EXHIBIT E

VERMONT SUPERIOR COURT
WASHINGTON UNIT
CIVIL DIVISION

STATE OF VERMONT Plaintiff v. MPHJ TECHNOLOGY INVESTMENTS, LLC Defendant	FILED Docket No. 282-5-13 Wncv

RULING ON MOTION TO STAY, MOTION TO AMEND, and MOTION TO DISMISS

The State filed this consumer protection action in May of 2013. The complaint alleges that MPHJ, a Delaware company, sent numerous unfair and deceptive letters to Vermont businesses alleging patent infringement and threatening to sue if the businesses did not pay licensing fees. The State alleges that the letters violate the Vermont Consumer Protection Act.

Defendant MPHJ promptly removed the case to federal court. That court found that it lacked jurisdiction, and remanded the case back to this court in April of this year. There are several motions pending that were not resolved by the federal court, as well as one filed since the remand. [1]

[1] One of the motions still pending appears to be a Rule 11 motion for sanctions. However, the motion and response are not included on the disc sent back to this court from federal court (perhaps because they were filed under seal?). If MPHJ wishes to have the court consider the motion, MPHJ shall file copies of the motion and any responses and replies by September 15. If nothing is filed, the motion will be considered withdrawn.

Motion to Stay

Defendant moved to stay this case pending resolution of its appeal in the Second Circuit. That court has now affirmed the remand of the case to this court. State of Vermont v. MPHJ Technology Investments, LLC, Nos. 2014–1481, 2014–137, 2014 WL 3938955 (2d Cir. Aug. 11, 2014). Thus, the motion to stay is denied as moot.

Motion to Amend

The State moved to clarify or amend the complaint. The court grants the motion to amend.

Motion to Dismiss

MPHJ seeks dismissal for lack of personal jurisdiction. The complaint alleges that MPHJ "did business in Vermont" through its wholly owned subsidiaries. First Amended Complaint, ¶ 7. Specifically, it alleges that MPHJ has sent "hundreds or thousands" of letters to businesses in Vermont alleging potential patent infringement, and seeking to sell licenses to the recipients. Id., ¶¶ 15-17. It alleges that often there are three letters in a row to a business, with the last letter threatening litigation. Id, ¶¶ 23-32. The State further alleges that the letters contained false representations and false threats of litigation, were sent in bad faith, and constituted unfair and deceptive practices in violation of the Vermont Consumer Protection Act, 9 V.S.A. § 2453(a). MPHJ says this is insufficient to create personal jurisdiction.

There are two essential prongs to the inquiry here: whether the defendant has "minimum contacts" with the state, and whether it is fair and reasonable to subject it to suit in this jurisdiction. Some cases break this down, and some discuss the issues as part of a single inquiry. The overall question is whether "the defendant's conduct and connection with the forum state are such that [it] should reasonably anticipate being haled into court there." N. Aircraft, Inc. v. Reed,

154 Vt. 36, 41 (1990). "This reasonableness requirement is met when the defendant purposefully directs activity toward residents of a forum state and the litigation arises out of, or relates to, that activity. The reasonableness requirement also prevents a defendant from being subjected to jurisdiction on the basis of fortuitous, attenuated, or random contacts." Dall v. Kaylor, 163 Vt. 274, 276 (1995), (*citing* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472, 475 (1985); . N. Aircraft, Inc., 154 Vt. at 41).

Both parties agree that in this case the question is whether "specific jurisdiction" relating to MPHJ's conduct in Vermont exists, as opposed to "general jurisdiction" over MPHJ in a broader sense. *See, e.g.*, Fox v. Fox, 2014 VT 100, ¶ 27. ("Nobody suggests that Vermont has general jurisdiction to adjudicate claims against defendant. Plaintiff introduced no evidence that defendant owned property in Vermont, did business in Vermont, visited Vermont, or had any contact with the State or its residents. The question in this case is whether Vermont has specific jurisdiction because the litigation arises from defendant's personally directing his activities toward Vermont.").

