal cases continue to be transferred.

defendant in the two Vermont cases consolidated in MDL 1358, it did not challenge Vermont's exercise of jurisdiction in those cases.

The federal district court presiding over the MTBE MDL denied similar motions to dismiss for lack of personal jurisdiction filed by manufacturers of MTBE and refiners of MTBE-containing gasoline who alleged that they had not sold their products in Vermont or intentionally targeted the Vermont market. The MDL court found their supply of gasoline into the national market, which reached Vermont, through established commercial channels was sufficient to support jurisdiction in Vermont. The Court should deny TPRI's motion here on the same grounds, and also because the motion depends on an affidavit that the Court should disregard.

## FACTS ABOUT TPRI'S ACTIVITIES IN VERMONT

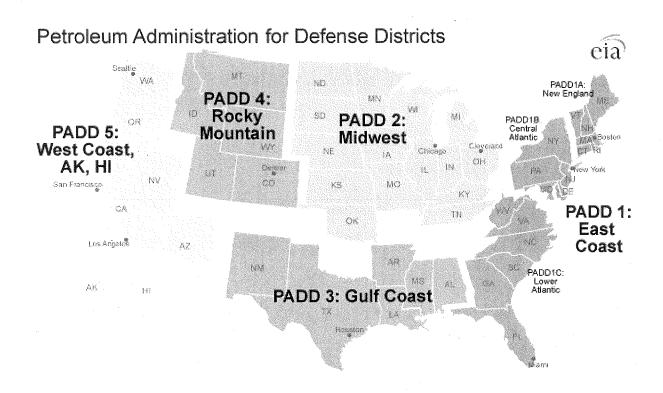
 Gasoline Has at All Relevant Times Been Supplied to Vermont through a Planned, Regular Distribution System.

As alleged in the State's Complaint, gasoline containing MTBE was released from underground storage tanks at gasoline stations during normal storage and use and during routine transfer and delivery through the distribution system. Complaint at ¶¶ 32-33. The Complaint alleges that MTBE and gasoline containing MTBE are fungible — or generic — products, making it impossible, based on physical characteristics, to identify the manufacturer or refiner of any given quantity of gasoline that was the source of MTBE found in the environment. *Id.* at ¶¶ 40-42, 176. The

Complaint also alleges that gasoline from many different refiners is mixed or commingled during the transportation of gasoline from refinery to station, so that the gasoline that ultimately arrives at any particular station is an intentionally blended product made up of gasoline from many different refiners. *Id.* at ¶ 41. The State alleges that all Defendants — including TPRI — manufactured, supplied, and/or sold gasoline containing MTBE that was supplied to Vermont in this blended state and seeks, therefore, to hold them jointly and severally liable for contributing to the State's injuries. *Id.* at ¶¶ 17, 176-177.

Because there are no gasoline refineries in Vermont, in-state stations are supplied with gasoline that is refined elsewhere. See Affidavit of Bruce F. Burke in Support of Plaintiff State of Vermont's Opposition to Defendant's Motion to Dismiss for Lack of Personal Jurisdiction ("Burke Aff.") at ¶15, attached as Exhibit A. The Energy Information Administration (EIA), created by Congress in 1977, is a statistical agency of the U.S. Department of Energy. EIA tracks national and regional fuel markets based on the five "Petroleum Administration for Defense Districts" (or "PADDs"), as shown below. 2 See also Burke Aff. at ¶ 13.

<sup>&</sup>lt;sup>2</sup> See U.S. Energy Information Administration, *PADD regions enable regional analysis of petroleum product supply and movements*, http://www.eia.gov/todayinenergy/detail.cfm?id=4890&src=email (last accessed September 8, 2014).



According to EIA, in 2010, PADD 3 shipped more gasoline than any other PADD, and PADD 1 (which includes Vermont) received more gasoline than any other PADD. More than half of all inter-PADD shipments were from PADD 3 to PADD 1. See table below.<sup>3</sup> This reflects the historical trend. Although a larger percentage of pipeline-sourced gasoline is sold in PADD 1C and 1B, a certain amount is delivered to PADD 1A, which includes Vermont, via ocean vessels or land transport. Burke Aff. at ¶¶ 15-16.

 $<sup>^3</sup>$  Id.

Petroleum Product Inter-PADD Pipeline Movements, 2010

million parrels

	SHIPPING PADD					
araja maja aja araja sahammadikunda ara dia Pida ada da da Pida da Arab Mandria.		The second secon				Total
PADD	From 1	From 2	From 3	From 4	From 5	receipts
To 1		17	886	0	C	903
To 2	212	. 4	278	58	C	447
. To 3	٥	121		ō9	· G	190
To 4	0	28	10		G	38
To 5	Q	0	54	12		66
Total	,					
shipments	111	166	1228	139	C	1644

The majority of gasoline shipped from PADD 3 to PADD 1 travels by pipeline. Burke Aff. at ¶ 13. Gasoline that is shipped by pipeline is first stored in tanks that hold gasoline for shipment. Various refiners' gasolines are commingled in common storage tanks before injection into the pipeline. These tanks are generally segregated by fuel grades (e.g., 87 octane, 89 octane, and 91 octane) but not by refinery of origin. Id. at  $\P$  6. There is no way to match the provenance of gasoline drawn from community tanks to particular refinery products put into the tank: "Thus, early in the process of moving gasoline from refineries to retail users, the ability to track gasoline from a single refinery is lost." Id.

Pipeline transportation further commingles gasoline. In fact, commingling of gasolines is required for the pipelines to function efficiently. A petroleum industry spokesperson explained the gasoline distribution system in testimony to the United States Senate by likening it to the electrical power grid:

The distribution of gasoline is in many ways similar to the distribution of electricity. Throughout New England, power plants generate electricity and send it to customers through the power grid. This power is co-mingled with the power produced at other plants. ... The gasoline distribution system is very similar. Think of refineries as power plants and the pipelines and barges that deliver that product as the transmission system. Gasoline produced at refineries is put into the transmission system where it is co-mingled with the product produced at other refineries. This co-mingled product travels through the system to a terminal. At the terminal it finally becomes a specific brand of gasoline. It is loaded onto trucks and delivered to gasoline stations. ... The fungibility of Gasoline allows it to be moved efficiently and ensures adequate supply.

See Remarks of David Harrington, Executive Director of the New Hampshire Petroleum Council, a division of the American Petroleum Institute, February 19, 1999, BPX 047489, attached as Exhibit B.<sup>4</sup> As Harrington notes, gasoline is not converted to a particular refiner's brand until it is shipped by truck to the retail outlet. Id.; see also EIA, Frequently Asked Questions, Can I tell where the gasoline at my local stations comes from?, available at http://www.eia.gov/tools/faqs/faq.cfm?id=21&t=10 (last accessed September 8, 2014).

Gasoline moves from PADD 3 to PADD 1 via the Colonial Pipeline System, which extends from the Gulf Coast refineries to its terminus in Linden, New Jersey, near New York City, and serves the New York region and Vermont as well as the other markets it traverses. Burke Aff. at ¶¶ 13-21. By the time gasoline products exit the Colonial Pipeline, refiners do not

<sup>&</sup>lt;sup>4</sup> Although BP marked this document "confidential," it waived that designation in 2005. See Letter from J. Andrew Langan to Celeste A. Evangelisti, June 22, 2005.

receive back the same gasoline they injected into the pipeline. As Colonial's own literature states, when fungible products are shipped on the Colonial Pipeline, "shippers will receive equivalent product but may not get back the actual product shipped." Colonial Pipeline Company, Frequently Asked Questions, http://www.colpipe.com/home/about-colonial/frequently-asked-questions (last accessed September 8, 2014).

The hub of gasoline distribution in PADD 1 is a vast storage and distribution center at Linden, New Jersey, which receives and stores gasoline from the Colonial Pipeline, the regional Sun and Harbor Pipelines, bulk storage terminals, and local refineries. Burke Aff. at  $\P$  21. With a storage capacity of 3,000,000 barrels, Linden acts as a staging area for distribution of gasoline to the Central Atlantic and New England parts of PADD 1. Id.

Gasoline arrives in Vermont in only a few ways. First, as discussed above, gasoline arrives in northern New Jersey via the Colonial Pipeline as well as several other pipelines, and some of this gasoline is shipped by vessel to the New England regions, including Vermont. Second, some is supplied by the refineries in PADD 1, with shipping via vessel to the New England region. And some percentage is imported from foreign suppliers. See Burke Aff. at ¶13.

The most important characteristic of the distribution system, for purposes of the TPRI Motion, is that any entity like TPRI that places MTBE or gasoline containing MTBE into the Colonial Pipeline, blends MTBE into

gasoline within PADD 1, or sells MTBE to other nationwide refiners, is fully aware that its product will be distributed throughout PADD 1, including Vermont. Any supplier of gasoline into PADD 1 "will have, on average, supplied gasoline throughout the entire supply system." Burke Aff. at ¶21. "[R]efiners in the United States have an understanding of the fungible nature of the gasoline that they produce, and also that, over time, through commingling their gasoline will end up throughout the distribution system." *Id*.

II. TPRI Intentionally Used a National System to Supply Gasoline to all of PADD 1, Including Vermont.

TPRI is "a corporation engaged in petroleum refining and the manufacture of petrochemicals with facilities in Texas, Louisiana, Colorado, Connecticut, and Alabama." Affidavit of Kim Arterburn ("Arterburn Aff."), attached as Exhibit 1 to Motion. TPRI participated in the Vermont market in four specific ways: it produced gasoline in Texas that was shipped via pipeline into PADD 1; it blended MTBE into gasoline in New Jersey for sale; it imported MTBE-gasoline into New Jersey for resale; and it made and sold MTBE in Texas for sale to other refiners who, in turn, blended that MTBE into gasoline marketed nationwide.

First, TPRI produced MTBE-containing gasoline at its Port Arthur,

Texas refinery — approximately half of which (about 1.5 million barrels)

was sold to third parties via shipment on the Colonial Pipeline, which serves

New England, including Vermont. See Burke Aff. at ¶ 13; see also Rule

56.1 Statement in Support of the Motion for Partial Summary Judgment of Total Petrochemicals USA, Inc., In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig., MDL 1358 (SAS) (January 11, 2008), attached as Exhibit C. Most of the sales transactions for this gasoline occurred in Hebert, Texas, though a few occurred in North Carolina, Pennsylvania, and New Jersey. Id. at Ex. A. It is more likely than not that some of TPRI's gasoline refined in Texas supplied the State of Vermont. Burke Aff. at ¶26.

Second, TPRI leased storage tanks in Linden, New Jersey, where it blended MTBE into gasoline for sale. See Declaration of Total Petrochemicals USA, Inc. Pursuant to Case Management Order #4 ("Total Dec."), In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig., 1:00-1898 (SAS), MDL 1358 (February 25, 2005) at 4, attached as Exhibit D. This gasoline was "sold in the state of New Jersey to third parties ... either into barges ... or into a pipeline within the state of New Jersey." Total Dec. at 5. As discussed above, New Jersey's gasoline distribution center supplies gasoline to New England, including Vermont. It is more likely than not that some of TPRI's blended gasoline supplied the State of Vermont with gasoline containing MTBE. Burke Aff. at ¶ 24.

Office of the ATTORNEY GENERAL 109 State Street Montpelier, VT 05609 Third, TPRI leased similar tanks at the GATX Terminal in Carteret, New Jersey. Rule 56.1 Statement at 2. At Carteret, TPRI imported MTBE-containing gasoline that it resold to third parties. *Id.* at Affidavit of Tom Knight ("Knight Aff.), ¶¶ 2,4. All of these sales were made in New Jersey. The customers who bought this MTBE-gasoline from TPRI include Mobil Oil

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Corporation, Amoco Oil Company, BP Oil Company, Shell Oil Company, Valero Refining & Marketing Company, and others, who delivered gasoline with MTBE to Vermont. *Id.* at Knight Aff., Ex. B. That gasoline radiated out from the New Jersey nucleus to New England, including Vermont. It is more likely than not that some of TPRI's gasoline supplied entities in Vermont with gasoline containing MTBE. Burke Aff. at ¶ 24.

And fourth, TPRI made and sold neat MTBE to other refiners, including many with a national sales presence, including BP Products North America, Inc., Mobil Oil Corporation, Citgo Petroleum Corporation, Conoco, Inc., Exxon Company USA, ExxonMobil Refining & Supply Company, ExxonMobil Oil Corporation, Shell Trading US Company, Valero Marketing and Supply Company, and others. Total Dec. at 2. From 1984 to 2005, Total sent a "mixed butylenes stream from the company's refinery in Port Arthur, Texas to a facility owned and operated by Huntsman Petrochemical Corporation . . . located in Port Neches, Texas at which isobutylene is extracted from the stream and reacted with methanol in the presence of catalyst [sic] to create MTBE for TOTAL Petrochemicals." Id. These sales transactions occurred "at the outlet of the tanks in which the manufactured neat MTBE was stored in Port Neches, Texas" or "at delivery points on or near the Gulf Coast of Texas or Louisiana." Id. at 3. Because TPRI sold neat MTBE to "national or regional suppliers of gasoline throughout the United States ... it is reasonable to conclude that it expected that its MTBE

would be distributed nationally, including in New England and Vermont." Burke Aff. at ¶27.

In its declaration, TPRI admitted that it blended gasoline with MTBE at its Port Arthur, Texas refinery and conceded that it cannot track the final destination of its refined gasolines. "TOTAL Petrochemicals does not, in the ordinary course of business, create or maintain data or records that track the ultimate destination of gasoline blended with MTBE that it sells to customers." Total Dec. at 4. TPRI also admitted that it does know where its products are ultimately sold: "TOTAL Petrochemicals does not choose or dictate the marketing or retail outlets to which its customers ultimately send gasoline blended with MTBE, and does not know whether terminals owned and/or operated by third parties actually supply the [New York area] with such gasoline." Total Dec. at 4. TPRI acknowledged that its MTBE-gasoline was supplied into the system that serves PADD 1 — including Vermont — although TPRI cannot now determine which stations ultimately sold that gasoline. See id. at 2; see also Rule 56.1 Statement, Aff. at § 8.

## LEGAL STANDARD

Where no evidentiary hearing is held on the jurisdictional issue, the plaintiff need only make a *prima facie* showing of jurisdiction and the Court "must consider the pleadings and affidavits in a light most favorable to the plaintiff." N. Sec. Ins. Co. v. Mitec Elecs., Ltd., 184 V.t 303, 311, 965 A.2d 447, 453 (2008) (quotation omitted). The Court must accept the evidence

submitted by the plaintiff as true. Schwartz v. Frankenhoff, 169 Vt. 287, 295, 733 A.2d 74, 81 (1999).

### ARGUMENT

I. This Court Has Personal Jurisdiction Over TPRI, Which Knowingly Placed Its Products In A Stream Of National Commerce That Included Vermont.

Vermont's long-arm statute, 12 V.S.A. § 855, "expresses a policy to assert jurisdiction over foreign corporations to the full extent permitted by the Due Process Clause of the Fourteenth Amendment." Chittenden Trust Co. v. Bianchi, 148 Vt. 140, 141, 530 A.2d 569, 570 (1987) (quotation omitted); see also 12 V.S.A. § 913 (same). A state court may assert jurisdiction compatible with due process over a nonresident defendant who has certain "minimum contacts" with the forum state such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. Int'l Shoe v. Washington, 326 U.S. 310, 316 (1945). Those contacts with a state must be such that a defendant "should reasonably anticipate being haled into court there." World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980). As a general rule, the state's exercise of power requires some act by which the defendant "purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." Hanson v. Denckla, 357 U.S. 235, 253 (1958).

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Vermont courts have long applied a broad "stream of commerce" theory to find sufficient "minimum contacts" when a defendant's product

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reaches Vermont through ordinary commercial channels. Vermont courts have explained that when manufacturers and sellers act "to advance their commercial interest[s], they should reasonably anticipate being sued in Vermont if a dispute arises from these activities." Northern Aircraft, 572 A.2d at 1387. In applying the stream of commerce principle, the Supreme Court has observed that

[a]s technology and economic practices diminish the importance of geographic boundaries, it is not unreasonable to anticipate the expansion of personal jurisdiction to those who deliberately transcend those boundaries in pursuit of economic gain.

Dall v. Kaylor, 163 Vt. 276, 658 A.2d at 80 (1995). The Court maintains an expansive view of jurisdiction over defendants who exploit contacts with Vermont for financial benefit.

In Pasquale v. Genovese, the Supreme Court held that jurisdiction was properly exercised over a German car manufacturer who sold its cars to its wholly-owned subsidiary, who then resold the cars throughout the United States. 136 Vt. 417, 419, 392 A.2d 395, 397 (1978). The Court held that jurisdiction was proper: the nonresident manufacturer had engaged in "intentional and affirmative action" through "active, planned participation in the Vermont market, through a chain of manufacture and distribution set up for the purpose, and through eventual sale of the vehicle in question in Vermont." Id. at 421, 392 A.2d at 398.

Vermont's adherence to the broad stream of commerce theory allows it to reach defendants who merely advertise in the state because that

activity shows an intent to benefit from conducting sales, no matter how inconsequential, in Vermont. In Dall v. Kaylor, the plaintiff sued a Maryland horse farm that the plaintiff had found via a classified advertisement in a nationally circulated publication. 163 Vt. at 275, 658 A.2d at 79. The Supreme Court found that jurisdiction was proper because the horse farm was in the regular business of selling horses and had initiated the business transaction with the plaintiff by advertising, over 100 times, in a national market that included Vermont. Id. The Court applied the same rationale in Brown v. Cal Dykstra Equip. Co., Inc., holding that jurisdiction was properly exercised over a Wisconsin crane seller because it advertised its equipment in a national magazine. 740 A.2d 793, 795 (Vt. 1999); see also Sollinger v. Nasco Int'l, Inc., 655 F. Supp. 1385, 1388 (D. Vt. 1987) ("In sending its catalogs into Vermont to solicit sales and in actually entering into a transaction with a Vermont resident, though that transaction may not have been completed, Nasco has 'purposefully directed [its] activities at residents of the forum' and this 'litigation results from alleged injuries that 'arise out of or relate to' those activities.").

Office of the ATTORNEY GENERAL 109 State Street Montpelier, VT 05609 Where, as here, the claim arises out of the defendant's contacts with the forum, the defendant is considered to reasonably anticipate being subjected to the jurisdiction of state's courts when the defendant purposefully directs activity toward the state. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985); Northern Aircraft, 154 Vt. at 41, 572 A.2d at 1386. The forum state is said to exercise "specific jurisdiction" over

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the suit arising from its contacts. Burger King, 471 U.S. at 473 n.15. By contrast, when the defendant's contacts with the forum are "continuous and systematic," the forum state is said to exercise "general jurisdiction" over any suit, whether or not it arises from the defendant's contacts.

Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 416 (1984).

A defendant's placement of goods into the stream of commerce "with the expectation that they will be purchased by consumers within the forum State" may satisfy these requirements and subject the defendant to specific jurisdiction in the forum. World-Wide Volkswagen, 444 U.S. at 298. In World-Wide Volkswagen, the Supreme Court explained that when

> the sale of a product of a manufacturer is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its own or to others. The forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State.

Id. at 297-98 (emphasis added). In the underlying case, New York residents bought an Audi from a Volkswagen dealer in New York and, a year later, were injured in an accident in Oklahoma as they drove the Audi to Arizona. Id. at 288. The purchasers filed a products liability lawsuit in Oklahoma against the German manufacturer of the car, the American importer, the regional distributor, and the New York dealer. Id.

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The Supreme Court found that Oklahoma's exercise of jurisdiction did not comport with due process because the plaintiff's unilateral activities in Oklahoma did not demonstrate the defendant's connection with Oklahoma. "It is foreseeable that the purchasers of automobiles sold by World-Wide and Seaway may take them to Oklahoma. But the mere 'unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State." Id. at 298 (quoting Hanson, 357 U.S. at 253). The holding in World-Wide Volkswagen was not — as TPRI states — that placing a product into the stream of commerce is not sufficient to establish jurisdiction. To the contrary, World-Wide Volkswagen stands for the proposition that placing a product into the stream of commerce with the expectation that the product will be used in the forum state does, in fact, support jurisdiction.