The "unifying feature" in cases finding specific jurisdiction is that "the defendant directed activity into the forum state, or toward its residents in that state." Fox, 2014 VT 100, ¶ 29. The key factor is "the intentional and affirmative action on the part of the non-resident defendant in pursuit of its corporate purposes within this jurisdiction." O'Brien v. Comstock Foods, Inc., 123 Vt. 461, 464 (1963). Physical presence in the state is, of course, not required:

> [I]t is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a State in which business is conducted. So long as a commercial actor's efforts are "purposefully directed" toward residents of another State, we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there.

Burger King, 471 U.S. at 476. Moreover, "[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, 163 Vt. at 277.

Our Supreme Court has noted in passing that letters and phone calls to Vermonters from out-of-state lawyers might not alone be sufficient to create personal jurisdiction over those lawyers. Schwartz v. Frankenhoff, 169 Vt. 287, 297 (1999). However, the court's analysis focused not on that issue, but on the lack of a valid legal claim against the lawyers. Id. at 297-99. Moreover, the case to which it cited addressed the issue of a non-resident merely *answering* a phone call, not initiating one. The court thus finds Frankenhoff of little help here.

Other courts have held that letters and phone calls were not alone sufficient to establish minimum contacts. *See, e.g.*, Viasystems, Inc. v. EBM-Papst St. Georgen GmbH & Co., K.G., 646 F.3d 589, 594 (8th Cir. 2011); Far West Capital Inc. v. Towne, 46 F.3d 1071, 1077 (10th Cir. 1995); Pharmabiodevice Consulting, LLC v. Evans, No. GJH–14–00732, 2014 WL 3741692 *4 (D. Md. July 28, 2014). Unlike this case, however, those cases did not involve allegations that it was the letters themselves that constituted the unlawful activity. Instead, the letters, calls or emails were merely the connection upon which the plaintiffs sought to bring *other* activities of the defendants into court. Here, the State alleges that the very act of sending the letters violated Vermont law. Other courts have distinguished such cases. *See, e.g.*, Couvillier v. Dillingham & Associates, No. 2:14–cv–00482–RCJ–NJK, 2014 WL 3666694 * 3 (D. Nev. July 23, 2014) (In case alleging violation of the Fair Debt Collection Practices Act, "[t]he mailing of the collection letter to Nevada was an intentional act expressly aimed at Nevada (allegedly) causing harm that

Dillingham knew or should have known would be felt in Nevada, and the present claims arise directly out of that act.").

As MPHJ points out, other courts have found that patent-related letters similar to those at issue here were insufficient to establish minimum contacts. *See, e.g.*, Invellop, LLC v. Bovino, No. 3:14–cv–00033–SI, 2014 WL 3478866 *4 (D. Or. July 11, 2014)("An alleged injury based only on the threat of infringement communicated in an 'infringement letter' is insufficient to establish personal jurisdiction."). The Bovino court noted that patent-holders have a right to inform others of suspected infringement, and concluded that it would not be fair to subject the patent-holder to litigation everywhere it sent such letters. Id. The case involved a plaintiff seeking a declaratory judgment that it had not infringed Defendant's patents, and a declaration that the patents were invalid. Again, that case is distinguishable from this one because here the claim is that *the letters themselves* constituted a violation of Vermont's consumer projection statute. The same is true of the cases cited by MPHJ. *See*, Avocent Hunstville Corp. v. Aten Int'l Co., 552 F. 3d 1324, 1326 (Fed. Cir. 2008); Hildebrand v. Steck Mfg. Co., 279 F. 3d 1351, 1353 (Fed. Cir. 2002); Red Wing Shoe Co. v. Hockerson-Halberstadt, Inc., 148 F. 3d 1355, 1357 (Fed. Cir. 1998); Engineering & Inspection Services, LLC v. IntPar, LLC, No. 13–0801, 2013 WL 5589737 * 2 (E.D.La. Oct. 10, 2013)(in which MPHJ was a defendant).

This case is analytically similar to one involving text messages allegedly sent in violation of a consumer protection statute. Luna v. Shac, LLC, No. C14–00607 HRL, 2014 WL 3421514 (N.D.Cal. July 14, 2014). In Luna, the court held that "[w]hen Shac intentionally sent unsolicited text messages advertising Sapphire to California cell phone numbers, which conduct gave rise to this litigation, it purposefully directed its activity to California such that Shac is reasonably subject to the personal jurisdiction of this Court." Id. * 4. This is what the Supreme Court

addressed in Calder v. Jones, 465 U.S. 783 (1984), a libel suit in which it said that wrongful out-of-state conduct intentionally directed at in-state residents can be sufficient: "petitioners are primary participants in an alleged wrongdoing intentionally directed at a California resident, and jurisdiction over them is proper on that basis." Id. at 790. "An individual injured in California need not go to Florida to seek redress from persons who, though remaining in Florida, knowingly cause the injury in California." Id. Other states addressing alleged violations of the Telephone Consumer Protection Act have reached the same conclusion. Luna, 2014 WL 3421514 at * 4 (citing cases finding allegedly unlawful phone calls to be sufficient basis for jurisdiction).

Other courts have found that mailings that allegedly violated consumer protection laws created sufficient grounds for specific jurisdiction. *See, e.g.*, State by Humphrey v. Granite Gate Resorts, Inc., 568 N.W.2d 715, 720 (Minn. Ct. App. 1997) ("Advertising contacts justify the exercise of personal jurisdiction where unlawful or misleading advertisements are the basis of the plaintiff's claims."), *aff'd*, 576 N.W. 2d 747 (Minn. 1998); State of Washington v. Reader's Digest Ass'n, 501 P. 2d 290, 302-03 (Wash. 1972)(mailings to residents of the state that violated state lottery laws created jurisdiction), *mod. on other grounds by* Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 719 P. 2d 531 (Wash. 1986). This court concludes that because the allegation here is that the letters themselves are violations of the law, purposefully directed at Vermont residents, they create sufficient minimum contacts for purposes of personal jurisdiction over MPHJ.

Even when sufficient "minimum contacts" exist, however, the court must consider whether it is fair to exercise jurisdiction. Burger King, 471 U.S. at 476. Relevant factors may include "the burden on the defendant, the forum State's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief, the interstate judicial system's

interest in obtaining the most efficient resolution of controversies, and the shared interest of the several States in furthering fundamental substantive social policies." Id. at 477 (internal quotations and citations omitted). "These considerations sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required." Id.

The court finds a key factor here to be the fact that the case is brought by the State on behalf of the public, seeking to enforce our consumer protection law. The State has a special interest in protecting its citizens, which is categorically different from an individual business suing to protect solely its own interests. "We agree that the 'fairness' of haling respondent into a New Hampshire court depends to some extent on whether respondent's activities relating to New Hampshire are such as to give that State a legitimate interest in holding respondent answerable on a claim related to those activities." Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 775-76 (1984). The Supreme Court in Keeton noted that a state "may rightly employ its libel laws to discourage the deception of its citizens." Id. at 776. The same is true here: Vermont has a strong interest in protecting its citizens from consumer fraud.

Moreover, rejecting jurisdiction would be unfair to those alleged to have been subjected to the deceptive letters:

> To require a resident to commence his action in a foreign jurisdiction on a tort committed where he lives, and to transport his witnesses to such other state might well make protection of his right prohibitive and in effect permit a foreign corporation to commit a tort away from its home with relative immunity from legal responsibility.

Smyth v. Twin State Imp. Corp., 116 Vt. 569, 575 (1951).

While MPHJ argues that it would be burdensome for it to defend litigation in Vermont, it fails to respond to the States' point that MPHJ's own letters to Vermont businesses threatened

litigation in Vermont. While that in itself does not establish jurisdiction here, it certainly undercuts MPHJ's claim that having to litigate in Vermont would be unreasonably burdensome. In addition, it would be more burdensome for the "hundreds or thousands" of recipients of the letters to provide evidence in Delaware than it would for MPHJ's witnesses, presumably a limited group, to provide evidence here.

Finally, it is unlikely that another state's court would conclude that it had jurisdiction over the Vermont Consumer Protection Act claims asserted here. Thus, denying jurisdiction here might well mean denying any forum at all for the resolution of these claims.

In balancing the burdens on both sides here, the interest of the State in protecting its citizens weighs heavily in favor of jurisdiction.