The Supreme Court revisited the issue in Asahi Metal Industry Co., Ltd. v. Superior Court, 480 U.S. 102 (1987), and two competing views of the "stream of commerce" standard emerged. The plurality opinion, authored by Justice O'Connor, disagreed with the World-Wide Volkswagen standard, taking the position that "a defendant's awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State." Id. at 112. Justice Brennan's concurrence staked out a different view, explaining,

stream commerce refers The of unpredictable currents or eddies, but to the regular and anticipated flow of products from manufacture to distribution to retail sale. As long as a participant in this process is aware that the final product is being marketed in the forum State, the possibility of a lawsuit there cannot come as a surprise. Nor will the litigation present a burden for which there is no corresponding benefit. A defendant who has placed goods in the stream of commerce benefits economically from the retail sale of the final product in the forum State, and indirectly benefits from the State's laws that regulate and facilitate commercial activity.

*Id.* at 117.

The Supreme Court returned to the issue in J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2788 (2011), and again produced divided philosophical approaches to "stream of commerce" theory. The issue was whether a New Jersey court could exercise jurisdiction over a foreign product manufacturer who knew that its products were being distributed through a nationwide distribution system that might lead to those products being sold in any of the fifty states. The Court began by acknowledging the fact that the standards for determining jurisdiction "have been unclear because of decades-old questions left open" in Asahi. Id. at 2785. It then recreated the Asahi divide, with the plurality opinion reiterating O'Connor's "stream-of-commerce plus" position from Asahi. The concurring opinion likewise cites the Asahi concurrence for the proposition that jurisdiction should lie where a sale in a State is part of "the regular and anticipated flow" of commerce into the State. Id. at 2792. Ultimately, the Court decided

that jurisdiction was not proper because the relevant facts showed "no regular flow' or 'regular course' of sales in New Jersey." *Id*.

Because neither Asahi nor McIntyre produced a majority opinion, World-Wide Volkswagen remains controlling precedent. See In re Methyl Tertiary Butyl Ether Prods. Liab. Litig., 2005 U.S. Dist. LEXIS 753, at \*32 (S.D.N.Y. Jan. 18, 2005); Marks v. United States, 430 U.S. 188, 193 (1977) (holding in a case resulting in a plurality is "that position taken by the Members who concurred in the judgment on the narrowest grounds.")

Though relied on and cited extensively by TPRI, the McIntyre plurality's statement that jurisdiction is proper only where the defendant "targeted" the forum is not the law. Rather, the rule of law announced in McIntyre is set forth in the concurrence, which more or less restated the rule from World-Wide Volkswagen — i.e., that a "single isolated sale" does not establish jurisdiction but jurisdiction should lie where a sale is part of the "regular flow" of commerce into the forum. McIntyre, 131 S. Ct. at 2792.

Thus, contrary to TPRI's Motion, this Court remains bound by the rule from World-Wide Volkswagen: introducing a product into the stream of commerce supports the exercise of jurisdiction if the sale of the product "is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its product . . . ." 444 U.S. at 297. "The forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with

the expectation that they will be purchased by consumers in the forum State." *Id.* at 297-98.

A. TPRI Has Sufficient "Minimum Contacts" with Vermont to Support Specific Jurisdiction.

The crux of TPRI's argument against jurisdiction in Vermont is that it did not carry out any corporate business activities, refining processes, or sales activities within the state. These allegations do not negate TPRI's active participation in the stream of commerce that predictably and necessarily carried its gasoline to all the states in PADD 1, including Vermont. Even if TPRI could show that none of its own gasoline made it to Vermont, this Court would have specific jurisdiction because TPRI sold MTBE and MTBE-gasoline to other national refiners and distributors who supply all of PADD 1, including Vermont.

In the MTBE MDL, the federal district court applied the World-Wide Volkswagen standard to deny similar motions to dismiss filed by non-resident gasoline refiners who argued that jurisdiction was improper in several states including Vermont. As mentioned above, although TPRI was a named defendant in the two Vermont cases consolidated in MDL 1358, it did not challenge Vermont's exercise of jurisdiction. Lyondell Chemical Company, a producer who sold MTBE to oil refiners, traders, and blenders across the country for use in their gasolines, argued that it had no minimum contacts with Vermont. The district court disagreed, pointing to Lyondell's activities in creating a national market for MTBE and selling to nationwide

distributors, including Exxon Mobil Corporation, which operates stores and gas stations across the United States. See In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig., 2005 WL 106936, at \*9 (S.D.N.Y. Jan. 18, 2005). Adopting Justice Brennan's definition of the "stream of commerce" as "the regular and anticipated flow of products from manufacture to distribution to retail sale," the district court observed that "[if] a corporation 'in this process is aware that the final product is being marketed in the forum State, the possibility of a lawsuit there cannot come as a surprise." Id. (citing Asahi, 480 U.S. at 117). Moreover, a corporation "purposefully establishes minimum contacts with every state in the nation by introducing its products into the stream of commerce in vast amounts." Id.

In a second opinion, the MDL court denied the motions of Defendants Lyondell-Citgo Refining LP ("LCR") and Equistar Chemicals, LP, explaining that when a corporation sells its product to a nationwide distributor, it reasonably should have expected its product to reach all of the states in the nation. In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig., 399 F. Supp. 2d 325, 332 (S.D.N.Y. 2005). Although LCR's refinery in Houston produced MTBE-containing gasoline, LCR claimed that it did not sell products in other states but sold its gasoline only to Citgo. Similarly, Equistar's two Texas facilities produced MTBE, which it then sold to Lyondell. The district court found LCR subject to personal jurisdiction in each of the forum states — including Vermont — because it supplies MTBE-containing gasoline to the national market through Citgo, whose

"nationwide distribution network reaches every one of the relevant states."

Id. The same rationale applied to Equistar: "Equistar's MTBE is produced in Texas and then reaches the forum states through arrangements with members of the Lyondell enterprise and through sales to other refiners with nationwide distribution. For instance, Equistar sells MTBE to LCR and Lyondell, who in turn supply MTBE and MTBE-containing gasoline to Citgo and ExxonMobil, respectively." Id. at 333. This "deliberate participation in the national market for MTBE" shows "intent to serve the markets of all the forum states." Id.

The Court may properly exercise jurisdiction over TPRI here based upon the same principles. TPRI shipped its gasoline via the gasoline distribution system set up for the very purpose of moving gasoline from PADD 3 to PADD 1, thus demonstrating "active, planned participation in the Vermont market, through a chain of manufacture and distribution set up for the purpose, and through eventual sale of the [product] in question in Vermont." Pasquale, 136 Vt. at 421, 392 A.2d at 398; see also Burke Aff. at \$\frac{1}{2}\$ (the Colonial Pipeline system transports gasoline to the New Jersey distribution center that, in turn, supplies gasoline to New England, including Vermont). These sales, and the sales of gasoline products blended or imported in New Jersey, are the results of TPRI's efforts "to serve, directly or indirectly, the market for its product in other States," — here, all of PADD 1, at least. See World-Wide Volkswagen, 444 U.S. at 297-98. Like other refiners, TPRI knew that by using this system, its gasoline would end

up "throughout the distribution system" — including in Vermont. See Burke Aff. at ¶ 21.

In addition, TPRI sold both gasoline and neat MTBE to other refiners, including national distributors. By doing so, TPRI reasonably should have expected its product to reach all of the states in the nation. In re MTBE, 399 F. Supp. 2d at 332. TPRI sold to Citgo and ExxonMobil, sales that the In re MTBE court found to be sufficient to subject Texas companies to jurisdiction in Vermont because their "nationwide distribution network reaches every one of the relevant states." Id. This "deliberate participation in the national market for MTBE" shows "intent to serve the markets of all the forum states." Id. at 333; see also Burke Aff. at ¶ 27 (TPRI "expected that its MTBE would be distributed nationally, including in New England and Vermont.").

TPRI's gasoline and neat MTBE did not arrive in Vermont through an "unpredictable current" but from the "regular and anticipated flow of products from manufacturer to distributor to retail sale." Asahi, 480 U.S. at 117. The fact that TPRI's gasoline and MTBE were ultimately used in Vermont is not fortuitous but is the result of comprehensive distribution arrangements that carry it into the state. TPRI made use of the common carrier pipeline system that moves gasoline from the Gulf Coast to New England, including Vermont. See Burke Aff. at ¶25. And it carried out blending operations and sales in New Jersey, the center of gasoline distribution to New England and Vermont. Id. at ¶24. Further, it

knowingly sold to third-parties who operate on a national level, so that it participated in the national market through their sales. *Id.* at ¶ 27. Indeed, "given its activities and the known national distribution system for gasoline, [TPRI] would have (should have had) the expectation that some of its gasoline with MTBE, or neat MTBE would ultimately be sold into and used in Vermont." Burke Aff. at ¶ 28.

TPRI's Motion rests entirely on its corporate and transactional absence from Vermont. If its supporting affidavit is credited, (see discussion of its insufficiency, infra), TPRI has never refined, marketed, stored, or sold gasoline or MTBE in Vermont. Motion at 4. But courts have long rejected the notion that physical presence in the state is required for personal jurisdiction. See Burger King, 471 U.S. at 476. Physical presence is not required; rather, commercial business transacted solely out-of-state will support jurisdiction if purposefully directed at the state. Id.

The fact that TPRI transacted the sales or transferred title to the gasoline outside of Vermont "in no way determines the degree of contacts" between TPRI and the forum state. See Kaplan v. DaimlerChrysler, 99 F. Supp. 2d 1348, 1352 (M.D. Fla. 2000) ("The fact that title to the Mercedes-Benz vehicles passes to MBUSA in Germany rather than in the United States 'in no way determines the degree of contacts' between DaimlerChrysler and the United States."). Courts have generally disregarded similar attempts to avoid jurisdiction. See, e.g., Hypoxico, Inc. v. Colorado Altitude Training LLC, 2003 WL 21649437, \*5 (S.D.N.Y. 2003)

(not reported) ("F.O.B. provisions in the contracts do not render personal jurisdiction in New York unconstitutional because those provisions do not undercut the fact that the defendants purposefully directed the allegedly infringing goods into New York and indeed assisted their use in this state."); R & J Tool, Inc. v. Manchester Tool Co., 2001 WL 1636435 at\*4 (D.N.H. 2001) (not reported) (the fact that title to product transfers to buyers in Ohio did not preclude the exercise of personal jurisdiction in New Hampshire); North American Philips Corp. v. American Vending Sales, Inc., 35 F.3d 1576, 1578-80 (Fed. Cir. 1994) (title transfer to an Illinois purchaser in Texas did not affect analysis of jurisdiction when tort occurred in Illinois). This Court should disregard the argument here as a simple attempt to mask the extent of TPRI's participation in the gasoline market supplying Vermont.

#### B. TPRI's Contacts Support General Jurisdiction in Vermont.

TPRI is part of an expansive, global enterprise known as the TOTAL Group. See TOTAL S.A Form 20-F (2013).<sup>5</sup> Held by the parent company, TOTAL, S.A., the TOTAL Group comprises 898 consolidated subsidiaries, 98,799 employees, and operations in 130 countries. Id. at 77, 128. The Group's consolidated sales revenues in 2013 exceeded \$221 billion (€ 171,655 million). Id. at F-3. TOTAL proclaims itself "[a]mong the world's ten largest integrated producers," and "[o]ne of the leading traders of oil and

<sup>&</sup>lt;sup>5</sup> Available at http://www.total.com/en/investors/institutional-investors/publications/annual-publications (last accessed September 2, 2014)

refined products worldwide" with a "[r]efining capacity of about 2 million barrels per day in year-end 2013." See Total at a Glance: A Global Energy Company, http://www.total.com/en/corporate-profile/thumbnail/total-glanceglobal-energy-company (last accessed September 2, 2014).

Within the Group, TPRI is part of the "Refining and Chemicals" business, which produces base petrochemicals (olefins and aromatics) and polymer derivatives (polyethylene, polypropylene and polystyrene), as well as specialty chemicals including elastomer processing, adhesives and electroplating chemistry. TOTAL S.A Form 20-F at 35. Some of the specialty chemicals business is carried out through Bostik, a TOTAL subsidiary that touts itself as a "world leader in the adhesive sector" with "significant positions on the industrial, hygiene and construction markets, complemented by both consumer and professional distribution channels." Id. TOTAL supplies Bostik products to customers in Vermont via in-state distributors: Lumber Liquidators, 329 Harvest Lane, Williston, Vermont, 05495 and Daltile, 44 Miller Lane, Suite 20, Williston, Vermont, 05495. See Bostik Distributor Locator, http://distributorlocator.bostik-us.com/ (last accessed September 2, 2014).

In addition, TPRI admits that it made sales of polypropylene in Vermont exceeding \$1,200,000 from 2006 to present. Motion at 11. TPRI also stored polypropylene in Vermont in 2012. Id.

In In re MTBE, the district court concluded that defendants Lyondell, LCR, and Equistar were also subject to general jurisdiction in Vermont

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based on evidence that: (1) Lyondell "has made tens of billions of dollars by selling a variety of chemicals nationwide over the last two decades. . . . These products, used to produce plastics such as foam cups and containers, are precisely the type of end products that are sold in every state in the nation including, of course, the forum states," In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig., 2005 WL 106396 at \*10, n.106; (2) LCR "derives substantial revenue from the production and sale of other chemicals throughout the country in addition to MTBE-containing gasoline," In re MTBE, 399 F. Supp. 2d at 332, and; (3) Equistar regularly sold products to customers in each forum state, id. at 333. Thus, these defendants maintained "continuous and systematic" contacts sufficient to support general jurisdiction in Vermont.

Applying the *In re MTBE* analysis, this Court may find that TPRI, too, is subject to general jurisdiction. TPRI occupies a similar position as part of the TOTAL global enterprise, which sells chemical products in every state including Vermont, where it maintains regular sales relationships with Vermont distributors. In addition, TPRI regularly sells polypropylene products to Vermont customers.

II. Vermont's Exercise of Jurisdiction Over TPRI is Fair And Just.

Vermont's exercise of jurisdiction over TPRI also satisfies the fairness prong of the due process test, which considers the following factors: (1) the burden that the exercise of jurisdiction will impose on the defendant; (2) the

interests of the forum state in adjudicating the case; (3) the plaintiff's interest in obtaining convenient and effective relief, (4) the interstate judicial system's interest in obtaining convenient and effective relief, and (5) the shared interest of the states in furthering substantive social policies.

Burger King, 471 U.S. at 476.

This Court recently recognized that a key factor in this analysis is "the fact that the case is brought by the State on behalf of the public ...."

See State of Vermont v. MPHJ Tech. Investments, LLC, No. 282-5-13, at \*7

(Vt. Super. August 28, 2014) (opinion attached as Exhibit E). Here, the State "brings this action as an exercise of its statutory authority to protect groundwater and its common law police power, which includes, but is not limited to, its power to prevent pollution of the State's property and waters, to prevent nuisances, and to prevent and abate hazards to public health, safety, welfare, and the environment." Complaint at ¶ 10. The State also acts in its parens patriae capacity

for the benefit of the citizens of the State, whose private property, groundwater, and/or water supplies have been contaminated with MTBE; for the benefit of public water providers, whose property and/or water supplies have been contaminated with MTBE; for the benefit of governmental subdivisions, whose property and/or water supplies have been contaminated with MTBE and/or who have spent funds associated with MTBE contamination; and for the benefit of all citizens of the State who rely on public and private drinking water wells at their residences, schools, churches, workplaces, recreational sites, and elsewhere.

Id. at ¶ 11. The State has alleged the sort of "special interest in protecting its citizens, which is categorically different from an individual business suing to protect solely its own interests," State v. MPHJ, supra, that weighs heavily in favor of jurisdiction in Vermont.

In addition to its interest in protecting the public interest, Vermont has a legitimate interest in sanctioning defendants who create relationships with Vermont citizens for the consequences of their activities in the state. Dall, 163 Vt. at 277, 658 A.2d at 80 ("It is hardly unfair for defendants to defend themselves in jurisdictions where they choose to advertise their products."); see also Pasquale, 136 Vt. at 419, 392 A.2d at 397 (jurisdiction is fair when defendant's conduct was purposefully directed toward Vermont and inevitably affected Vermont residents). The Court's and parties' interests are also best served by the exercise of jurisdiction. The properties, wells, and other resources were damaged in Vermont by MTBE sold in Vermont.

TPRI does not explain what burden it would face if it were required to litigate in Vermont. TPRI's Motion merely concludes that "TPRI would be significantly and unduly burdened by being forced to litigate in Vermont." Motion at 12. At this stage, however, the burden is on TPRI to make a "compelling case" that forcing it to litigate in Vermont would violate traditional notions of fair play and substantial justice. Burger King, 471 U.S. at 477 (emphasis added); Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez, 305 F.3d 120, 129 (2d Cir. 2002). Even if forcing TPRI to

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litigate in Vermont were found to impose a burden, "the argument would provide defendant only weak support, if any, because 'the conveniences of modern communication and transportation ease what would have been a serious burden only a few decades ago." Bank Brussels Lambert, 305 F.3d at 129. TPRI has provided no evidence to demonstrate any burden, much less enough of a burden to compel the Court to forgo jurisdiction.

Because of Vermont's strong interest in having the claims litigated in Vermont, and because TPRI has not expressed any reason to the contrary, it would not be unfair to require TPRI to litigate the claims in Vermont.

Vermont's substantial interest in protecting the health and safety of its citizens and guaranteeing the availability of suitable drinking water outweighs any minimal burden TPRI might have identified.

In conclusion, Vermont's assertion of jurisdiction comports with both steps of the two-part due process analysis. First, TPRI has intentionally established far more than "minimum" contacts with Vermont. Second, the exercise of jurisdiction is consistent with traditional notions of fair play and substantial justice.

### III. TPRI's Motion should be denied outright because Ms. Arterburn's affidavit is not based on personal knowledge.

The Court may deny TPRI's motion without reaching the merits of the argument, however, because the Affidavit of Kim Arterburn attached to TPRI's Motion fails to comply with the minimum requirements of the civil rules. On a "challenge to personal jurisdiction, supporting and opposing

affidavits must 'be made on personal knowledge, ... set forth such facts as would be admissible in evidence, and ... show affirmatively that the affiant is competent to testify to the matters stated therein." *Gerling-Konzern Gen. Ins. Company-United Kingdom Branch v. Noble Assur. Co.*, 2006 U.S. Dist. LEXIS 85027, at \*28 n.11 (D. Vt. 2006) (citing Fed. R. Civ. P. 56 (e) and Fed. R. Evid. 602). Where an affidavit does not meet these requirements, a court may properly disregard it. *Id*.

The Supreme Court of Vermont also has held that an insufficient affidavit will not support a motion for summary judgment. In U.S. Bank Nat. Ass'n v. Kimball, the Court found lacking an affidavit that was not based on personal knowledge and contained conclusions rather than facts. 2011 VT 81, ¶ 17, 190 Vt. 210, 27 A.3d 1087. At issue was whether a homeowner's loan had been assigned from GMAC to U.S. Bank; the latter presented an affidavit in support of its argument that the mortgage had been properly assigned. Id. at ¶ 5. "The affiant, Zeitz, declared himself to be an employee of GMAC, the servicer of homeowner's loan. Zeitz averred that the note was endorsed to U.S. Bank in September 2005 but provided no explanation of how he gained personal knowledge about this endorsement that supposedly took place several years before his company began servicing homeowner's loan. Further, the affidavit failed to explain the obvious contradictions with other evidence." On appeal, the Court found the affidavit "[f]raught with contradictions and evidently lacking information based on personal knowledge," finding it insufficient to support U.S. Bank's

argument. Id. at ¶ 17. See also Levy v. Town of St. Albans Zoning Bd. of Adjustment, 152 Vt. 139, 145, 564 A. 2d 1361, 1365 (1989) (affidavit does not raise a genuine issue as to any material fact where its allegations pertaining to abandonment of a construction project are not based on personal knowledge or admissible evidence, and they do not "show affirmatively that the affiant is competent to testify to the matters stated therein."); Alpstetten Assoc., Inc. v. Kelly, 137 Vt. 508, 408 A. 2d 644 (1979) (same).