Order

The motion to stay is denied. The motion to amend is granted. The motion to dismiss is denied. The motion for sanctions will be deemed withdrawn unless MPHJ submits copies of the motion, responses, and replies by September 15. As discussed at the status conference on May 22, discovery shall be completed by May 28, 2015. The parties are directed to submit a proposed discovery/pretrial order by September 15.

Dated at Montpelier this 28th day of August, 2014.

Helen M. Toor
Superior Court Judge

VERMONT SUPERIOR COURT
WASHINGTON UNIT, CIVIL DIVISION

STATE OF VERMONT, Plaintiff, v. ATLANTIC RICHFIELD COMPANY, et al., Defendants.	Docket No. 340-6-14 Wncv

TOTAL PETROCHEMICALS & REFINING USA, INC.'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION

1. Pursuant to V.R.C.P. 12(b)(2) and 78(b)(1) Total Petrochemicals & Refining USA, Inc. ("TPRI") submits this Reply in Support of its Motion to Dismiss Plaintiff's Original Complaint for Lack of Personal Jurisdiction, and would respectfully show the Court as follows:

I. INTRODUCTION

2. In its Opposition to TPRI's Motion to Dismiss, Plaintiff relies on outdated case law and ignored controlling Supreme Court precedent in a futile attempt to avoid dismissal of its claims against TPRI. Although critical of the information in TPRI's affidavit, never in its 100-page Opposition does Plaintiff ever dispute a single jurisdictional fact. Nor does Plaintiff ever establish that TPRI maintained *any* jurisdictionally relevant contacts with the State of Vermont. Plaintiff's attempt to fabricate jurisdiction by arguing that it was foreseeable that TPRI's product may have found its way to Vermont through the stream of commerce is a legally deficient. Thus, even if the Court accepts every inference drawn in the expert opinion attached to Plaintiff's Opposition, the exercise of personal jurisdiction over TPRI would be improper. Because Plaintiff has failed to meet its burden, this Court should dismiss all claims against TPRI.

II. STATEMENT OF UNDISPUTED FACTS

3. In its Complaint, Plaintiff attempts to establish jurisdiction over all twenty-nine Defendants by broadly alleging that all of them:

> 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.

Compl. at ¶ 20. In its Motion to Dismiss, TPRI refuted Plaintiff's baseless allegation with specific facts conclusively establishing that TPRI never participated in the Vermont market for MTBE or gasoline containing MTBE. *See generally* Defendant's Motion at Ex. 1 (Affidavit of Kim Arterburn). Specifically, through the sworn testimony of TPRI's Senior Manager, Financial Accounting, based on her own personal knowledge, TPRI established the following:

(1) TPRI has never refined, manufactured, blended, or otherwise made, marketed, advertised, stored, or sold any product containing MTBE in the State of Vermont [*Id.* at ¶ 3];

(2) TPRI has never been qualified to do business in Vermont and has never been registered with the Vermont Secretary of State [*Id.* at ¶ 4];

(3) TPRI has never owned or leased any real estate in Vermont [*Id.* at ¶ 5];

(4) 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 [*Id.* at ¶ 6];

(5) TPRI has never entered into any contractual relationship with any jobber or other distributor for the delivery of MTBE or gasoline containing MTBE to Vermont [*Id.* at ¶ 7];

(6) TPRI has no knowledge of any third party who delivered MTBE or gasoline containing MTBE to Vermont that TPRI refined, manufactured, or to which it ever held title [*Id.*];

(7) TPRI has never employed officers or directors in Vermont [*Id.* at ¶ 9];

(8) TPRI has never maintained an office, agent for service of process, bank account, phone number, or physical address in Vermont [*Id.* at ¶¶ 8, 10, 11]; and

(9) The sum total of TPRI's contacts with the State of Vermont amount to a limited volume of sales of an unrelated product that amount to no more than 0.0013% of TPRI's total revenue over the last 7 years. [*Id.* at ¶¶ 12, 13].