The Affidavit of Kim Arterburn is flawed in exactly the same manner as the affidavits found lacking in Gerling-Konzern, U.S. Bank, and Levy.

Arterburn declares that she is employed in Financial Accounting for TPRI and has personal knowledge of the matters stated in the affidavit.

Arterburn Aff. at 1. As in U.S. Bank, however, the affidavit does not explain how the affiant gained personal knowledge about TPRI's refining, marketing, sales, and distribution of gasoline and MTBE into Vermont. Nor does the affidavit provide foundations for the affiant's conclusory statements regarding TPRI's various activities. It does not explain, for example, the basis for any of the affiant's statements regarding whether TPRI conducted activities in Vermont. Nor does it refer to any supporting materials, information, or interviews that would support the affiant's statements. The affidavit does not purport to show that Ms. Arterburn is anything more than a mere fact witness.

For these reasons, the Court should disregard the Arterburn Affidavit as insufficient to support TPRI's Motion and deny the Motion outright.

IV. In the Alternative, the State is Entitled to Discovery Regarding Jurisdiction.

TPRI's placement of MTBE and MTBE-gasoline into the Vermont market via the stream of commerce is sufficient to subject it to personal jurisdiction in Vermont courts, and this Court should deny Defendants' Motion. In the alternative, however, Plaintiffs ask the Court to allow targeted jurisdictional discovery before ruling on TPRI's Motion.

This Court has the power to require Defendants to respond to discovery requests relevant to their motions to dismiss for lack of jurisdiction. Godino v. Cleanthes, 163 Vt. 237, 239, 656 A. 2d 991, 992 (1995). Other courts, both state and federal, agree. See, e.g., Compagnie des Bauxites de Guinee v. L'Union Atlantique S.A. d'Assurances, 723 F. 2d 357, 362 (3d Cir. 1983) (where a plaintiff's claim is not "clearly frivolous," the district court should ordinarily allow jurisdictional discovery); El-Fadl v. Central Bank of Jordan, 75 F.3d 668, 676 (D.C. Cir. 1996) ("A plaintiff faced with a motion to dismiss for lack of personal jurisdiction is entitled to reasonable discovery, lest the defendant defeat the jurisdiction of a federal court by withholding information on its contacts with the forum.").

In fact, refusal to allow such limited discovery may constitute reversible error. *In re Magnetic Audiotape Antitrust Litigation*, 334 F.3d 204, 207-8 (2d Cir. 2003) (district court improperly denied plaintiffs the

opportunity to engage in limited discovery on the question of minimum contacts prior to dismissing defendant); Renner v. Lanard Toys, Ltd. 33 F. 3d 277, 283 (3d Cir. 1994) ("The Renners need not accept [the manufacturer's] analysis of the facts without a chance to probe further. They are entitled to conduct discovery into the jurisdictional facts."); Wyatt v. Kaplan, 686 F. 2d 276, 283 (5th Cir. 1982) ("When a defendant challenges personal jurisdiction, courts generally permit depositions confined to issues raised in the motion to dismiss. In an appropriate case, we will not hesitate to reverse a dismissal for lack of personal jurisdiction, on the ground that the plaintiff was improperly denied discovery."); Andersen v. Sportmart, Inc., 179 F.R.D. 236, 244 (N.D. Ind. 1998) (where the records reflect that foreign manufacturers sold the allegedly defective products to a distributor that then sold the goods in the forum, discovery regarding general and specific jurisdiction is warranted).

Here, TPRI's Affidavit is, at best, conclusory and incomplete. It states that TPRI's gasoline has never reached Vermont, an inference that is squarely contradicted by its own discovery responses and pleadings in MDL 1358. Further, the State "need not accept [TPRI's] analysis of the facts without a chance to probe further" into the facts. Rather, as held in *Renner*, the State is "entitled to conduct discovery into the jurisdictional facts." *See* 33 F.3d at 283. To respond fully to TPRI's motion, should the Court not deny it outright for TPRI's failure to meet its burden, Plaintiffs need

discovery regarding the following jurisdictional subjects that are relevant to responding to TPRI's motions to dismiss:

- TPRI's sales of MTBE-containing gasoline to PADD 1 refiners, suppliers, distributors, jobbers, wholesalers, and/or retailers for the years 1980 to 2007;
- TPRI's exchange agreements for MTBE-containing gasoline with PADD 1 refiners, suppliers, distributors, jobbers, wholesalers, and/or retailers for the years 1980 to 2007:
  - TPRI's knowledge of any sales, distribution, marketing, supply, or transportation activities that occurred in Vermont and involving MTBE-containing gasoline sold by TPRI to any third-party; and
  - TPRI's business activities in Vermont, including the more than \$1 million in polypropylene sales TPRI admits to transacting in Vermont.

#### CONCLUSION

Jurisdiction is entirely proper in Vermont. The State's evidence demonstrates TPRI's active, planned participation in the Vermont market by shipping its gasoline via the gasoline distribution system set up for the very purpose of moving gasoline into New England, including Vermont. The evidence also shows that TPRI served, directly or indirectly, the market for its products in Vermont. In addition, the State's evidence shows that TPRI made regular sales to national distributors and, therefore, reasonably should have expected its product to reach all of the states in the nation including Vermont.

Finally, jurisdiction in Vermont is fair. The State acts on behalf of the public interest and public welfare in litigating a case involving public

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trust resources, public drinking water supplies, public lands, and public health. All of the properties at issue as well as the relevant information and witnesses are in Vermont. Because jurisdiction is not only proper but fair, the State respectfully asks this Court to deny TPRI's motion to dismiss for lack of personal jurisdiction.

Dated: September 19, 2014

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## EXHIBIT A

# AFFIDAVIT OF BRUCE F. BURKE IN SUPPORT OF PLAINTIFF STATE OF VERMONT'S OPPOSITION TO DEFENDANT'S TOTAL PETROCHEMICALS & REFINING USA, INC.'S MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION

I, Bruce F. Burke, being duly sworn, depose and say as follows: I submit to the Court this Affidavit in support of Plaintiff State of Vermont's Opposition to Defendant Total Petrochemicals & Refining USA, Inc.'s Motion To Dismiss For Lack Of Personal Jurisdiction. I am fully competent to make this affidavit, and I have personal knowledge of the facts and opinions stated in this document. As detailed below, that knowledge is derived from work experience in the refining and petrochemical industry, study of materials relevant to an understanding of the production and distribution of gasoline, review of discovery and expert reports produced in other MTBE litigation, and review of discovery and other materials produced by Total Petrochemicals & Refining USA, Inc. ("TPRI"), specifically.

- 1. I am a Senior Vice President of the Energy and Chemicals Advisory Business
  Unit at Nexant, Inc., 44 South Broadway, Fourth Floor, White Plains, New York 10601, a firm
  specializing in the provision of management and technical consulting services to the global
  energy sector. I currently have responsibility for energy-related consulting assignments in North
  and South America. I have more than thirty years of experience working in the refining and
  petrochemical industry. I have been retained by the State of Vermont to serve as an expert
  witness in this case.
- 2. Upon graduation from the University of Pennsylvania with a Bachelor of Science degree in Chemical Engineering in 1976, I began work with Gulf Oil Corporation. As a refinery process engineer with Gulf Oil from 1976 to 1980, I gained experience in the analysis and

management of several technical and economic aspects of petroleum refining, including refinery operations analysis, supervision of refinery operating units, gasoline blending, and finished product handling and shipping. During this period, I was directly involved in blending and shipping of refined products, including motor gasoline, at Gulf Oil's Marcus Hook, Philadelphia refinery.

- In 1980, I began work as a consultant with Nexant's predecessor company, Chem Systems Inc. Chem Systems Inc. was acquired by IBM in 1998, becoming part of its Consulting Services Group, and then sold to Nexant in 2001. As a full-time consultant for the past thirtyfour years, I have conducted studies both domestically and abroad focusing on global energy, refining and petrochemicals, strategic analysis, project feasibility and financing as well as alternative fuels and technologies. Clients for which I have provided consulting services include a wide range of private sector companies as well as public sector entities such as the World Bank, the Asian Development Bank, the U.S. Trade and Development Agency, and the Inter-American Development Bank. I have also worked for numerous national oil companies, including Enap (Chile), Petroleos de Venezuela, S.A. (Venezuela), Petrobras (Brazil), Pemex (Mexico), PTT Public Company Limited (Thailand), Petronas (Malaysia), Pertamina (Indonesia) and Sinopec (China). I have authored more than 30 papers, articles and industry conference presentations, which I have presented both domestically and internationally. During my career I have been a guest lecturer (for a 10-year stretch) on the topics of petroleum refining and petrochemicals as part of an international program to certify industry participants in the fundamentals of hydrocarbon processing.
- 4. I have been asked to briefly discuss how gasoline is manufactured and distributed to retail stations in the United States, and in particular in the Northeast which includes the State

of Vermont. I have also been asked to describe how Total Petrochemicals & Refining USA, Inc. (TPRI), due to the largely commingled nature of the United States gasoline distribution system, supplied MTBE gasoline to Vermont during the period from 1979 to 2007.

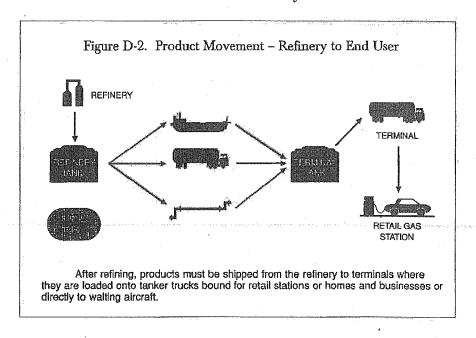
#### **GASOLINE DISTRIBUTION SYSTEM**

- 5. The supply chain for gasoline in the United States is highly complex, but can be generalized into four segments: major gasoline producing centers (refineries), transport to distribution terminals, distribution terminals, and retail service stations. A simplified profile of these primary steps is presented in Figure 1.
- 6. Once gasoline is produced at refineries, it must be transported to the ultimate consumer via a number of discrete steps. I will focus on the steps associated with moving high volumes of gasoline from refineries via pipelines to terminals, as this is the most relevant for this case. I also focus on the shipping of non-segregated, or fungible gasoline, since this is how the majority of gasoline is shipped. These steps typically include:
- Transfer from refinery product tanks to receiving tanks at pipelines, prior to shipment on the pipeline. Pipelines receive gasoline through manifolds that handle gasoline from multiple refineries. Pipeline tanks can end up with gasoline from more than one refinery. Thus, early in the process of moving gasoline from refineries to retail users, the ability to track gasoline from a single refinery is lost.
- Pipelines ship gasoline via batches. Each batch typically is created by injecting gasoline from multiple tanks at the pipeline, which results in further commingling of the gasoline such that it is impossible to track where each gallon has been manufactured.

- Gasoline is shipped in batches on pipelines to its destination, which typically is a distribution or product terminal. These terminals have a number of receiving tanks, which receive the gasoline batch shipments off the pipelines. Batch shipments often are transferred into more than one tank, and thus gasoline from multiple batches may be mixed within individual tanks. This results in additional commingling, such that it is impossible to track where each gallon had been manufactured.
- Gasoline stored in distribution terminal tanks is then shipped to product terminals or onto trucks for delivery to retail stations. In the case of shipping to product terminals, this is typically done either by pipeline or barge. In these cases, gasoline from multiple tanks at the distribution terminal is commingled to create batches (in the case of pipelines) or for loading on barges. Thus additional commingling takes place, making it impossible to track where each gallon had been manufactured.
- Gasoline received at the product terminals goes into multiple tanks for storage. Similar to distribution terminals, product terminal tanks can receive gasoline from multiple batches of gasoline received by pipeline or barge. Thus additional commingling takes place, making it impossible to track where each gallon had been manufactured.
- The final step in the distribution chain is the transfer of gasoline from tanks at product terminals to trucks that then deliver gasoline to multiple retail service stations. During this process, it is not unusual for trucks to receive gasoline from more than one storage tank at the terminal. Thus, additional commingling takes place, making it impossible to track where each gallon had been manufactured.

Figure 1

Gasoline Distribution System<sup>1</sup>



7. Pipelines are the lowest cost option for moving refined products. As indicated in Table 1 and Figure 2, the vast majority of gasoline shipped in the United States is by pipeline, and this has been the case for many years. As indicated, since 1995, between 68 and 75 percent

<sup>&</sup>lt;sup>1</sup> "U.S. Petroleum Refining: Assuring the Adequacy and Affordability of Cleaner Fuels.", Report by the National Petroleum Council, June 2000 Page D-2

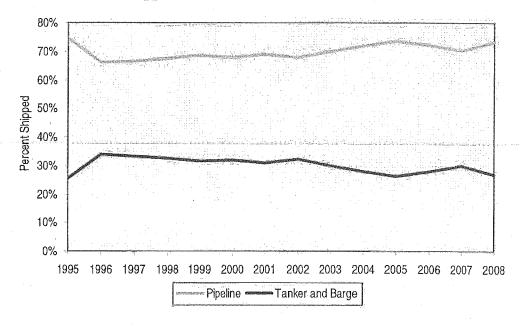
of finished gasoline was shipped by pipeline. The balance was by Tanker and Barge. Smaller amounts are also moved by rail. Trucks are used for local distribution.

- 8. Product moved from refineries is transferred into distribution or product terminals. Distribution terminals tend to be larger than product terminals, and may be a supply source for pipelines and vessels/barges in addition to retail sales. They often exist at the end of pipelines or in coastal locations, and serve an important function of providing a storage and staging location for the large volumes of gasoline that are moved long distances by pipeline or ship.
- 9. Product terminals tend to be smaller than distribution terminals. They are located near consuming markets and primarily serve retail sales.
- 10. Once gasoline is received at product terminals, several final steps are performed prior to delivery to retail stations, including addition of proprietary additive packages that are used to differentiate gasoline into brands that are sold at the retail level.
- and are supplied by privately owned pipelines, common carrier pipelines, barges, vessels, rail and even truck. Total capacity at a terminal can range from a few thousand barrels to millions of barrels. The primary equipment at a terminal is the tanks used for storage and separation of different product grades. The number of tanks can range from a few to hundreds. Other equipment includes piping, pumps, valves, and meters needed for bulk receipts and for loading racks used for loading trucks. Marine terminals have vessel length and water depth limits that dictate the size of tankers that can offload at the facility.

Table 1
Modes of Shipping Finished Gasoline in the United States<sup>2</sup>

	Pipeline		Tanker + Barge	
	k barrels	% total	k barrels	% total
1995	551,734	75%	188,320	25%
1996	717,739	66%	367,464	34%
1997	712,744	67%	357,997	33%
1998	747,501	67%	361,080	33%
1999	738,836	68%	340,523	32%
2000	741,581	68%	350,170	32%
2001	749,753	69%	337,441	31%
2002	748,123	68%	353,888	32%
2003	756,300	70%	323,699	30%
2004	769,859	72%	299,383	28%
2005	787,180	74%	282,047	26%
2006	682,173	72%	263,156	28%
2007	660,968	70%	280,921	30%
2008	569,750	73%	208,872	27%

Figure 2
Modes of Shipping Finished Gasoline in the United States



<sup>&</sup>lt;sup>2</sup> EIA Petròleum Supply Annuals Volume I, 1995 through 2008

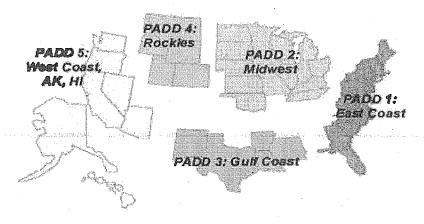
### DISTRIBUTION OF GASOLINE INTO THE UNITED STATES EAST COAST MARKET

12. Information regarding the United States gasoline market is maintained by a number of entities. The most prominent is the United States Energy Information Administration (EIA), a part of the United States Department of Energy. In general I have utilized EIA data in preparing relevant exhibits and analysis. The EIA prepares extensive data on gasoline and other fuels markets. This is available on a national and regional basis. The EIA divides the United States into five regions, called Petroleum Administration for Defense Districts (PADDs), which are presented in Figure 3.

Figure 3

Petroleum Administration for Defense Districts

### Petroleum Administration for Defense Districts



13. For the purposes of this affidavit, I have focused on published information from the EIA for the national and PADD I (East Coast) markets as the key source to establish overall industry trends in supply and distribution of gasoline into the East Coast and ultimately to the State of Vermont. A more detailed discussion of distribution into Vermont itself is based on my

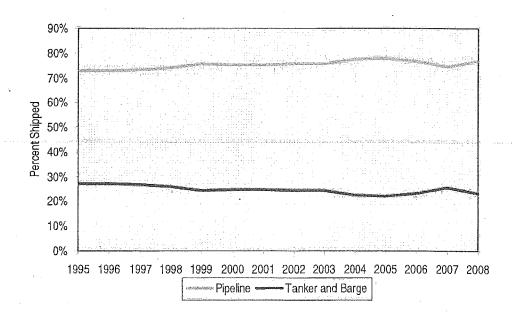
general experience as well as a review of statements of the Defendants. As shown in Table 3, the East Coast of the United States receives the majority of its supply of gasoline via pipelines from the United States Gulf Coast (primarily from Texas and Louisiana refineries), which represents about 54 percent of supply between 1981 and 2008. The second largest supply of gasoline is from refineries located within PADD 1, which also distribute their gasoline within the region by pipeline as well as other means. These local refineries supplied about 33 percent between 1981 and 2008. The smallest source of supply is from foreign imports, generally received by ship, which represented about 12 percent during this period. As indicated in Table 3 and Figure 4, the majority (approximately three quarters) of gasoline transported into PADD 1 (United States East Coast) from other regions of the United States is by pipeline, followed by Tanker and Barge. Since 1995, between 73 and 78 percent of finished gasoline was shipped by pipeline between other PADDs and PADD 1. The balance was from Tankers and Barges.

14. As shown in Figure 5, the vast majority of refining capacity in PADD 1 is located in the center of the PADD, in Eastern Pennsylvania and New Jersey.

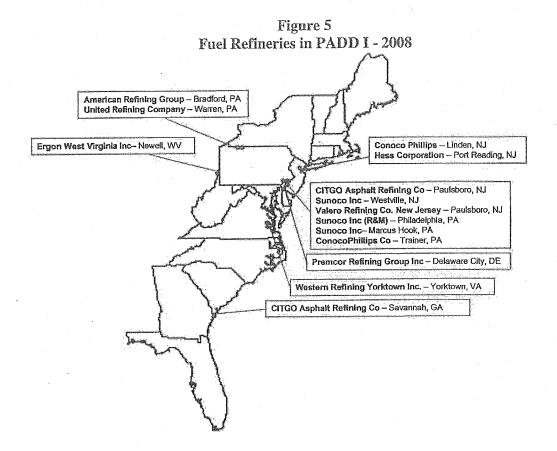
Table 3 Modes of Shipping Finished Gasoline into PADD  $1^3$  From other PADD Regions

	Pipeline		Tanker + Barge	
	k barrels	% total	k barrels	% total
1995	463,996	73%	171,711	27%
1996	476,983	73%	176,981	27%
1997	468,808	73%	171,436	27%
1998	501,285	74%	174,364	26%
1999	495,103	75%	160,880	25%
2000	489,207	75%	162,233	25%
2001	487,470	75%	159,432	25%
2002	487,593	76%	156,984	24%
2003	494,111	76%	158,929	24%
2004	500,623	77%	145,483	23%
2005	474,619	78%	134,113	22%
2006	414,165	77%	124,820	23%
2007	394,002	74%	135,501	26%
2008	333,855	77%	100,602	23%

Figure 4
Modes of Shipping Finished Gasoline into PADD 1
From other PADD Regions



<sup>&</sup>lt;sup>3</sup> EIA Petroleum Supply Annuals Volume I, 1995 through 2008



### DISTRIBUTION OF GASOLINE INTO THE NEW ENGLAND MARKET

- 15. The New England market (Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, and Connecticut) for gasoline can be characterized by the following:
- No petroleum refineries operate in the New England market area
- All gasoline consumed must be imported from outside of the New England market area
- Gasoline is supplied to New England markets from the following sources:
  - Imports from other States
  - Imports from foreign sources

- 16. I have reviewed an analysis prepared by John O'Brien<sup>4</sup> for the Defendants in the New York City Case to characterize the supply sources for RFG gasoline into the New England market area. Thus, as shown in Figure 6, Mr. O'Brien indicates the following specific sources of gasoline supply into New England:
- Imports from foreign sources
- Imports from PADD 3 (United States Gulf Coast)
- Imports from PADD 1 (East Coast) South of New York Harbor
- Imports from New York Harbor

The Defendants that Mr. O'Brien prepared this analysis for in the New York City case include the following: BP Products North America, Inc., Chevron USA, Inc., Citgo Petroleum Corporation, ConocoPhillips Company, Equilon Enterprises LLC, Equistar Chemicals, LP, ExxonMobil Corporation, Flint Hills Resources, LP, Lyondell Chemical Company, Marathon, Motiva Enterprises, LLC, Premcor, Shell Oil Company, Shell Oil Products Company LLC, Texaco, Inc., Texaco Refining and Marketing, Inc, and Valero Energy Corporation<sup>5</sup>. I note that many of these entities are Defendants in the current case.

<sup>5</sup> Rebuttal Report of John B. O'Brien, City of New York vs. Amerada Hess Et. Al., Issued March 30, 2009

<sup>&</sup>lt;sup>4</sup> Supplemental Expert Report of John O'Brien, City of New York vs. Amerada Hess Et. Al., Issued February 13, 2009

### EXHIBIT G NEW ENGLAND RFG SUPPLY SOURCES

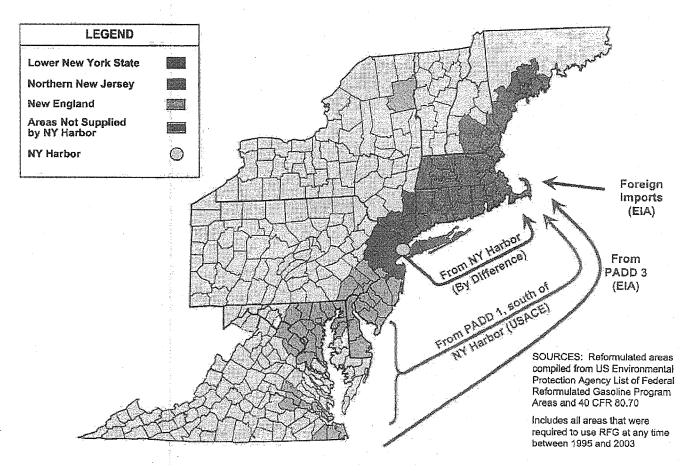


Figure 6
Schematic of RFG Gasoline Supply to New England<sup>6</sup>

P.C. 185

#### FUNGIBILITY AND COMMINGLING OF GASOLINE

- 17. A critical aspect of gasoline shipping in the United States is the use of "fungible" gasoline as the primary mode of movement. Within the U.S. gasoline distribution industry, the term "fungible" means that "the quality of a particular batch of fuels meets minimum agreed-upon specifications, and may be mixed with similar fuels (of the same type, octane grade, and RVP class) made by other refiners for shipment and use."
- 18. Based on my knowledge of the industry, as well as a review of relevant statements made by key pipelines in the distribution system supplying the U.S. East Coast, the vast majority of gasoline shipped by pipeline and through the terminal distribution system is "fungible", as opposed to "segregated". Thus, the typical mode of shipment of gasoline from production at refineries, shipping through pipelines or ships, into terminals, and then by truck to retail service stations operation, does not allow for tracking of individual shipments of gasoline from the producing refinery to the final retail customer. This conclusion is supported by a number of quotations that follow from the major pipelines that service the New York Harbor market for gasoline. Specifically these include statements by the Colonial Pipeline, the Buckeye Pipeline, and the Sun Pipeline, which combined, represent the primary pipelines that supply, either directly or indirectly, the New York Harbor market.
- 19. The **Colonial Pipeline** states that it does not segregate the petroleum products shipped on the Colonial Pipeline unless explicitly put in a segregated batch. Specifically, the Colonial Pipeline states:

<sup>&</sup>lt;sup>7</sup> Responses of Defendant Atlantic Ritchfield Company to Discovery Requests in Case Management Order No. 4, Paragraph III.B.2, Page 8 City of New York vs. Amerada Hess Et. Al.

- "Fungible products shipped on the Colonial system are generic products. These products meet published specifications. Shippers will receive equivalent product but may not get back the actual product shipped. Segregated products are branded products or blendstock materials. On segregated shipments shippers receive the same product they injected into the system."
- Colonial's minimum quantity or "tender" of products to be shipped on a segregated batch basis is 75,000 barrels. However, several shippers may make up joint fungible batches by tendering a minimum of 25,000 barrels each."

The Colonial representative states that there are specifications for the movement of product in order to create fungibility and to be able to move the product successfully. <sup>10</sup>

The Colonial representative testifies that for the time that gasoline containing MTBE was transported along the Colonial Pipeline system, the gasoline containing MTBE would have been a fungible product and therefore be coming from multiple suppliers and be commingled for the majority of the cases.<sup>11</sup>

The Colonial representative testifies that gasoline containing MTBE was treated no differently than any other gasolines along the Colonial Pipeline system during the years that gasoline containing MTBE was transported along the pipeline.<sup>12</sup>

http://www.colpipe.com/ab\_faq.asp

<sup>8</sup> http://www.colpipe.com/ab\_faq.asp

<sup>&</sup>lt;sup>10</sup> Brown, James Edward – January 18,2008 10:05:00 a.m. Volume:1, Page 22 City of New York vs. da Hess Et. Al.

<sup>11</sup> Brown, James Edward – January 18,2008 10:05:00 a.m. Volume:1, Page 33-34

<sup>&</sup>lt;sup>12</sup> Brown, James Edward – January 18,2008 10:05:00 a.m. Volume:1, Page 35

- 20. As a result of the fungibility of gasoline within the PADD 1 region, it is impossible to determine where each gallon of gasoline that has been delivered to the New York Harbor area and the State of Vermont was originally produced.
- 21. Further, since the vast majority of time pipeline batches of gasoline contain mixtures of gasoline from multiple refineries, and shipments of gasolines are almost always further intermingled during the course of transfers into terminals and then to retail stations, I am of the opinion that, over time, any supplier of fungible gasoline into the PADD 1 gasoline supply system will have, on average, supplied gasoline throughout the entire supply system. Thus, it is reasonable to conclude that gasoline suppliers that supplied MTBE-gasoline into PADD 1 via the main pipeline systems have also supplied MTBE-gasoline into the New York Harbor marketplace, and from there into New England and Vermont. A key component of this distribution system is the extensive terminal storage capacity centered in and around Linden, New Jersey, which is at the northern terminus of the Colonial Pipeline. This tankage serves as a staging site for taking gasoline from the Colonial Pipeline as well as other sources, and then shipping it onward throughout the region, including to New England and the State of Vermont. In my opinion, refiners in the United States have an understanding of the fungible nature of the gasoline that they produce, and also that, over time, through commingling their gasoline will end up throughout the distribution system.
- 22. An example helps to illustrate the fungibility of gasoline in the distribution system. A refiner, like all refiners in the industry, makes 87 octane gasoline containing MTBE to meet specifications developed by ASTM. A batch of that 87 octane gasoline containing MTBE is interchangeable with any other refiner's batch of 87 octane gasoline meeting the same specifications. When a refiner ships a batch of its 87 octane gasoline containing MTBE on a

pipeline, that refiner is not guaranteed to, and generally will not receive the exact same batch on the other end. Instead, the refiner receives an equivalent batch that meets specifications. The source of the batch taken off the pipeline would be unknown; all that matters to the receiving company is that the batch meets the requisite specifications for 87 octane gasoline that contains MTBE.

#### TPRI (TOTAL)'S LINKS TO THE VERMONT GASOLINE MARKET

- 23. I have reviewed information regarding TPRI's refining and gasoline manufacture and distribution activities over the 1979 to 2007 time period. I have identified three (3) activities that link TPRI to the supply of gasoline containing MTBE in Vermont. These are discussed in the following paragraphs.
- 24. Activity 1: TOTAL operated terminals in New Jersey that blended or handled gasoline with MTBE, for which it does not know where the final consumption occurred. As discussed above, due to the comingled nature of sales feeding into the Mid-Atlantic states and the New England region, it is more likely than not that some of the gasoline that was blended or handled by TOTAL as part of its terminal operations in New Jersey ended up supplying the State of Vermont with gasoline containing MTBE. Relevant information provided by TOTAL includes:
- "from approximately 1988 to 1998, TOTAL blended gasoline in storage tanks located in Linden, New Jersey that were leased by the company from a third party. Some, but not all, of the gasoline blended at this facility contained MTBE. To the best of TOTAL's knowledge, all gasoline blended at the New Jersey facility was sold in the State of New

Jersey, to third parties not affiliated with the company, either at the outlet flange of the storage tanks or into a pipeline in the state of New Jersey." <sup>13</sup>

- 25. Activity 2: TOTAL manufactured gasoline containing MTBE at its Port Arthur Texas refinery and shipped it on the Colonial Pipeline. TOTAL is not aware of where the final consumption occurred. As discussed above, due to the comingled nature of sales in the Mid-Atlantic states, and their links to supplying the New England region, it is more likely than not that some of the gasoline containing MTBE that was manufactured by TOTAL at its Port Arthur refinery and was shipped on the Colonial Pipeline ended up supplying the State of Vermont with gasoline containing MTBE. Relevant information provided by TOTAL includes:
- "Approximately 1.5 million barrels of the RFG manufactured by TOTAL at its Port

  Arthur Refinery were similarly sold to third parties via shipment on the Colonial

  Pipeline."<sup>14</sup>
- 27. Activity 3: TOTAL sold neat MTBE to numerous national marketers of gasoline during the period from 1984 through 2007. TOTAL is not aware of where the final consumption of the gasoline containing MTBE occurred. As discussed above, due to the comingled nature of sales of gasoline into the East Coast of the United States, including the New England region, it is more likely than not that some of the gasoline containing MTBE that was manufactured utilizing TOTAL-supplied MTBE ended up supplying the State of Vermont with gasoline containing MTBE. Relevant information provided by TOTAL includes:

<sup>&</sup>lt;sup>13</sup> Letter from M. Coy Connelly to Robin L. Greenwald, March 29, 2007

<sup>&</sup>lt;sup>14</sup> Affidavit of Kim Arterburn, January 11, 2008, Paragraph 8

"Total Petrochemicals identifies the following entities to which it sold neat MTBE at thee listed locations during the years 1999 through 2004:

Mobil Oil Corporation Beaumont, Texas; Port Neches. Texas Equiva Trading Company Pasadena, Texas Citgo Petroleum Corporation Port Neches, Texas; Lake Charles, Louisiana Conoco, Inc. Lake Charles, Louisiana Tauber Oil Company Galena Park, Texas Noble Americas Corporation Port Neches, Texas Exxon Company USA Baytown, Texas ExxonMobil Refining & Supply Company Port Neches, Texas Koch Petroleum Group LP Galena Park, Texas Shell Trading US Company Port Neches, Texas Enron Clean Fuels Company Port Neches, Texas Noble America Port Neches, Texas Valero Marketing and Supply Company Vidor, Texas Beaumont, Texas; Baytown, Texas; Exxon Mobil Oil Corp. Port Neches, Texas BP Product North America, Inc. Port Neches, Texas Port Neches, Texas Vitol SA, Inc. Huntsman International Fuel LP Port Neches, Texas Port Neches, Texas Tradax Energy, Inc. Atlantic Trading & Marketing, Inc. Galena Park, Texas PMI Norteamerica SA de CV Port Neches, Texas BP North America Petroleum Port Neches, Texas NIC Holding Corp. Port Neches, Texas Beaumont, Texas" 15 American Agip Company, Inc.

Many of these companies are national or regional suppliers of gasoline throughout the United States. Thus, TOTAL sold neat MTBE to national suppliers and it is reasonable to conclude that it expected that its MTBE would be distributed nationally, including in New England and Vermont.

<sup>&</sup>lt;sup>15</sup> Declaration of Total Petrochemicals USA, Inc. Pursuant to Case Management Order #4, Section (iii)

manufacturing gasoline containing MTBE, covering all or a significant portion of the period from 1979 to 2007. Based on this information, and my knowledge of how gasoline is transported in a commingled and fungible manner to the Northeast region of the United States, including Vermont, I conclude that TOTAL supplied gasoline with MTBE to the State of Vermont during

In summary, TOTAL engaged in a number of activities associated with

all or parts of this time period. I further conclude that given its activities and the known national

distribution system for gasoline, TOTAL would have (should have had) the expectation that

some of its gasoline with MTBE, or neat MTBE would ultimately be sold into and used in

Vermont.

28.

The facts recited herein are based on my personal knowledge and so far as I can rely on that knowledge, I believe them to be true.

DATED at White Plains, New York this 19 day of September, 2014.

Bruce Burke

Subscribed to and sworn to before me this

1944 day of September, 2014.

Notary Public

PHYLLIS C. MITCHELL Notary Public, State of New York No. 01Mi6210499 Qualified in Westchester County Commission Expires 8/24/20

Bruce 2 Binks

### EXHIBIT B

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	Forward Header		Subject:
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manu on CD 71		t	

Draft testimony on SB 71

Author: newhampshire (newhampshire@api.org) at unix.mime Date: 2/19/99 11:57 AM

New Hampshing Petroleum Com co

A division of The American Petroleum Institute 11 Depot Street Concord, NH 03301

Telephone: 603-224-4097 Fax: 603-225-7466

Date: Free Property Control of the C

CC: Drew Cobbs Creg Smith Patty Aho

From: David Harrington

Subject: Propose as a propose of St. 7

Attached please find my first draft of proposed testimony opposing the passage of SB 71, a bill banning MTBE by 01/01/2000.

In a discussion with the Director of New Hampshire's Air Resources Division, he indicated that they will also be testifying in opposition to the passage of SB 71.

health departments of the consense of the meanings of the consense of the

It is clear that our role is to discuss the distribution and supply issues that will present themselves with a han on MTBE. Larry Olejnik of Equiva will also be present to answer any technical questions or questions regarding supply and distribution which are beyond my knowledge or expertise.

I would appreciate any comments you have may have on this proposed testimony no later than COB Friday, February 26, 1999.

Of course, should you have any questions, please do not hesitate to give me a call.

112/19/99

Draft of Testimony of David Harrington on SB 71

Good Day. For the record I am David Harrington, Executive Director of the New Hampshire Petroleum Council. The Petroleum Council is a Division of the American Petroleum Institute. API represents approximately 400 companies involved in all aspects of the oil and gas industry, including exploration, production, transportation, refining and marketing.

The Petroleum Council opposes the passage of SB 74.

BPX 047487. CONFIDENTIAL

MDL 1358

In conventional gasoline, a ban on MTBE would require industry to find another product to enhance octane. And since residual product containing MTBE could contaminate MTBE free fuel, this fuel would have to be segregated from the rest of New England's fuel supply. The availability of some other octanes enhance would as obe an example Furthermore, I am sure you would want to know the health effects of any new gasoline additive before we begin to use it.

The issue essentially boils down to this one point. In banning MTBE, the state of New Hampshire will in essence be imposing a new fuel standard. Thus new schildret would counte mouse the properties anche of boutions fuel that is distinct from the rest of New England's fuel supply. It is the creation of a unique fuel for our state that is most problematic. Let me illustrate with an analogy.

The distribution of gasoline is in many ways similar to the distribution of electricity. Throughout New England, power plants produce electricity and send it to customers through the power grid. This power is co-mingled with the power produced at other plants. A customer of Public Service Company of New Hampshire may get power produced by PSNH or it may come from Connecticut or Maine or even Quebec.

The gasoline distribution system is very similar. Think of refineries as power plants and the pipelines and barges that deliver that product as the transmission system. Gasoline produced at refineries is put onto the transmission system where it is co-mingled with the product produced at other refineries. This co-mingled product travels through the system to a terminal. At the terminal it finally becomes a specific brand of gasoline. It is loaded onto trucks and delivered to gasoline stations.

From refinery to terminal similar products share similar properties. Conventional unleaded gasoline produced by refinery X is, within a set of specific parameters, the same as unleaded gasoline produced by refinery Z, just like the electricity produced in Bow by PSNH is the same as electricity produced in St. James Bay by Hydro-Quebec. The fungibility of gasoline allows it to be moved efficiently and ensures adequate supply.

Continuing with this analogy, a ban on MTBE would be similar to my small town of New Boston requiring that all power used by its residents originate from a hydro-electric plant.

To accomplish this, the town would have to find a plant willing to supply this power. Since we must be assured that it is indeed hydro power, a separate distribution system would have to be built from that plant to the town.

The same is sues pre-uniform the same is a same of the same is seen as the same is such that is willing to produce the same is a same is such that is willing to produce the same is a same is same in the same is same in the same in the

What happens to New Boston if the turbine at the hydro plant breaks, or an ice storm collapses the transmission line? Likewise, what happens to supply if a refinery shuts down or a barge is unable to deliver product due to a weather problem? In creating a "boutique" fuel we have limited our ability to turn to other suppliers in search of needed product.

Yet, despite all of the clean air benefits attributable to RFG and the supply and distribution problems created by a ban on MTBE, some would have you believe that these issues do not outweigh the risk associated with this product when it gets into ground water.

While I will leave others in discuss the issues of health effects and sestimine quality imprented detail. I think it is unportant to soft inactine different equality panels. The interpretation of the grant of the

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MDL 1358

## EXHIBIT C



UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK	) ) )
In re: Methyl Tertiary Butyl Ether ("MTBE") Products Liability Litigation	) ) ) ) ) Master File No. 1:00-1898 ) ) MDL 1358 (SAS) ) M21-88
This document relates to: County of Suffolk and Suffolk County Water Authority v. Amerada Hess Corp., et al. No. 04-CV-5424	) ) ) )

### RULE 56,1 STATEMENT IN SUPPORT OF THE MOTION FOR PARTIAL SUMMARY JUDGMENT OF TOTAL PETROCHEMICALS USA, INC.

Pursuant to Local Rule 56.1, and in support of its Motion for Partial Summary Judgment, Defendant TOTAL PETROCHEMICALS USA, Inc. ("TOTAL") hereby submits this statement of material facts as to which there is no genuine issue to be tried:

- 1. From 1985 through 1996, TOTAL manufactured neat MTBE at its Big Spring refinery in northwest Texas, all of which it used to blend with conventional gasoline for octane enhancement purposes. (Affidavit of Kim Arterburn ("Arterburn Aff.") ¶ 3.)
- 2. TOTAL did not sell any of the neat MTBE manufactured at Big Spring to third parties. (Arterburn Aff. ¶ 3.)
- 3. The Big Spring refinery is not connected to any waterway for delivery to customers via barge, nor is it connected to the Colonial Pipeline or any other pipeline which delivers product to the East Coast of the United States. (Arterburn Aff. ¶ 3.)
- 4. It is virtually impossible that any product manufactured at the Big Spring refinery ever reached the New York market. (Arterburn Aff. ¶ 3.)