4. Despite Plaintiff's cursory attempt to discredit the foundation of Ms. Arterburn's Affidavit, the State never disputes a single fact set forth therein. Because Plaintiff has come forward with no evidence to dispute any of these critical, jurisdictionally relevant facts, the Court is bound to consider Plaintiff's broad-sweeping allegation as having been refuted. When a "defendant rebuts plaintiffs' unsupported allegations with direct, highly specific, testimonial evidence regarding a fact essential to jurisdiction – and plaintiffs do not counter that evidence—the allegation must be deemed refuted." *In re Stillwater Capital Partners Inc. Litig.*, 851 F. Supp. 2d 556, 567 (S.D.N.Y. 2012) (quoting *Schenker v. Assicurazioni Generaeli S.p.A., Consol.*, No. 98 Civ. 9186, 2002 WL 1560788, at *3 (S.D.N.Y. July 15, 2002)).

5. Recognizing it cannot base specific jurisdiction on TPRI's Vermont-based conduct, Plaintiff attempts to manufacture jurisdiction based on the argument that TPRI placed its products in the national stream of commerce. Its overbroad theory presumes that some unknown volume of TPRI's product may have been physically transported to Vermont by the unilateral actions of a third party. Based on the controlling precedent discussed in detail below, such an argument is unavailing. Any attempt to establish general jurisdiction based on the *de minimis* sale in Vermont of an unrelated product is also futile.

III. ARGUMENT

A. TPRI's Contacts are Insufficient to Support Specific Jurisdiction

6. It is undisputed that TPRI did not direct or deliver MTBE or gasoline containing MTBE to Vermont. In the absence of any such evidence, Plaintiff has urged this Court to base

jurisdiction on the hypothetical conduct of a third party. Following Plaintiff's logic, the Court would need to accept each of the following unsupported presumptions: (1) that at some unknown point in time, (2) an unidentified third party (3) ***may have*** made a unilateral decision (4) to deliver an unspecified volume of MTBE or gasoline containing MTBE (5) that TPRI either manufactured or distributed outside the State (6) to an undisclosed location in Vermont. Doing so would be challenging when Plaintiff's own expert fails to establish how gasoline reaches the State of Vermont. Nevertheless, even accepting each of those assumptions as true, for specific jurisdiction to attach, this Court would need to make the further evidentiary leap to find that some unknown amount of that product actually leaked into the environment and contributed to Plaintiff's alleged damages. Plaintiff has presented no evidence to support such a conclusion. Moreover, whether such a scenario is even remotely possible given the facts in the record is irrelevant because the issue can be resolved as a matter of law. Due to binding Supreme Court precedent, TPRI may not be haled before a Vermont court based solely on the unilateral conduct of a third party or its participation in a "national market."

1. The Supreme Court's Unanimous Opinion in *Walden v. Fiore* Bars the Exercise of Personal Jurisdiction based on the Unilateral Conduct of a Third Party

7. A unanimous Supreme Court recently affirmed the longstanding, bedrock principle that personal jurisdiction must rest on contacts that "the ***defendant himself*** creates with the forum State." *Walden v. Fiore*, 134 S. Ct. 1115, 1122 (2014) (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985)) (emphasis added). In *Walden*, the Court addressed the question of whether a federal court in Nevada could exercise personal jurisdiction over a Georgia police officer for his allegedly tortious conduct in connection with the seizure of plaintiffs' funds at an Atlanta airport. Plaintiffs argued jurisdiction was proper because the defendant knew his conduct would result in foreseeable harm in Nevada, where plaintiffs maintained one of their two

primary residences. The Court found plaintiffs' argument unconvincing in light of the requirement that personal jurisdiction analysis "focus[] on the relationship among the defendant the form and the litigation." *Id.* at 1121. The Court's opinion clarifies that the conduct of a plaintiff or a third party cannot confer specific jurisdiction on an nonresident defendant with no relevant connection to the forum State.

> For a State to exercise jurisdiction consistent with due process, the defendant's suit-related conduct must create a substantial connection with the forum State . . . . Due process limits on the State's adjudicative authority principally protect the liberty of the nonresident defendant—not the convenience of plaintiffs or third parties. We have consistently rejected attempts to satisfy the defendant-focused 'minimum contacts' inquiry by demonstrating contacts between the plaintiff (or third parties) and the forum State. The unilateral activity of another party or a third person is not an appropriate consideration when determining whether a defendant has sufficient contacts with a forum State to justify an assertion of jurisdiction.