- 5. TOTAL manufactured approximately 3 million barrels of Reformulated Gasoline ("RFG") containing MTBE at its Port Arthur refinery during 1995. (Arterburn Aff. § 6.)
- 6. According to TOTAL's records, only roughly 1.5 million barrels of RFG manufactured at its Port Arthur refinery were sold to third parties via shipment on the Colonial Pipeline. (Arterburn Aff. § 8; Ex. A to Arterburn Aff.)
- 7. All of the remaining RFG manufactured at TOTAL's Port Arthur refinery that was not shipped via the Colonial Pipeline was shipped via the Explorer Pipeline, which does not deliver product to the East Coast. (Arterburn Aff. ¶ 7.)
- 8. TOTAL never made any sales of gasoline from its Port Arthur refinery with title transfer points in the State of New York. (Arterburn Aff. ¶¶ 7-10; Ex. A to Arterburn Aff.)
- 9. TOTAL is not in possession of any records indicating that product it manufactured at its Port Arthur Refinery ever reached any service stations in Suffolk County. (Arterburn Aff. ¶ 8-10.)
- 10. During the time period from 1987 to 1995, TOTAL leased storage tanks at the Northville Terminal in Linden, New Jersey, and, from 1995 to 1996, leased similar tanks at the GATX Terminal in Carteret, New Jersey. (Affidavit of Tom Knight ("Knight Aff.") ¶ 2.)
- 11. With respect to TOTAL's operations in New Jersey, all sales of both conventional gasoline and RFG were made either within the State of New Jersey or on an ex-duty basis in the open water while the product was en route to the United States. (Knight Aff. ¶ 5.)
- 12. TOTAL never directed any gasoline to Long Island or more specifically to Suffolk County. (Knight Aff. § 5.)
- 13. TOTAL is not in possession of any records indicating that product it sold in the State of New Jersey ever reached Suffolk County. (Knight Aff. § 5.)

- 14. Prior to 1995, TOTAL used the storage tanks it leased in New Jersey to import low-octane gasoline blendstocks, which it then blended with various high-octane components in order to meet gasoline specifications for sale in the United States. (Knight Aff. ¶ 3.)
- 15. MTBE was used as a blending agent only on a couple of occasions in TOTAL's New Jersey operations; therefore, the vast majority of the conventional gasoline blended and sold by TOTAL in New Jersey did not contain MTBE. (Knight Aff. ¶ 3.)
- 16. Between 1987 and 1995, TOTAL sold less than 2 million barrels of conventional gasoline that contained over 1% MTBE by volume. (Knight Aff. ¶ 3, 8; Ex. A to Knight Aff.)
- 17. During 1995 and 1996, TOTAL imported RFG into New Jersey, which was received as a finished gasoline product, ready for sale in the United States. (Knight Aff. ¶ 4.)
- 18. TOTAL did not blend the RFG it imported into New Jersey with MTBE or any other additional components before it was sold to third parties. (Knight Aff. ¶ 4.)
- 19. Sales of RFG from TOTAL's New Jersey operations were primarily shipped via barge or transferred to a storage tank controlled by a third party at the terminal. (Knight Aff. ¶ 4.)
- 20. Gasoline from TOTAL's New Jersey operations was rarely shipped via the Buckeye Pipeline. (Knight Aff. ¶¶ 3-4.)
- 21. During 1995 and 1996, TOTAL sold just over 3.5 million barrels of RFG through its New Jersey operations. (Knight Aff. ¶¶ 4, 8; Ex. B to Knight Aff.)
- 22. To the best of TOTAL's knowledge, only 527,808 barrels of both conventional gasoline and RFG containing MTBE from TOTAL's New Jersey operations were delivered to the Buckeye Pipeline. (Knight Aff. ¶¶ 3-4, 8; Exs. A and B to Knight Aff.)

23. During 1995, TOTAL manufactured a small amount of RFG containing MTBE at

its Port Arthur refinery, of which 1,560,027 barrels were sold to third parties via shipment on the

Colonial Pipeline. (Arterburn Aff. ¶ 8; Ex. A to Arterburn Aff.)

24. The Colonial Pipeline has the capacity to transport approximately 1 million

barrels of gasoline per day. (Ex. F, Declaration of John B. O'Brien (May 24, 2004) ¶ 13.)

25. The Colonial Pipeline is only one minor source among several sources of gasoline

supply to the New York market. (Ex. G, Supplemental Expert Declaration of John B. O'Brien

(Oct. 15, 2007) ("O'Brien Suppl. Decl.") ¶ 10-12; Ex. H, Declaration of John B. O'Brien in

Support of Defendants' Opposition to Plaintiffs' "Motion to Apply Causation Theories" (Mar. 28,

2006) ("O'Brien Causation Decl.") ¶¶ 23-28.)

26. Foreign imports account for about 60% of gasoline supplied to New York Harbor,

and seven local refineries in New Jersey and Pennsylvania that supply New York Harbor have a

combined capacity of about 1.4 million barrels per day. (O'Brien Causation Decl. §¶ 24-25;

O'Brien Suppl. Decl. ¶¶ 10-11.)

Dated: January 11, 2008

Respectfully submitted,

M. Coy Connelly (MC 9384) Julia K. Huff (JH 1359) Amy E. Parker (AP 7027)

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Attorneys for Defendant TOTAL PETROCHEMICALS USA, INC.

### CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Rule 56.1 Statement in Support of the Motion for Partial Summary Judgment of TOTAL PETROCHEMICALS USA, INC. was served upon counsel for Plaintiffs and all other counsel of record via LexisNexis File & Serve on the Whoday of January 2008.

M Cov Connelly

HOUSTON/2147162



UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK	) Master File C.A. No. 1:00-1898 ) MDL 1358 (SAS)		
In re Methyl Tertiary-Butyl Ether ("MTBE") Products Liability Litigation	) No. M21-88 ) AFFIDAVIT OF ) KIM ARTERBURN		
This document relates to:	) ) `		
County of Suffolk and Suffolk County Water Authority v. Amerada Hess Corp., et al. No. 04- CV-5424	, ) ) )		
	) )		
STATE OF TEXAS §			
COLINITY OF HARRIS 8			

I, Kim Arterburn, being duly sworn, state the following:

- 1. My name is Kim Arterburn. I am an employee of TOTAL PETROCHEMICALS USA, INC. ("TOTAL"). I am over twenty-one years of age and am competent to make this affidavit. The statements made herein are true and correct and are based on my personal knowledge, on my review of documents prepared and maintained by TOTAL in the ordinary course of business, and on summaries of voluminous documents in the possession of TOTAL.
- 2. Through my employment at TOTAL, I gained knowledge regarding the operation of TOTAL's refineries located in Port Arthur and Big Spring, Texas.
- 3. From 1985 through 1996, TOTAL manufactured neat MTBE at its Big Spring, Texas Refinery which it used to blend with conventional gasoline for octane enhancement purposes. TOTAL did not sell any of the neat MTBE manufactured at Big Spring to third parties. All of it was used at the refinery to blend with conventional gasoline.
- 4. The Big Spring Refinery is located in Northwest Texas. It is not connected to any waterway for delivery to customers via barge, nor is it connected to the Colonial Pipeline or any

other pipeline, which delivers product to the East Coast of the United States. As a result, it is virtually impossible that any product manufactured at the Big Spring refinery ever reached the New York market. The Big Spring Refinery was sold to ALON USA Energy Inc. effective August 31, 2000.

- 5. TOTAL never manufactured any conventional gasoline containing MTBE at its Port Arthur Refinery.
- 6. TOTAL manufactured approximately 3 million barrels of Reformulated Gasoline ("RFG"), compliant with the 1990 Clean Air Act Amendments, at its Port Arthur refinery during the year 1995. The product was sold to customers via shipment on either the Colonial or Explorer Pipelines.
- 7. Approximately 1.5 million barrels of the RFG manufactured by TOTAL at its Port Arthur Refinery were sold to third parties via shipment on the Explorer Pipeline. The Explorer Pipeline primarily ships product from the Gulf Coast to the Dallas/Fort Worth Area and delivery points further north in Oklahoma, Missouri, Illinois and Indiana. The Explorer Pipeline does not deliver product to the East Coast of the United States. As a result, it is virtually impossible that any product manufactured at the Port Arthur refinery and sold to customers via shipment on the Explorer Pipeline ever reached the New York market.
- 8. Approximately 1.5 million barrels of the RFG manufactured by TOTAL at its Port Arthur Refinery were similarly sold to third parties via shipment on the Colonial Pipeline. The chart attached as Exhibit A sets forth each individual sale of RFG made by TOTAL on the Colonial Pipeline, the customer, the number of barrels sold, and the title transfer point. TOTAL never made any sales of gasoline from its Port Arthur Refinery with title transfer points in the State of New York, and is not in possession of any records which would indicate that gasoline

manufactured at its Port Arthur Refinery was ever delivered to a service station in Suffolk County.

- 9. TOTAL has never owned, operated, or maintained a branded dealer relationship with any service station in Suffolk County.
- 10. TOTAL has never owned, operated, or leased storage space at any terminal in the State of New York, and never delivered gasoline to, nor purchased gasoline from, any of the following 9 terminals in the New York Harbor area: Riverhead Terminal, Holtsville Terminal, Port Jefferson/Setauket/East Setauket Terminal, Oyster Bay Terminal, Great Neck Terminal, Oceanside Terminal, Inwood Terminal, and Lawrence Terminal.

Dated: January 10, 2008.

SUBSCRIBED AND SWORN to me on this 10 day of January, 2008, to certify which, witness my hand and seal of office.

SONJA L RODRIGUEZ RANGEL My Commission Expires December 23, 2009

The State of Texas My Commission Expires: December 23,2009

EXHIBIT A

### SALES OF REFORMULATED GASOLINE MANUFACTURED AT TOTAL'S PORT ARTHUR REFINERY AND SHIPPED ON THE COLONIAL PIPELINE

Date of Sale	Customer	Volume in Barrels	Title Transfer Point
2/14/1995	Morgan Stanley Capital Group	25,023	Hebert, TX
2/14/1995	Louis Dreyfus Energy Group	25,004	Hebert, TX
2/14/1995	Northeast Petroleum	50,003	Hebert, TX
2/14/1995	Northeast Petroleum	50,000	Hebert, TX
2/19/1995	Amerada Hess Oil Company	25,215	Hebert, TX
2/19/1995	BP Exploration & Oil Company	50,092	Hebert, TX
2/19/1995	Louis Dreyfus Energy Group	25,001	Hebert, TX
2/24/1995	Amoco Oil Company	25,174	Hebert, TX
2/24/1995	Koch Refining Company Inc.	25,003	Hebert, TX
2/24/1995	Koch Refining Company Inc.	25,003	Hebert, TX
2/24/1995	Koch Refining Company Inc.	25,005	Hebert, TX
3/1/1995	Koch Refining Company Inc.	25,000	Hebert, TX
3/1/1995	Amoco Oil Company	50,002	Hebert, TX
3/1/1995	Louisiana Land & Exploration	13,168	Hebert, TX
3/1/1995	Louisiana Land & Exploration	11,838	Hebert, TX
3/12/1995	Clark Oil Trading Company	25,000	Hebert, TX
3/12/1995	Koch Refining Company Inc.	25,000	Hebert, TX
3/12/1995	Clark Oil Trading Company	25,000	Hebert, TX
3/12/1995	Clark Oil Trading Company	24,999	Hebert, TX
3/17/1995	Clark Oil Trading Company	50,006	Hebert, TX
3/17/1995	Apex Oil Company	50,003	Hebert, TX
3/22/1995	Koch Refining Company Inc.	25,109	Hebert, TX
3/22/1995	Clark Oil Trading Company	25,000	Hebert, TX
3/22/1995	Phibro Energy USA Inc.	25,011	Hebert, TX
3/22/1995	Apex Oil Company	25,019	Hebert, TX
3/28/1995	Crown Central Petroleum Company	50,001	Hebert, TX
3/28/1995	Apex Oil Company	25,001	Hebert, TX
4/1/1995	BP North America	25,003	Hebert, TX
4/2/1995	BP North America	24,999	Hebert, TX
4/1/1995	Louis Dreyfus Energy Group	8,450	Hebert, TX
4/2/1995	Louis Dreyfus Energy Group	16,551	Hebert, TX
4/2/1995	Northeast Petroleum	50,104	Hebert, TX
4/8/1995	Citgo Petroleum Corporation	50,011	Hebert, TX
4/8/1995	Morgan Stanley Capital Group	25,011	Hebert, TX
4/8/1995	Northeast Petroleum	9,780	Hebert, TX
4/9/1995	Northeast Petroleum	15,277	Hebert, TX
4/14/1995	Vitol SA Inc.	50,128	Hebert, TX
4/14/1995	Northeast Petroleum	25,005	Hebert, TX

Date of Sale	Customer	Volume in Barrels	Title Transfer Point
4/14/1995	Northeast Petroleum	25,000	Hebert, TX
5/13/1995	FINA Shipments into CPL	50,059	Not Listed.
5/18/1995	FINA Shipments into CPL	50,079	Not Listed.
8/7/1995	George E. Warren Corporation	24,999	Hebert, TX
8/7/1995	Citgo Petroleum Corporation	24,766	Hebert, TX
8/7/1995	Koch Refining Company Inc.	25,003	Hebert, TX
12/22/1995	FINA Shipments into CPL	35,109	Not Listed.
4/26/1995	Louis Dreyfus Energy Group	50,004	Charlotte, NC
5/4/1995	George E. Warren Corporation	7,052	Booth, PA
5/5/1995	George E. Warren Corporation	17,948	Booth, PA
5/5/1995	Sun Refining & Marketing	25,007	Booth, PA
5/8/1995	George E. Warren Corporation	5,003	Booth, PA
5/9/1995	BP Oil Company	24,990	Philadelphia, PA
5/10/1995	Petron Oil Corporation	24,002	Buckeye, NJ
5/10/1995	George B. Warren Corporation	16,277	Sewaren, NJ
5/11/1995	George E. Warren Corporation	28,730	Sewaren, NJ
	ME OF REFORMULATED GASOLINE	1,560,027	
1 ' ' '	MTBE MANUFACTURED BY TOTAL		
1	ARTHUR REFINERY AND SHIPPED	The state of the s	
ON THE COLO	NIAL PIPELINE	<u> </u>	<u>.l</u>



) Master File C.A. No. 1:00-1898 ) MDL 1358 (SAS)
) No. M21-88 ) ) AFFIDAVIT OF ) TOM KNIGHT
) )
) }

STATE OF TEXAS

COUNTY OF BOWIE

I, Tom Knight, being duly sworn, state the following:

- 1. My name is Tom Knight. I am a former employee of Fina Oil and Chemical Company. It is my understanding that Fina Oil and Chemical Company changed its name to Atofina Petrochemicals, Inc., which then changed its name to TOTAL PETROCHEMICALS USA, INC. ("TOTAL"). I am over twenty-one years of age and am competent to make this affidavit. The statements made herein are true and correct and are based on my personal knowledge, on my review of documents prepared and maintained by TOTAL in the ordinary course of business, and on summaries of voluminous documents in the possession of TOTAL.
- 2. Through my employment at TOTAL, I gained knowledge regarding its gasoline blending and distribution operations in the State of New Jersey. These operations were conducted through a TOTAL subsidiary known as Petrofina Trading Services, however throughout this affidavit I will simply refer to the activities as those of TOTAL. During the timeframe from 1987 through 1995, TOTAL leased storage tanks at the Northville Terminal in Linden, New Jersey. From 1995 through 1996, TOTAL leased similar storage tanks at the

GATX Terminal in Carteret, New Jersey.

- 3. From 1987 through 1995, TOTAL imported low-octane gasoline blendstocks, which it blended with various high-octane components in order to meet United States gasoline specifications. MTBE was only used on a couple of occasions as a blending agent. Therefore, the vast majority of conventional gasoline blended and sold by TOTAL in New Jersey contained only trace amounts of MTBB, if any at all. These gasoline products were primarily shipped via barge or transferred to storage tanks controlled by a third party at the Northville Terminal. Product was rarely shipped out via the Buckeye Pipeline. The data provided on Exhibit A represents the total amount of conventional gasoline containing MTBE sold by TOTAL through its New Jersey operations during the time period from 1987 through 1995. That exhibit also lists the percent by volume of MTBE in the batches of gasoline sold by TOTAL.
- 4. During 1995 and 1996, TOTAL imported Reformulated Gasoline ("RFG"), which was received as a finished gasoline product, ready for sale in the United States. Consequently, TOTAL did not alter the product by blending this gasoline with MTBE or any other additional components before it was sold to third parties. As with the conventional gasoline discussed previously, RFG sales were primarily shipped via barge or transferred to a storage tank controlled by a third party at the terminal. Product was rarely shipped out via the Buckeye Pipeline. The data on Exhibit B represents the total amount of RFG sold by TOTAL through its New Jersey operations. That exhibit also lists the percent by volume of MTBB in the batches of RFG sold by TOTAL.
- 5. All sales of gasoline from TOTAL's New Jersey operations were made either in the state of New Jersey or on an ex-duty basis in open water while the product was en route to the United States. TOTAL never delivered or directed any gasoline product to Long Island, New

York, or more specifically to Suffolk County. TOTAL is not in possession of any records or information indicating that gasoline products it sold in the State of New Jersey or in the open waters ever reached gasoline service stations in Suffolk County, New York.

- 6. In fact, TOTAL's New Jersey operations never made a sale of gasoline where title transferred within the State of New York. Further, it never owned, operated, or maintained a branded dealer relationship with, any service station in Suffolk County. TOTAL never made a direct sale of gasoline to any service stations in Suffolk County, New York.
- 7. TOTAL's New Jersey operations never owned, operated, or leased storage space at any terminal in the State of New York, and never delivered gasoline to, nor purchased gasoline from, any of the following 9 terminals in the New York Harbor area: Riverhead Terminal, Holtsville Terminal, Port Jefferson/Setauket/East Setauket Terminal, Oyster Bay Terminal, Great Neck Terminal, Oceanside Terminal, Inwood Terminal, and Lawrence Terminal.
- 8. Exhibits A and B are charts which summarize all sales of gasoline containing MTBE made by TOTAL through its New Jersey operations. These charts were prepared by counsel following a thorough review of all sales records from the New Jersey operations. The sales records comprise 8 large boxes of individual file folders which contain documentation regarding each sale. These records were kept under my supervision in the ordinary course of TOTAL's business, and were made at or near the time of each individual transaction. TOTAL has maintained these records in its archive document storage facility and has made them available to counsel for their review. I have reviewed individual sales files as well as the summaries attached to this affidavit as Exhibits A and B and they are true and correct to the best of my knowledge.

Dated: January 10, 2008.

SUBSCRIBED AND SWORN to me on this  $\bigcirc$  day of  $\bigcirc$  day of  $\bigcirc$  , 2008, to certify which, witness my hand and seal of office.

Notary Public in and for The State of Texas

My Commission Expires: 6-1-08

# EXHIBIT A SALES OF CONVENTIONAL GASOLINE THROUGH TOTAL'S NEW JERSEY OPERATIONS

Customer	Date of Sale		Volume in Barrels	Percent MTBE by Volume
Sun Oll Trading Co.	10/13/87	Via Barge "Interstate 50" to Northville Terminal, Linden NJ	25,123,45	0.93
Ashland Petroleum, Co.	10/27/87	Northville delivery tank #15 Linden NJ vla Sun PL	15,069.60	0.93
Ashland Petroleum, Co.	10/23/87	Barge "I-50" Northville Terminal, Linden NJ	10,000	0.93
Shell Oil Co.	07/01/88	Via Barge "E #57" Northville, Linden NJ	49,764	0.19
Shell Oil Co.	07/01-02/88	Via Barge "E #60" Northville, Linden NJ	49,922	0.20
Shell Oil Co.	07/02-03/88	Via Barge "E #57" Northville, Linden NJ	34,926	0.20
Mobil Oil Corp.	07/12/88	Via Mobil barge #20 Northville, Linden NJ	19,483.14	0.17
Mobil Oil Corp.	07/09/88	Via Mobil barge #35 Northville, Linden NJ	34,415.90	0,14
Mobil Oil Corp.	07/09/88	Via Mobil barge #20 Northville, Linden NJ	19,165.29	0.15
Mobil Oll Corp.	07/13/88	Via Mobil barge "Chicago" Northville, Linden NJ	24,512.76	0.17
Tenneco Oil	07/29/88	Via barge "Hartford" at IMTT/Bayonne NJ	24,951.07	2.70
Berisford Oil Co., Inc.	08/04/88	Via Mobil vessel #35 at Northville, Linden NJ	34,337.81	0.18
Mobil Oil Corp.	08/15/88	Via Barge "Janet C" Northville, Linden NJ	39,830.83	0.20
Mobil Oil Co.	11/15/88	Via pipeline transfer - Northville to Buckeye	25,001.00	0.33
Mobil Oil Corp.	11/14/88	Via pipeline transfer - Northville to Buckeye	25,002.00	0.25
Mobil Oil Corp.	11/15/88	Via barge Mobil #120, Northville, Linden NJ	55,311.03	0.34
Mobil Oil Corp.	11/14- 15/1988	Via pipeline transfer - Northville to Buckeye	20,007.00	0.32
Bear Stearns NY, Inc.	12/27/88	pumpover Northville, Linden, NJ to Mobil	44,981.00	1.60
Bear Stearns NY, Inc.	12/20/88	pumpover Northville, Linden, NJ to Mobil	45,011.00	1,50
Mobil Oll Corp.	12/22/88	via barge LD B-65 Northville, Linden	50,601.74	1.30
Northeast Petroleum	2/23-24/89	pumpover Northville, Linden to Mobil, Linden	34,812.00	0.40
Texport Oil Co.	04/04/89	Via barge T/B RTC-340 at IMTT, Bayonne, NJ to GATX, Carteret, NJ	10,178.41	0.20

Customer	Date of Sale	Method of Transportation	Volume in Barrels	Percent MTBE by Volume
Astroline Corp.	03/01/89	Via Buckeye pipeline transfer - pumpover Northville, Linden to Mobil, Linden	16,565.00	0.40
Shell Oil Co.	04/14/89	Via barge E-19, Linden NJ	18,982.00	0.20
Shell Oil Co.	04/01/89	Via barge E-57, Linden NJ	50,869.90	0.20
Shell Oll Co.	04/23/89	Via barge E-60, Linden NJ	55,331.81	0.50
Shell Oil Co.	04/20/89	Via barge E-60, Linden NJ	45,338.48	0.20
Shell Oil Co.	04/14/89	Via barge E-60, Linden NJ	30,239,45	0,20
Shell Oil Co.	03/16/89	Via barge E-57, Linden NJ	50,325.69	0.50
Shell Oil Co.	05/08/89	Via barge E-57, Linden NJ	50,355,59	0,50
Hess Oil & Chem.	03/08/89	Via Buckeye pipeline transfer	34,829.00	0.21
Center Oil Co.	07/29/89	Via barge "Bonnie B"	6,984.54	1,40
Texport Oil Co.	04/14-15/89	Via barge E-60, Linden NJ	75,048.85	0.20
George E. Warren Corp.	05/19/89	Via barge "Mobil 35" Terminal N.I.C. Linden, NJ	32,923.43	0.80
Atlantic Commodities(Hess)	06/11/89	Via barge "Hygrade 42" Northville, Linden NJ	39,426.67	0.04
Shell Oil Co.	07/05/89	Vla barge "RTC #380" Northville, Linden NJ	24,835.95	0.13
Clark Oil Trading Co.	05/30/89	Pumpover N.I.C to Mobile, Linden NJ	20,004.00	0,50
Mobil Oil Corp.	06/29/89	Via Barge "Mobil Champiain" Northville Linden, NJ	24,809.26	0.15
Northville Industries Corp.	06/28/89	Via barge "Interstate 36" Northville Terminal, Linden NJ	24,920.83	0.10
Getty Terminals, Corp.	07/03/89	Via barge "B 55" G.A.T.X. Carteret, NJ	24,647.01	0.20
Clark Oil Trading Co.	07/27/89	Via Barge Westchester Northville Terminal Linden NJ	49,732.43	0.13
Drexal Burnham Lambert Trading Co.	07/21/89	Via Barge "Janet C" IMTT Terminal, Bayonne NJ	25,000.00	1.40
Drexal Burnham Lambert Trading Co.	07/21/89	Via Barge "Janet C" IMTT Terminal, Bayonne NJ	24,389.34	1.40
Gulf Oil/Cumberland Farms	07/25/89	Via pipeline movement from tank #9 Northville to Buckeye, Linden NJ	15,237.00	5,80
Vanol, Inc.	08/29/89	Via Barge "Mobil Chicago" Northyllle, Linden NJ	24,472.05	1.70
Getly Terminals, Corp.	10/04/89	Via barge "Mobil Chicago" IMTT Bayonne, NJ	24,400.17	5.98/5.2
Fina Oil & Chemical Co.	10/01/89	Stock transfer Northville Terminal, Linden NJ	138,409,79	5.5
Clark Oil Trading Co.	10/01/89	Via barge RTC 52 Northville, Linden NJ	25,021.88	6,30
Getty Terminals, Corp.	11/02-02/89	Via barge "Janet C" I.M.T.T Bayonne, NJ	14,954.30	6,40
Getty Terminals, Corp.	10/30/89	Via barge RTC I.M.T.T. Bayonne, NJ	34,996.39	1.68

Customer	Date of Sale	Method of Transportation	Volume in Barrels	Percent MTBE by Volume
Clark Oil & Trading Co.	01/23-24/90	Via barge "RTC #380" at Northville, Linden NJ	25,205,33	0.15
Shell Oil Co.	03/31/90	Via barge "Rockland" at Northville, Linden, NJ	50,714.19	2.98
Getty Terminal	05/30-31/90	Via barge "B #55" at Northville, Linden, NJ	8,027.64	0.36
Coastal States Trading Co.	5/30-31/90	Via barge "Montrachet" at GATX Carteret, NJ	208,697.64	1,70
Mobil Oil Corp.	06/05/90	Via Buckeye Pipeline transfer at Northville Linden, NJ	25,000.00	0.51
Shell Oil Co.	06/07/90	Via Buckeye Pipeline transfer at Northville Linden, NJ	15,083.00	6.56
Northville Industries	07/15/90	Via barge "Séptember 115" Northville, Linden, NJ	24,938.69	2.38
Shell Oil Co.	08/07/90	Via "RTC 52" loaded at Northville, Linden, NJ	49,330.79	1.20
Mobil Oil Corp.	10/8-9/90	Via barge "Ocean 96" at Northville, Linden, NJ	9,968.98	0.23
Louis Dryfus Energy Corp.	11/19/1991	Shipped via barge "Peter Hearne"	9,970.48	0.5
Global Petroleum Corp.	2/27/1992	Shipped via barge "Product Endeavor."	74,429.81	4.7
Global Petroleum Corp.	2/27/1992	Shipped via barge "Product Endeavor."	25,107.98	4.7
Louis Dryfus Energy Corp.	4/24/1992	Shipped via barge "RTC-340"	15,053.67	1.6
Mobil Oil Corporation	9/16/1992	Shipped via barge "Tomls South."	255,877.00	8.3
Phibro Energy USA Inc.	11/16/1992	Shipped via barge "Product Endeavor."	74,408.69	15.2
Amoço Oll Company	11/20/1992	Shipped via barge "North Cape." Discharged at Carteret, NJ.	65,877.85	15.2
Chevron U.S.A. Products Company	02/21/93	Pumpover 100-2 to 160-60	25,475.35	0.60
BP Exploration and Oil Co.	03/01/93	Shipped via barge: "San Juan"	15,600.22	1.10
BP Exploration and Oil Co.	3/10/1993	Shipped via barge: "Mobil 135"	24,995.31	1.06
Global Petroleum Corp.	4/21/1993	Buckeye Pipeline Batch No. 246- 009-112-6081	14,968.00	0.14
Phibro Energy USA, Inc.	6/9/1993	Shipped via barge: "T/B B-15"	23,905.17	0.94
Phibro Energy USA, Inc.	6/27/1993	Shipped via barge: LD B-15	23,753.17	0.7
George E. Warren Corporation	6/30/1993	Shlpped via barge: T/B B-15	23,773.00	0.95
MG Refining and Marketing	12/2/1993	Shipped via barge: Mobil 70	67,395.52	1
Bayway Refining Company	1/13/1994	Shipped via barge: B-55	50,262.17	1.6

Customer	Date of Sale	Method of Transportation	Volume in Barrels	Percent MTBE by Volume
Bayway Refining Company	1/27/1994	Shipped via barge: Domar 6501	61,499.55	1.5
Northville Industries	4/16/1994	Shipped via barge: "M-91"	75,235.55	10.33
Mobil Oil Corporation	6/13/1994	Shipped via barge: "Bouchard 65"	49,779.60	0.9
Citgo Petroleum Corporation	6/24/1994	Pumpover from Northville, Linden to Citgo, Linden	72,292.26	1.28
Citgo Petroleum Corporation	6/24/1994	Pumpover from Northville, Linden to Citgo, Linden	27,704.26	1.21
Northeast Petroleum	6/25/1994	Shipped via barge: "B-35"	49,300.76	0.2
Mobil Oil Corporation	8/13/1994	Shipped via barge: " T/B B-145"	25,000.00	0.2
Mobil Oil Corporation	8/13/1994	Shipped via barge: "T/B B-145"	25,000.00	0.2
Mobil Oil Corporation	8/15/1994	Buckeye Pipeline Batch No. 9- 112-8538	25,026.00	0.27
Mobil OII Corporation	8/13/1994	Shipped via barge: "T/B B-145"	49,003.64	0.2
Mobil Oil Corporation	9/3/1994	Shipped via barge: "M-120"	10,000.00	0.28
Northeast Petroleum	1/6/1995	Buckeye Batch No. 9-712-8001	25,393.00	14.7
Northeast Petroleum	1/4/1995	Pumpover Shoretank 11 to Shoretank 41	50,254.52	14.7
Northeast Petroleum	1/6/1995	Buckeye Batch No. 17-712-8001	25,042.00	14.7
Northeast Petroleum	12/31/1994	Buckeye Batch No. 17-712-8001	14,998.00	14.7
Northeast Petroleum	12/31/1994	Pumpover Shoretank 15 to Shoretank 41	9,956.81	14.7
		AL GASOLINE CONTAINING ITS NEW JERSEY OPERATIONS	3,498,763.44	

# EXHIBIT B SALES OF REFORMULATED GASOLINE THROUGH TOTAL'S NEW JERSEY OPERATIONS

Customer	Date of Sale	Method of Transportation	Volume in Barrels	Percent MTBE by Volume
Northeast Petroleum	1/4/1995	Shipped via barge: "RTC 501"	15,125.28	13.9
Northeast Petroleum	12/31/1994	Shipped via barge "Putnam"	35,421.33	15.01
Northeast Petroleum	1/6/1995	Buckeye Batch No. 14-712-8573	30,193.00	14.7
Northeast Petroleum	1/6/1995	Stock Transfer	20,000.00	Not Listed.
Northeast Petroleum	12/30/1994	Shipped via barge "Peter Hearne"	15,184.74	15.1
George E. Warren Corporation	01/25/95	BP Terminal, Tremley Point, NJ. Delivered on exchange from Northville via the Buckeye Pipeline	15,271.00	Not listed.
Northville Industries Corp.	02/13/95	In-Tank Transfer-Shore Tank No. 11	35,272.52	Not listed.
Northville Industries Corp.	02/22/95	In-Tank Transfer-Shore Tank No. 7	196,000	Not listed.
Mobil Oil Corporation	02/21/95	Mobil Terminal, Linden NJ. Delivered on exchange from Northville via the Sun Pipeline.	24, 654	Not listed.
Mobil Oil Corporation	3/3/1995	Mobil Terminal, Linden NJ. Delivered on exchange from Northville via the Sun Pipeline.	49,942.00	Not listed.
Northeast Petroleum	03/27/95	Shipped via barge: "RTC 501"	50,357.31	10.81
Global Petroleum Corp.	03/25/95	Shipped via barge: "Putnam"	25,156.71	8.73
Gulf Oil Limited Partnership	3/24-25/1995	Shipped via barge: "Morania 440"	35,006.40	9.11
Gulf Oil Limited Partnership	03/23/95	Shipped via barge: "Great Lakes"	25,263.33	11.57
Northeast Petroleum	04/05/95	Shipped via barge: "Westchester"	50,499.64	11.29
Northeast Petroleum	04/18/95	Shipped via barge: "Putnam"	33,679,76	15.03
Northeast Petroleum	04/13/95	Shipped via barge: "Oyster Bay"	15,068.71	15.53
Phibro Energy USA, Inc.	04/01/95	Buckeye Pipeline Batch # 356- 712-8010	25,030.00	Not listed.
Phibro Energy USA, Inc.	03/31/95	Shipped via barge: "George Morris"	25,200.68	15.00
Amoco Oil Company	03/31/95	Buckeye Pipeline Batch # 14- 712-8018	34,919.00	Not listed.
Amoco Oil Company	04/04/95	Buckeye Pipeline Batch #14- 712-8019	35,155.00	15.00
BP Oil Company	04/02/95	Buckeye Pipeline Batch # 333- 712-8014	15,102.00	Not listed.

Shell Oil Company	Customer	Date of Sale	Method of Transportation	Volume in Barrels	Percent MTBE by Volume
Shell Oil Company	Shell Oil Company	04/20/95	Shipped via barge: "RTC 400"	23.392.29	
Mobil Oil   O4/04-05/95   Shipped via barge: "George   25,339.88   15.20   Morris."   Shipped via barge: "Great Lakes"   10,090.38   7.87					
Corporation					
Gulf Oil Limited   Partnership   Partnersh	1	,		201000.00	10.20
Partnership   Warex Terminals   O4/18/95   Shipped via barge: "RTC 20"   10,037.29   15.60   Corp.   Northville   O5/17/95   Pumpover: Shoretank #8 to   Shoretank #9.14   Not listed.   Industries Corp.   Northville   O5/18/95   In-tank transfer   9,949.12   Not listed.   Industries Corp.   Northville   O5/26/95   Pumpover: Shoretank #11 to   Shoretank #6   12.3 (Tank 11)   Shoretank #6   O5/31/95   Pumpover: Shoretank #8 & 11 to   Shoretank #6   O5/31/95   Pumpover: Shoretank #8 & 11 to   Shoretank #6   O5/31/95   Pumpover: Shoretank #8 & 11 to   O5/18/36   Northville   O5/04/95   Pumpover: Shoretank #11 to   Shoretank #14   O5/18/36   Not listed.   Northville   O5/04/95   Shipped via barge: "Putnam"   7,000.55   Not listed.   Industries Corp.   O5/18/95   Shipped via barge: "Putnam"   7,000.55   Not listed.   Industries Corp.   O5/18/95   Shipped via barge: "Putnam"   7,000.55   Not listed.   Industries Corp.   O5/18/95   Shipped via barge: "T/B B-85"   57,688.71   12.20   Industries Corp.   O5/17/95   Shipped via barge: "T/B Putnam"   35,000.00   12.20   Industries Corp.   Northville   O5/18/95   Shipped via barge: "T/B Putnam"   35,000.00   12.20   Industries Corp.   Northville   O5/27/95   Shipped via barge: "RTC 380"   25,000.00   12.50   Industries Corp.   Northville   O5/28/95   Shipped via barge: "RTC 380"   26,002.19   12.10   Industries Corp.   Northville   O5/28/95   Shipped via barge: "Great Lakes"   9,889.88   12.79   Irading Co.   Pumpover: Shoretank # 8 to   Shoretank # 9 & 2   Shoretan		04/08-09/95		10.090.38	7.87
Warex Terminals		, ,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,	Tripped Fin Tangar Grant Zanta	. 0,000.00	1.01
Northville		04/18/95	Shipped via barge: "RTC 20"	10.037.29	15.60
Northwille   O5/17/95   Pumpover: Shoretank #8 to   Shoretank #14   Shipped via barge: "Great Guil"   14,995.17   13,00   13,00   14,005   12,30   14,005   12,30   14,005   12,30   14,005   12,30   14,005   12,30   14,005   12,30   14,005   12,30   14,005   12,30   14,005   12,30   14,005   12,30   14,005   12,30   12,30   14,005   12,30   14,005   12,30   14,005   12,30   14,005   12,30   14,005   12,30   14,005   12,30   14,005   12,30   14,005   12,30   14,005   14,005   14,005   14,005   14,005   14,005   14,005   14,005   14,005   14,207.90   14,207.90   13,10   14,005   14,207.90   13,10   14,005   14,207.90   13,10   14,005   14,207.90   13,10   14,005   14,207.90   13,10   14,207.90   13				141001122	10.00
Industries Corp.   Shoretank #14   Shipped via barge: "Great Gull"   14,995.17   13.00   14,005.17   13.00   14,005.17   13.00   14,005.17   13.00   14,005.17   13.00   14,005.17   13.00   14,005.17   13.00   14,005.17   13.00   14,005.17   13.00   14,005.17   13.00   14,005.17   14,005.17   13.00   14,005.17   14,		05/17/95	Pumpover: Shoretank #8 to	24.916.57	Not listed
Industries Corp.   Northville   O5/19/95   In-tank transfer   9,949.12   Not listed.   Industries Corp.   Mobil Oil   O5/26/95   Pumpover: Shoretank #11 to   25,008.48   12.3 (Tank 11)   Shoretank #6	Industries Corp.				, , , , , , , , , , , , , , , , , , ,
Industries Corp.   Northville   O5/19/95   In-tank transfer   9,949.12   Not listed.   Industries Corp.   Mobil Oil   O5/26/95   Pumpover: Shoretank #11 to   25,008.48   12.3 (Tank 11)   Shoretank #6   Not listed.   Northville   O5/04/95   Pumpover: Shoretank #8 & 11 to   49,710.07   12.1 (Tank 8)   Shoretank #6 & 2   Northville   Industries Corp.   Northville   O5/04/95   Pumpover: Shoretank #11 to   Shoretank #10   Not listed.   Not listed.   Northville   O5/04/95   Shipped via barge: "Putnam"   7,000.55   Not listed.   Industries Corp.   Northville   O5/18/95   Shipped via barge: "T/B B-85"   57,688.71   12.20   Industries Corp.   Northville   O5/18/95   Pumpover: Shoretank #14 & 11   40,000.00   12.20   Industries Corp.   Northville   O5/18/95   Shipped via barge: "T/B Putnam"   35,000.00   12.20   Industries Corp.   Northville   O5/27/95   Shipped via barge: "T/B Putnam"   35,000.00   12.20   Industries Corp.   Northville   O5/28/95   Shipped via barge: "TC 380"   25,000.00   12.50   Industries Corp.   Northville   O5/28/95   Shipped via barge: "RTC 380"   25,002.19   12.10   Industries Corp.   Northville   O5/28/95   Shipped via barge: "Morania   39,771.75   12.79   Industries Corp.   Northville   O5/28/95   Shipped via barge: "Morania   39,771.75   12.79   Industries Corp.   Northville   O5/28/95   Shipped via barge: "Great Lakes"   9,989.88   12.79   Industries Corp.   Northeast   O5/19/95   Shipped via barge: "Great Lakes"   9,989.88   12.79   Industries Corp.   O5/30/95   Shipped via barge: "T/B   O6,274.90   12.20   Industries Corp.   O5/30/95   Shipped via barge: "T/B   O6,274.90   Industries Corp.   O6/02/95   Shipped via barge: "Great Lakes"   Industries Corp.   Industries Corp.   O5/30/95   Shipped via barge: "T/B   O6,274.90   Industries Corp.   O6/02/95   Shipped via barge: "Great Lakes"   Industries Corp.   Industries Corp.   O6/02/95   Shipped via barge: "Great Lakes"   Industries Corp.   Industries Corp.   Industries Corp.   Industries Corp.   Industries Corp.   Industries Corp.   Industri	Northville	05/16/95	Shipped via barge: "Great Gull"	14,995,17	13.00
Industries Corp.	Industries Corp.			·	
Industries Corp.   Mobil Oil	Northville	05/19/95	In-tank transfer	9,949,12	Not listed.
Corporation         Shorestank #6         Pumpover: Shorestank #8 & 11 to Shorestank #8 & 11 to Shorestank #6 & 2         49,710.07         12.1 (Tank 8)           Northville Industries Corp. North	Industries Corp.			•	
Corporation         Shorestank #6         Pumpover: Shorestank #8 & 11 to Shorestank #8 & 11 to Shorestank #6 & 2         49,710.07         12.1 (Tank 8)           Northville Industries Corp. North	Mobil Oil	05/26/95	Pumpover: Shoretank #11 to	25,008.48	12.3 (Tank 11)
Corporation   Shoretank #6 & 2   Northville   O5/04/95   Pumpover: Shoretank #11 to   Shoretank #14   Not listed.   No	Corporation		Shoretank #6	·	,
Shoretank #6 & 2   Northville   O5/04/95   Pumpover: Shoretank #11 to   Shoretank #14   Shoretank #15   Shor		05/31/95	Pumpover: Shoretank # 8 & 11 to	49,710.07	12.1 (Tank 8)
Industries Corp.   Shoretank #14   Shipped via barge: "Putnam"   7,000.55   Not listed.   Industries Corp.   Northville   05/18-19/95   Shipped via barge: "T/B B-85"   57,688.71   12.20   Industries Corp.   Northville   05/18/95   Pumpover: Shoretank #14 & 11   40,000.00   12.20   Industries Corp.   Northville   05/17/95   Shipped via barge: "T/B Putnam"   35,000.00   12.20   Industries Corp.   Northville   05/27/95   Shipped via barge: "T/B Putnam"   35,000.00   12.50   Industries Corp.   Northville   05/28/95   Shipped via barge: "RTC 380"   25,002.19   12.10   Industries Corp.   Northville   05/28/95   Shipped via barge: "RTC 380"   25,002.19   12.10   Industries Corp.   Northville   O6/01/95   Shipped via barge: "Morania   39,771.75   12.79   Trading Co.   Koch Supply & O6/01/95   Shipped via barge: "Great Lakes"   9,989.88   12.79   Trading Co.   Shipped via barge: "Ocean 115"   49,894.86   12.50   Oil Inc.   Northeast   O5/19/95   Shipped via barge: "T/B   60,274.90   12.20   Petroleum   Northfield"   Shipped via barge: "Great Lakes"   14,764.86   12.10   Shoretank #5   Pumpover: Shoretank #8 to   Shoretank #5   Pumpover: Shoretank #8 to   Shoretank #5   Shoretank #9 & 2   Shoretank	Corporation				,
Northville		05/04/95	Pumpover: Shoretank #11 to	10,113.36	Not listed.
Industries Corp.   Northville   05/18-19/95   Shipped via barge: "T/B B-85"   57,688.71   12.20   Industries Corp.   Northville   05/18/95   Pumpover: Shoretank # 14 & 11   40,000.00   12.20   Industries Corp.   Northville   05/17/95   Shipped via barge: "T/B Putnam"   35,000.00   12.20   Industries Corp.   Northville   05/27/95   Shipped via barge: "Ocean 115"   25,000.00   12.50   Industries Corp.   Northville   05/28/95   Shipped via barge: "RTC 380"   25,002.19   12.10   Industries Corp.   Northville   05/28/95   Shipped via barge: "Morania   39,771.75   12.79   Industries Corp.   Northville   O6/01/95   Shipped via barge: "Morania   39,771.75   12.79   Industries Corp.   Northville   O6/01/95   Shipped via barge: "Great Lakes"   9,989.88   12.79   Industries Corp.   Northville   O6/01/95   Shipped via barge: "Great Lakes"   9,989.88   12.79   Industries Corp.   Industries Corp.   Northfield"   Industries Corp.   Northfield"   Industries Corp.   Industries Industries Industries Industries Industries Industries Industr	Industries Corp.				
Northville	Northville	05/04/95	Shipped via barge: "Putnam"	7,000.55	Not listed.
Industries Corp.   Northville   05/18/95   Pumpover: Shoretank # 14 & 11   40,000.00   12.20   Industries Corp.   Northville   05/17/95   Shipped via barge: "T/B Putnam"   35,000.00   12.20   Industries Corp.   Northville   05/27/95   Shipped via barge: "Ocean 115"   25,000.00   12.50   Industries Corp.   Northville   05/28/95   Shipped via barge: "RTC 380"   25,002.19   12.10   Industries Corp.   Northville   O5/28/95   Shipped via barge: "RTC 380"   26,002.19   12.10   Industries Corp.   Northville   O6/01/95   Shipped via barge: "Morania   39,771.75   12.79   Industries Corp.   Northville   O6/01/95   Shipped via barge: "Great Lakes"   9,989.88   12.79   Industries Corp.   Northries   O6/01/95   Shipped via barge: "Great Lakes"   9,989.88   12.79   Industries Corp.   Northries   O6/10/95   Shipped via barge: "Ocean 115"   49,894.86   12.50   Industries Corp.   O6/01/95   Shipped via barge: "T/B   G0,274.90   12.20   Industries Corp.   O6/30/95   Pumpover: Shoretank # 8 to   25,345.52   12.10   Shoretank #5   Industries Corp.   O6/02/95   Shipped via barge: "Great Lakes"   14,764.86   12.10   Industries Corp.   O6/02/95   Shipped via barge: "Great Lakes"   14,764.86   12.10   Industries Corp.   O6/02/95   Shipped via barge: "Great Lakes"   14,764.86   12.10   Industries Corp.   O6/02/95   Shipped via barge: "Great Lakes"   O6/03/05   Industries Corp.   O6/03/95   Pumpover: Shoretank # 8 to   O6/03/05   Industries Corp.   O6/03/05   O6/					
Northville	Northville	05/18-19/95	Shipped via barge: "T/B B-85"	57,688.71	12.20
Industries Corp.   Ito Shoretank #2, 6, & 9   Northville   O5/17/95   Shipped via barge: "T/B Putnam"   35,000.00   12.20   Industries Corp.   Shipped via barge: "Ocean 115"   25,000.00   12.50   Industries Corp.   Shipped via barge: "RTC 380"   25,002.19   12.10   Industries Corp.   Shipped via barge: "RTC 380"   25,002.19   12.10   Industries Corp.   Shipped via barge: "Morania   39,771.75   12.79   Industries Corp.   Shipped via barge: "Great Lakes"   9,989.88   12.79   Industries Corp.   Shipped via barge: "Great Lakes"   9,989.88   12.79   Industries Corp.   Shipped via barge: "Great Lakes"   9,989.88   12.79   Industries Corp.   Shipped via barge: "Great Lakes"   9,989.88   12.79   Industries Corp.   Shipped via barge: "Great Lakes"   14,789.88   12.79   Industries Corp.   Shipped via barge: "T/B   G0,274.90   Industries Corp.   Shipped via barge: "T/B   G0,274.90   Industries Corp.   Shipped via barge: "Great Lakes"   Industries Corp.   Industries Corp.   Shipped via barge: "Great Lakes"   Industries Corp.   Industries Industries Industries Industries Industries Industries Industries Indus	Industries Corp.				
Northville		05/18/95		40,000.00	12.20
Industries Corp.   Northville   05/27/95   Shipped via barge: "Ocean 115"   25,000.00   12.50   12.79   12.7					
Northville	1	05/17/95	Shipped via barge: "T/B Putnam"	35,000.00	12.20
Industries Corp.   Northville   12.10   12.1				····	
Northville		05/27/95	Shipped via barge: "Ocean 115"	25,000.00	12.50
Industries Corp.   Koch Supply &   06/01/95   Shipped via barge: "Morania   39,771.75   12.79					
Koch Supply & Trading Co.         06/01/95         Shipped via barge: "Morania 440"         39,771.75         12.79           Koch Supply & Trading Co.         06/01/95         Shipped via barge: "Great Lakes" 9,989.88         12.79           BP Exploration & Oil Inc.         06/10/95         Shipped via barge: "Ocean 115" 49,894.86         12.50           Northeast Petroleum         05/19/95         Shipped via barge: "T/B 60,274.90         12.20           Petroleum         Northfield"         25,345.52         12.10           Poperating Limited Partnership         Pumpover: Shoretank # 8 to Shipped via barge: "Great Lakes" 14,764.86         12.10           Phibro Energy USA, Inc.         06/02/95         Shipped via barge: "Great Lakes" 14,764.86         12.10           Mobil Oil Corporation         06/07/95         Pumpover: Shoretank # 8 to 75,133.69         11.20           Shoretank # 9 & 2         Shoretank # 9 & 2         Not listed.           Sun Company, Inc.         Delivered on exchange from Northville via the Sun Pipeline         Not listed.           R.A.D. Oil         07/13/95         Shipped via barge: "Carol V.         14,207.90         13.10		05/28/95	Shipped via barge: "RTC 380"	25,002.19	12.10
Trading Co.         440"           Koch Supply & Trading Co.         06/01/95         Shipped via barge: "Great Lakes" 9,989.88 12.79           BP Exploration & Oil Inc.         06/10/95         Shipped via barge: "Ocean 115" 49,894.86 12.50           Northeast Oil Inc.         05/19/95         Shipped via barge: "T/B 60,274.90 12.20           Petroleum Petroleum Portoleum Portoleum Schoretank # 8 to Operating Limited Partnership Phibro Energy O6/30/95         Pumpover: Shoretank # 8 to Operating Limited Shoretank # 5         25,345.52 12.10           Phibro Energy USA, Inc.         06/02/95         Shipped via barge: "Great Lakes" 14,764.86 12.10         12.10           Mobil Oil Oil Corporation Shoretank # 9 & 2         Pumpover: Shoretank # 8 to Shoretank # 8 to Operating Shoretank # 9 & 2         75,133.69 11.20           Sun Company, Inc. Delivered on exchange from Northville via the Sun Pipeline Northville via the Sun Pipeline         Not listed.           R.A.D. Oil 07/13/95         Shipped via barge: "Carol V. 14,207.90 13.10					
Koch Supply & Trading Co.         06/01/95         Shipped via barge: "Great Lakes"         9,989.88         12.79           BP Exploration & Oil Inc.         06/10/95         Shipped via barge: "Ocean 115"         49,894.86         12.50           Northeast Oil Inc.         05/19/95         Shipped via barge: "T/B Northfield"         60,274.90         12.20           Petroleum         Northfield"         25,345.52         12.10           Eott Energy Operating Limited Partnership         Pumpover: Shoretank # 8 to Shoretank # 5         25,345.52         12.10           Phibro Energy USA, Inc.         06/02/95         Shipped via barge: "Great Lakes"         14,764.86         12.10           Mobil Oil Corporation Shoretank # 9 & 2         Pumpover: Shoretank # 8 to Shoretank # 8 to Shoretank # 9 & 2         75,133.69         11.20           Sun Company, Inc.         Delivered on exchange from Northville via the Sun Pipeline         Not listed.         Not listed.           R.A.D. Oil         07/13/95         Shipped via barge: "Carol V.         14,207.90         13.10		06/01/95		39,771.75	12.79
Trading Co.   BP Exploration &   06/10/95   Shipped via barge: "Ocean 115"   49,894.86   12.50		00/04/07			
BP Exploration &   06/10/95   Shipped via barge: "Ocean 115"   49,894.86   12.50		06/01/95	Shipped via barge: "Great Lakes"	9,989.88	12.79
Oil Inc.         Northeast         05/19/95         Shipped via barge: "T/B Northfield"         60,274.90         12,20           Petroleum         Northfield"         25,345.52         12.10           Eolt Energy         05/30/95         Pumpover: Shoretank # 8 to Shoretank # 8 to Shoretank # 5         25,345.52         12.10           Operating Limited Partnership         Shoretank # 5         14,764.86         12.10           Phibro Energy USA, Inc.         06/02/95         Shipped via barge: "Great Lakes"         14,764.86         12.10           WSA, Inc.         Mobil Oil Corporation         06/07/95         Pumpover: Shoretank # 8 to Shoretank # 8 to Shoretank # 9 & 2         75,133.69         11.20           Sun Company, Inc.         06/23/95         BP Terminal, Tremley Point, NJ. Delivered on exchange from Northville via the Sun Pipeline         Not listed.           R.A.D. Oil         07/13/95         Shipped via barge: "Carol V.         14,207.90         13.10		05/40/05		40.004.00	
Northeast Petroleum		06/10/95	Shipped via barge: "Ocean 115"	49,894.86	12.50
Petroleum		AFMAINE	OLI TO	00.074.00	
Description		05/19/95		60,274.90	12,20
Operating Limited Partnership  Phibro Energy USA, Inc.  Mobil Oil Corporation Sun Company, Inc.  Delivered on exchange from Northville via the Sun Pipeline  R.A.D. Oil Shoretank #5  Shoretank #5  Shoretank #5  14,764.86 12.10 14,764.86 12.10 14,764.86 12.10 14,764.86 12.10 14,764.86 12.10 14,764.86 12.10 14,207.90 14,207.90 15,133.69 11.20 16,120 17,130 18,100 18,		OF IOOIOE		05.045.50	
Partnership   Phibro Energy   06/02/95   Shipped via barge: "Great Lakes"   14,764.86   12.10     USA, Inc.   Wobil Oil   06/07/95   Pumpover: Shoretank # 8 to   75,133.69   11.20     Corporation   Shoretank # 9 & 2     Sun Company, Inc.   Delivered on exchange from   Northville via the Sun Pipeline     R.A.D. Oil   07/13/95   Shipped via barge: "Carol V.   14,207.90   13.10		05/30/95		25,345.52	12,10
Phibro Energy USA, Inc.   Shipped via barge: "Great Lakes"   14,764.86   12.10			Shoretank #5		
USA, Inc.         Mobil Oil         06/07/95         Pumpover: Shoretank # 8 to Shoretank # 8 to Shoretank # 9 & 2         75,133.69         11.20           Sun Company, Inc.         06/23/95         BP Terminal, Tremley Point, NJ. Delivered on exchange from Northville via the Sun Pipeline         20,956.00         Not listed.           R.A.D. Oil         07/13/95         Shipped via barge: "Carol V.         14,207.90         13.10		ORIOZIOE	Chionad via hargas "Craat Lakaa"	4470400	40.40
Mobil Oil 06/07/95 Pumpover: Shoretank # 8 to 75,133.69 11.20 Corporation Shoretank # 9 & 2 Sun Company, 106/23/95 BP Terminal, Tremley Point, NJ. 20,956.00 Not listed. Delivered on exchange from Northyille via the Sun Pipeline R.A.D. Oil 07/13/95 Shipped via barge: "Carol V. 14,207.90 13.10		OOIOZIAO	Shipped via barge; "Great Lakes"	14,704.80	12,10
Corporation Shoretank # 9 & 2  Sun Company, 06/23/95 BP Terminal, Tremley Point, NJ. 20,956.00 Not listed.  Inc. Delivered on exchange from Northyllle via the Sun Pipeline  R.A.D. Oil 07/13/95 Shipped via barge: "Carol V. 14,207.90 13.10		06/07/05	Purpover Shoretank # 9 to	75 100 60	44.00
Sun Company, 06/23/95 BP Terminal, Tremley Point, NJ. 20,956.00 Not listed.  Delivered on exchange from Northyllle via the Sun Pipeline  R.A.D. Oil 07/13/95 Shipped via barge: "Carol V. 14,207.90 13.10		บบเบาเซอ		10,100.09	11.20
Inc. Delivered on exchange from Northville via the Sun Pipeline  R.A.D. Oil 07/13/95 Shipped via barge: "Carol V. 14,207,90 13.10		08/33/05		20 056 00	Mot Seter
R.A.D. Oil Northville via the Sun Pipeline 13.10		00123183		ZU,900.00	ivot listed.
R.A.D. Oil 07/13/95 Shipped via barge: "Carol V. 14,207.90 13.10	1110.			٠ ,	
	RADOI	07/13/05		1/1 207 00	12 10
CHARLEST I TABLET I I I I I I I I I I I I I I I I I I I	Company, Inc.	T. OTT TOPO	Poling"	17,401.80	19:10

Customer	Date of Sale	Method of Transportation	Volume in Barrels	Percent MTBE by Volume
George E. Warren Corporation	07/23/95	Buckeye Pipeline Batch # 85/93- 502-8004	39,998.00	Not listed.
Northeast Petroleum	08/01/95	Shipped via barge: "Ocean 60"	50,564.52	10.40
Gulf Oil Limited Partnership	08/02/95	Shipped via barge: "Great Lakes"	34,588.50	11.39
Warex Terminals Corp.	08/02/95	Shipped via barge: "Rockland"	24,684.86	13.10
Gulf Oil Limited Partnership	08/10/95	Shipped via barge: "RTC 502"	50,000.00	12.11
Gulf Oil Limited Partnership	08/10/95	Shipped via barge: "RTC 502"	23,094.83	12.11
Mobil Oil Corporation	08/17/95	Pumpover: Shoretank # 12 to Shoretank # 6	24,970.76	12.50
George E. Warren Corporation	01/23/96	Shipped via barge: "Kriti Color"	284,129.40	15.70
Petron Oil Corp.	02/14/96	Buckeye Pipeline Batch # 224- 002-712-8009	25,000.00	Not listed.
Amoco Oil Company	02/27/96	Pumpover: Shoretank 260-2 at GATX to Amoco Shoretank 19	24,199.35	15.45
Amoco Oil Company	02/22/96	Pumpover: Shoretank 260-2 at GATX to Amoco Shoretank 19	45,687.13	15.45
Amoco Oil Company	02/17/96	Pumpover: Shoretank 260-2 at GATX to Amoco Shoretank 25	45,816.57	15.45
Warex Terminals Corp.	02/20/96	Shipped via barge: "RTC-55"	22,285.63	14.90
George E, Warren Corporation	03/02/96	Shipped via barge: "Coral Queen"	6,279.30	Not listed.
George E. Warren Corporation	02/23/96	Shipped via barge: "Coral Queen"	4,821.73	Not listed.
George E. Warren Corporation	02/23/96	Shipped via barge: "Coral Queen"	2,480.76	Not listed.
Northville Industries Corp.	02/29/96	Shipped via barge: "DZON RIDS"	254,387.86	13.80
George E. Warren Corporation	03/19/96	Shipped via barge: "Coral Queen"	4,925.98	14.75
George E. Warren Corporation	03/17/96	Shipped via barge: "Coral Queen"	4,861.01	14.75
George E. Warren Corporation	03/17/96	Shipped via barge: "Coral Queen"	2,484.37	14.75
George E. Warren Corporation	03/18/96	Shipped via barge: "Reliable II"	5,089.19	14.00
Statoil North America, Inc.	04/29/96	Shipped via barge: "RTC-380"	25,093.80	11.06
Statoil North America, Inc.	04/30/95	Shipped via barge: "Rockland"	38,132.78	10.37
Getty Terminals Corp.	04/28/96	Shipped via barge: "Coral Queen"	4,914.86	10.70
Getty Terminals Corp.	04/29/96	Shipped via barge: "Coral Queen"	4,816.64	10.70
BP Exploration & Oil, Inc.	06/25/96	Book transfer.	10,000.00	Not listed.

Customer	Date of Sale	Method of Transportation	Volume in Barrels	Percent MTBE by Volume
Valero Refining & Marketing Co.	06/06/96	Shipped via barge: "Farandole"	276,079.54	11.77
Amoco Oil Company	06/17/96	Pumpover: Shoretank 260-2 to Amoco Shoretank 71	59,622.45	10.33
Itochu International, Inc.	06/18/96	Buckeye Pipeline Batch # 49- 502-8024	24,989.00	Not Listed.
Basis Petroleum, Inc.	06/19/96	Shipped via barge: "RTC-501"	25,000.00	11.35
Basis Petroleum, Inc.	06/19/96	Shipped via barge: "RTC-501"	24,633.80	11.35
Northeast Petroleum	07/01/96	Shipped via barge: "T/B B-130"	94,434.38	11.51
Statoil North America, Inc.	07/17/96	Shipped via barge: "Reliable II"	14,940.67	10,80
Statoll North America, Inc.	07/15/96	Shipped via barge: "Reliable II"	14,914.40	10.70
Statoll North America, Inc.	07/18/96	Shipped via barge: "RTC-55"	29,841.69	9,60
Statoll North America, Inc.	07/20/96	Pumpover: Shoretank 260-3 to Amoco Shoretanks 25 & 71	70436.76	13.20
Global Petroleum Corp.	07/28/96	Shipped via barge "Petrobulk Progress"	274,874.86	12.88
George E. Warren Corporation	07/11/96	Pumpover; Shoretank # 100-4 & 206-2 to Amoco Shoretank #19	19,787.26	11.87
George E. Warren Corporation	08/31/96	Pumpover: Shoretank # 25-1 to Shoretank # 100-60	7,006.61	11.51
George E. Warren Corporation	08/30/96	Pumpover: Shoretank # 260-2 to Shoretank # 100-61	15,252.01	12.00
George E. Warren Corporation	08/31/96	Pumpover: Shoretank # 260-2 to Shoretank # 100-60	42,114.05	12.00
George E. Warren Corporation	08/31/96	Pumpover: Shoretank # 260-2 to Shoretank # 100-9	15,322.22	12.00
George E. Warren Corporation	08/30/96	Shipped via barge: "Great Lakes"	7,851.26	9.10
George E. Warren Corporation	08/30/96	Shipped via barge: "Oyster Bay"	11,811.26	Not listed.
Vitol S.A. Inc.	08/26/96	Shipped via barge: "RTC-55"	29,561.38	12,63
George E. Warren Corporation	08/27/96	Pumpover: Shoretank # 260-2 to Amoco Shoretank # 19	48,227.06	12.00
Global Petroleum Corp.	08/28/96	Shipped via barge: "RTC-502"	39,153.44	12.63
George E. Warren Corporation	08/29/96	Pumpover; Shoretank # 25-1 to Shoretank # 100-60	25,000.00	11.51
George E. Warren Corporation	10/10/96	Pumpover: Shoretank # 25-1 & 260-2 to Shoretank # 60-60	6,438.41	Not Listed.
TOTAL VOLUME O		ATED GASOLINE CONTAINING 6H ITS NEW JERSEY	3,744,073.07	

# EXHIBIT D

#### IN THE UNITED STATES DISTRICT COURT

#### FOR THE SOUTHERN DISTRICT OF NEW YORK

IN RE:

METHYL-TERTIARY BUTYL ETHER ("MTBE") PRODUCTS LIABILITY LITIGATION Master File C.A. No. 1:00-1898 (SAS)

MDL 1358

This document refers to:

County of Suffolk, et al. v. Amerada Hess Corp., et al. United Water New York, Inc. v. Amerada Hess Corp., et al.

### DECLARATION OF TOTAL PETROCHEMICALS USA, INC. PURSUANT TO CASE MANAGEMENT ORDER #4

This Declaration by TOTAL Petrochemicals USA, Inc. ("TOTAL Petrochemicals") is provided in compliance with this Court's directive in section III.B.2 of Case Management Order No. 4 ("CMO #4") issued on October 19, 2004 to all defendants in County of Suffolk, et al. v. Amerada Hess Corp., et al. and United Water New York, Inc. v. Amerada Hess Corp., et al.

Many of the terms used in the requests under Section III.B.2 of CMO #4 are based on undefined words and terms. TOTAL Petrochemicals has made a good faith attempt to respond to the requests using what it believes to be commonly accepted and ordinary meanings of such terms and words. Accordingly, TOTAL Petrochemicals reserves the right to object to the plaintiffs' use and/or interpretations of such terms and words on the ground that such use and/or interpretation may not be accurate or correct, or is vague, overly broad, unduly burdensome and/or not reasonably calculated to lead to the disclosure of televant information in these lawsuits. Similarly, all documents and/or information are provided subject to all proper objections regarding relevance, admissibility, authenticity, and materiality, and any other objection that would require exclusion of the information if offered as evidence, or any other purpose, in any pre-trial proceeding or at trial.

TOTAL Petrochemicals has made a good faith effort to respond based on review of paper records, electronic databases, and interviews with current and former employees. The answers provided herein are based on the company's knowledge and belief pursuant to that review. However, TOTAL Petrochemicals believes there may be paper records relating to sales of neat MTBE and/or gasoline containing MTBB that have not been located and reviewed. Therefore, TOTAL Petrochemicals reserves the right to amend its response if records not yet identified are discovered and such indicate that any response berein was not complete or accurate.

For purposes of this Declaration, the term "Relevant Geographic Area" is understood to mean Suffolk County, New York and Rockland County, New York. For purposes of this Declaration, "TOTAL Petrochemicals" refers to both TOTAL Petrochemicals USA, Inc. and its predecessors during the relevant time period, unless otherwise stated.

 Identify Jobbers supplied by TOTAL Petrochemicals that provide gasoline containing MTBE to the Relevant Geographic Area.

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TOTAL Petrochemicals understands the term "jobber" to mean a third party distributor in contract with TOTAL Petrochemicals to sell gasoline supplied by TOTAL Petrochemicals at the retail level under the "FINA" brand name or to further distribute gasoline supplied by TOTAL Petrochemicals to other retail outlets for sale under the "FINA" brand name. Based on knowledge and belief, TOTAL Petrochemicals has never supplied jobbers that provide gasoline containing MTBE to the Relevant Geographic Area.

The TOTAL Petrochemicals employee most qualified to testify regarding the company's former marketing operations is Ray Been.

(ii) Manufacturers of neat MTBE and/or TBA will disclose bow and where it is made.

Based on knowledge and belief, TOTAL Petrochemicals has never been a manufacturer of Tert-Butyl Alcohol (TBA).

During the relevant time period (from approximately 1983 to approximately 1994), TOTAL Petrochemicals manufactured neat MTBE at the company's refinery in Big Spring, Texas. MTBE was manufactured at the Big Spring, Texas by reacting isobutylene with methanol in the presence of a catalyst.

During the relevant time period (approximately 1984 to present), TOTAL Petrochemicals has sent a mixed butylenes stream from the company's refinery in Port Arthur, Texas to a facility owned and operated by Huntsman Petrochemical Corporation or its predecessors (hereinafter "Huntsman") located in Port Neches, Texas at which isobutylene is extracted from the stream and reacted with methanol in the presence of catalyst to create MTBE for TOTAL Petrochemicals.

The TOTAL Petrochemicals employee most qualified to testify regarding the manufacture of neat MTBE at the Big Spring, Texas refinery is Steve Weber,

The TOTAL Petrochemicals employee most qualified to testify regarding the manufacture of neat MTBE by Huntsman for TOTAL Petrochemicals is Jeff Paules.

(iii) Manufacturers of neat MTBE and/or TBA will identify each refiner to whom it has sold or delivered neat MTBE and/or TBA, during the relevant time period for each focus case listed in subparagraph (a) above, that may have been added to gasoline for delivery in the Relevant Geographic Area of each focus case.

Based on knowledge and belief, TOTAL Petrochemicals has never been a manufacturer of Tert-Butyl Alcohol (TBA).

TOTAL Petrochemicals does not, in the ordinary course of business, create or maintain data or records that track the ultimate destination of neat MTBE it sells to refiners. TOTAL Petrochemicals does not control or direct a refiner customer's use, transport, or processing of the neat MTBE it sells to them and, further, does not control or dictate the ultimate destination(s) to which such neat MTBE or gasoline containing such neat MTBE is sent.

Based on knowledge and belief, TOTAL Petrochemicals declares that all neat MTBE manufactured by Huntsman using TOTAL Petrochemicals isobutylene feedstock was sold to

refiners at the outlet of the tanks in which the manufactured neat MTBE was stored in Port Neches, Texas, or was sold to refiners at delivery points on or near the Gulf Coast of Texas or Louisiana. Based on its review of records to date, and based on knowledge and belief, TOTAL Petrochemicals declares that it did not sell neat MTBE manufactured by Huntsman using TOTAL Petrochemicals isobutylene feedstock to any refiner in the Relevant Geographic Area. TOTAL Petrochemicals has not located records indicating that neat MTBE manufactured by Huntsman using TOTAL Petrochemicals isobutylene feedstock was added to gasoline that was delivered into the Relevant Geographic Area.

Without any admission or acknowledgement that any neat MTBE sold to any of the following listed entities was ever blended into gasoline for delivery into the Relevant Geographic Area, TOTAL Petrochemicals identifies the following entities to which it sold neat MTBE at the listed locations during the years 1999 through 2004.

Mobil Oil Corporation
Equiva Trading Company
Citgo Petroleum Corporation
Conoco, Inc.
Tauber Oil Company
Noble Americas Corporation
Exxon Company USA
ExxonMobil Refining & Supply Company
Koch Petroleum Group LP
Shell Trading US Company
Enron Clean Fuels Company
Noble America
Valero Marketing and Supply Company
ExxonMobil Oil Corp.

Vitol SA, Inc.
Huntsman International Fuel LP
Tradax Energy, Inc.
Atlantic Trading & Marketing, Inc.
PMI Norteamerica SA de CV
BP North America Petroleum
NIC Holding Corp.
American Agip Company, Inc.

BP Product North America, Inc.

Beaumont, Texas; Port Neches, Texas
Pasadena, Texas
Port Neches, Texas; Lake Charles, Louisiana
Lake Charles, Louisiana
Galena Park, Texas
Port Neches, Texas
Baytown, Texas
Port Neches, Texas
Galena Park, Texas
Galena Park, Texas
Port Neches, Texas

Neches, Texas
Port Neches, Texas
Galena Park, Texas
Port Neches, Texas
Port Neches, Texas
Port Neches, Texas
Port Neches, Texas
Beaumont, Texas

The TOTAL Petrochemicals employee most qualified to testify regarding the identity of refiners to which TOTAL Petrochemicals sold neat MTBE is Jeff Paules.

(iv) Each refiner will provide a history of ownershlp, during the relevant time period for each focus case listed in subparagraph (a) above, including changes in corporate structure, of each refinery it owns or has owned that serve the Relevant Geographic Area in each focus case.

TOTAL Petrochemicals is not able to determine with certainty what is meant by the phrase "serve the Relevant Geographic Area." TOTAL Petrochemicals and/or its predecessors in interest is/was the owner of two refineries, identified below, during the relevant time period (1979 – present). Neither refinery is or ever has been located in, or anywhere close to, the Relevant

Geographic Area. By any reasonable interpretation, neither refinery serves or has ever served the Relevant Geographic Area.

From 1979 to on or about April 29, 1983, Fin-Cos Corporation owned a refinery located in Big Spring, Texas title to which it acquired through a transaction, dated April 29, 1963, in which American Petrofina, Incorporated acquired substantially all of the assets of Cosden Petroleum Corporation. Based on review of company records in its possession, American Petrofina, Incorporated acquired the Big Spring, Texas refinery from Fin-Cos Corporation on or about April 29, 1983. Based on knowledge and belief, American Petrofina, Incorporated then transferred the Big Spring, Texas refinery to Cosden Oil & Chemical Company. On July 1, 1985, Cosden Oil & Chemical Company merged into American Petrofina Company of Texas, which changed its name on that date to Fina Oil and Chemical Company. Fina Oil and Chemical Company changed its name to ATOFINA Petrochemicals, Inc. on June 19, 2000. ATOFINA Petrochemicals, Inc. sold the Big Spring, Texas refinery to a third party effective August 31, 2000, and thereafter no longer owned or operated that facility. On October 1, 2004, ATOFINA Petrochemicals, Inc. changed its name to TOTAL PETROCHEMICALS USA, INC. TOTAL Petrochemicals does not own or operate the Big Spring, Texas refinery.

From 1979 to July 1, 1985, American Petrofina Company of Texas owned a refinery located in Port Arthur, Texas. On July 1, 1985, American Petrofina Company of Texas changed its name to Fina Oil and Chemical Company. Fina Oil and Chemical Company changed its name to ATOFINA Petrochemicals, Inc. on June 6, 2000. Effective November 30, 2002, the Port Arthur, Texas refinery was acquired by ATOFINA PAR L.P., which changed its name to TOTAL PAR L.P., on October 1, 2004.

The TOTAL Petrochemicals employee most qualified to testify regarding the history of refinery ownership is Susan Flynn.

(y) Each refiner will disclose the date it first blended MTBE and/or TBA into gasoline for deliveries to terminals that supplied the Relevant Geographic Area of each focus case.

Based on knowledge and belief, TOTAL Petrochemicals has never blended TBA into gasoline.

TOTAL Petrochemicals is not able to determine with certainty what is meant by the phrase "supplied the Relevant Geographic Area." TOTAL Petrochemicals does not, in the ordinary course of business, create or maintain data or records that track the ultimate destination of gasoline blended with MTBE that it sells to customers. TOTAL Petrochemicals does not choose or dictate the terminals to which its customers ultimately send gasoline blended with MTBE, and does not know whether terminals owned and/or operated by third parties actually supply the Relevant Geographic Area with such gasoline.

Based on discussions with a current employee of the company, TOTAL Petrochemicals blended gasoline with MTBE at the company's Big Spring, Texas refinery beginning in approximately 1983 until approximately 1994. Based on knowledge and belief, and based on discussions with a current employee of the company, TOTAL Petrochemicals did not deliver gasoline blended with MTBE at its Big Spring, Texas refinery to terminals that supplied the Relevant Geographic Area.

Based on discussions with a former employee of the company, and based on review of records in the company's possession, TOTAL Petrochemicals first blended MTBE with gasoline in 1990 in storage tanks located in Linden, New Jersey that were leased by the company from a third party. Based on discussions with a former employee of the company, and based on review of records in

the company's possession, all such blended gasoline was sold in the state of New Jersey to third parties not affiliated with the company either into barges at the outlet flange of the storage tanks located in Linden, New Jersey, or into a pipeline within the state of New Jersey. Based on discussions with a former employee of the company, and based on review of records in the company's possession, TOTAL Petrochemicals did not deliver gasoline blended with MTBE in New Jersey to terminals that supplied the Relevant Geographic Area.

From January 1995 through December 1995, TOTAL Petrochemicals blended gasoline with MTBB at its Port Arthur, Texas refinery. Based on knowledge and belief, and based on review of records in the company's possession, this blending operation was terminated in December 1995. Based on its review of records in its possession, TOTAL Petrochemicals did not deliver gasoline blended with MTBB at its Port Arthur, Texas refinery to terminals that supplied the Relevant Geographic Area.

The TOTAL Petrochemicals employee most qualified to testify regarding the blending of MTBE is Jeff Paules.

(vi) Each refiner shall describe the records, which include the name, contents and location of records, including electronically stored records, that record the batch number for batches of gasoline delivered from defendants' refineries to terminals in the Relevant Geographical Areas.

TOTAL Petrochemicals understands the phrase "delivered from defendants' refineries" to mean deliveries of gasoline by TOTAL Petrochemicals from its refinery generation point to a terminal within the Relevant Geographic Area with such deliveries either by a means of transport under the control of TOTAL Petrochemicals, or on pipeline capacity to which TOTAL Petrochemicals has contractual rights. As previously stated, TOTAL Petrochemicals does not choose or dictate the terminals to which its customers may ultimately deliver gasoline, and does not know whether such terminals are in the Relevant Geographic Area. Based on knowledge and belief, TOTAL Petrochemicals did not deliver gasoline from its refineries to terminals in the Relevant Geographic Area.

The TOTAL Petrochemicals employee most qualified to testify regarding this declaration is Kim Arterburn.

(vii) For each petroleum product containing MTBE refined and/or marketed by the defendant into the Relevant Geographic Area of each focus case, the defendant shall disclose the name and grade (if applicable) of the product, the product and product code.

TOTAL Petrochemicals understands the term "marketed" to mean the sale of petroleum products containing MTBE on a wholesale basis to jobbers (as defined in (i) above) or the sale by TOTAL Petrochemicals of petroleum products containing MTBE sold at company-owned retail outlets.

Based on knowledge and belief, TOTAL Petrochemicals did not market petroleum products containing MTBE into the Relevant Geographic Area.

TOTAL Petrochemicals is not able to determine with certainty what is meant by the phrase "refined...into the Relevant Geographic Area." As previously stated, TOTAL Petrochemicals does not, in the ordinary course of business, create or maintain data or records that track the ultimate destination of refined products sold to customers. TOTAL Petrochemicals does not choose or dictate the marketing or retail outlets to which its customers send gasoline sold to them

by TOTAL Petrochemicals. Furthermore, TOTAL Petrochemicals does not and has not owned a refinery in or near the Relevant Geographic Area. Based on knowledge and belief, TOTAL Petrochemicals did not refine petroleum products containing MTBE into the Relevant Geographic Area.

The TOTAL Petrochemicals employee most qualified to testify regarding marketing is Ray Been.

(viii) Each refiner will disclose the date it last blended MTBE and/or TBA into gasoline for deliveries into the Relevant Geographic Area of each focus case.

TOTAL Petrochemicals understands the phrase "for deliveries into the Relevant Geographic Area" to reference gasoline blended with MTBE by TOTAL Petrochemicals for delivery by TOTAL Petrochemicals or by a third party to specific end-point destinations located within the Relevant Geographic Area. As previously stated, TOTAL Petrochemicals does not, in the ordinary course of business, create or maintain data or records that track the ultimate destination of refined products sold to customers. TOTAL Petrochemicals does not choose or dictate the marketing or retail outlets to which its customers send gasoline sold to them by TOTAL Petrochemicals. Based on review of records in its possession, and based on knowledge and belief, and based on discussions with former and current employees, TOTAL Petrochemicals did not blend MTBE and/or TBA into gasoline for deliveries into the Relevant Geographic Area.

The TOTAL Petrochemicals employee most qualified to testify regarding blending of gasoline is Jeff Paules.

- (ix) Each defendant will respond to the seven categories identified by Judge Scheindlin in her Order to Marathon Ashland Petroleum, LLC, dated June 22, 2004, as that information pertains to the Relevant Geographic Area at issue in each focus case.
  - All locations, by city and state, in the Relevant Geographic Area, in which TOTAL. Petrochemicals directly sells or markets gasoline.
    - There are no locations in the Relevant Geographic Area in which TOTAL Petrochemicals directly sells or markets gasoline.
  - (2) All locations, by city and state, in the Relevant Geographic Areas, in which TOTAL Petrochemicals owns or operates refineries.
    - TOTAL Petrochemicals does not own or operate any refineries in the Relevant Geographic Area.
  - (3) All routes in the Relevant Geographic Area along which TOTAL Petrochemicals owns or operates gasoline pipelines, terminals, or other distribution facilities; Indicate, by city and state, any and all primary origin points, secondary origin points, ending points, and breakout terminals along the routes. Depict this information in graphic format.
    - There are no routes in the Relevant Geographic Area along which TOTAL Petrochemicals owns or operates gasoline pipelines, terminals, or other distribution facilities.
  - (4) All routes in the Relevant Geographic Area along which TOTAL Petrochemicals ships gasoline through a common carrier pipeline; Indicate, by city and state, any and all

primary and secondary origin points where TOTAL Petrochemicals inputs gasoline, and any and all ending points, breakout terminals, and off-take points where TOTAL Petrochemicals takes out gasoline. Depict this information in graphic format.

There are no routes in the Relevant Geographic Area along which TOTAL Petrochemicals ships gasoline through a common carrier pipeline.

(5) All locations, by city and state, in the Relevant Geographic Areas, in which TOTAL Petrochemicals owns or operates marine tankers, barges, and tank trucks that are used to transport gasoline.

There are no locations in the Relevant Geographic Area in which TOTAL Petrochemicals owns or operates marine tankers, barges, or trucks that are used to transport gasoline.

(6) All waterway routes in the Relevant Geographic Areas along which TOTAL Petrochemicals transports gasoline. Indicate, by city and state, the origin and ending points. Depict this information in graphic format.

There are no waterways routes in the Relevant Geographic Area along which TOTAL Petrochemicals transports gasoline.

(7) All rail and road routes in the relevant geographic area along which TOTAL Petrochemicals transport gasoline. Indicate, by city and state, the origin points, ending points, and all delivery points along the route. Depict this information in graphic format.

There are no rail or road routes in the Relevant Geographic Area along which TOTAL Petrochemicals transports gasoline.

The TOTAL Petrochemicals employee most qualified to testify regarding the matters in

(ix) above is Jeff Paules.

Given under my hand and seal of office this 25 day of February 2005.

Anltra N. Adams ary Public, State of Texas My Commission Explies MAY 29, 2005

Notary Public in and for

The State of Texas

(seal)