Id. at 1121-2 (internal citations and punctuation omitted).

8. In the absence of any forum-related contacts, the foreseeable nature of any injury in Nevada was irrelevant. "[I]t is the defendant's conduct that must form the necessary connection with the forum State that is the basis for its jurisdiction over him." *Id.* at 1122. "Due process requires that a defendant be haled into court in a forum State based on ***his own*** affiliation with the State, not based on . . . 'random, fortuitous, or attenuated' contacts." *Id.* at 1123 (quoting *Burger King*, 471 U.S. at 475) (emphasis added). As Plaintiff has admitted in failing to contest a single fact set forth in TPRI's Motion to Dismiss and the accompanying Affidavit, TPRI has no affiliation with the State of Vermont that bears any relation to the nature of this suit. The theory that an unidentified third party may have delivered TPRI's product to the State at some unknown point in time cannot suffice to support personal jurisdiction in light of the unanimous holding in *Walden.*

2. Supreme Court Jurisprudence on the Stream of Commerce Theory Prohibits the Exercise of Personal Jurisdiction based Solely on Foreseeability

9. The Court's holding in *Walden* is in keeping with the body of case law developed in response to personal jurisdiction arguments based on the stream of commerce theory. Despite Plaintiff's attempts to mischaracterize the Court's earlier holding in *World-Wide Volkswagen Corp. v. Woodson*, the Court's opinion clearly indicates that "foreseeability alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause." 444 U.S. 286, 296 (1980). The Court explained further that while foreseeability is not wholly irrelevant, "the foreseeability that is critical to the due process analysis is ***not the mere likelihood that a product will find its way into the forum State***." *Id.* at 297 (emphasis added). Setting aside the credibility or admissibility of Mr. Burke's Affidavit at this stage of the pleadings, Plaintiff's conclusion that personal jurisdiction is proper because "it is more likely than not that some of [TPRI's product] ended up supplying the State of Vermont," is in direct conflict with *World-Wide Volkswagen*, which as Plaintiff admits, "remains controlling precedent." Burke Aff. at ¶¶ 24, 25, 27; Opp. at 19.

10. Plaintiff seeks to avoid the majority's conclusion in *World-Wide Volkswagen*, by focusing on dicta reasoning that jurisdiction may be proper where "the sale of a 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 in [the forum] State." *World-Wide Volkswagen*, 444 U.S. at 297. Without identifying even one such isolated occurrence, however, Plaintiff nevertheless argues that TPRI's purported efforts to serve the national market for gasoline containing MTBE should render it subject to jurisdiction in Vermont. The Supreme Court has consistently rejected that argument.

11. In *Asahi Metal Industry Co. v. Superior Court of Cal., Solano County*, the Court declined to exercise jurisdiction even though the defendant was "fully aware that [its product] would end up throughout the United States." 480 U.S. 102, 107 (1987) (plurality opinion). The plurality opinion reasoned as follows:

> The "substantial connection" between the defendant and the forum State necessary for a finding of minimum contacts must come about by *an action of the defendant purposefully directed toward the forum State.* The placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed towards the forum State. Additional conduct of the defendant may indicate an intent or purpose to serve the market in the forum State, for example designing a product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State. But 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 (emphasis in original) (internal citations and punctuation omitted). It is undisputed that TPRI has not engaged in any of the "additional conduct" the Court stated could be relevant in its jurisdictional analysis. Like *Asahi*, "[TPRI is not registered to] do business in [Vermont]. It is has no office, agents, employees, or property in [Vermont]. It does not advertise or otherwise solicit business in [Vermont]. It did not create, control, or employ the distribution system that [may have] brought [its product] to [Vermont]. There is no evidence that [TPRI] designed its product in anticipation of sales in [Vermont.]" *Id.* at 112–3; Arterburn Aff. at ¶¶ 3-10. Thus, "[o]n the basis of these facts, the exertion of personal jurisdiction . . . [would] exceed[] the limits of due process." *Asahi*, 480 U.S. at 113.

12. Plaintiff focuses on the concurrence in *Asahi*, which questioned whether a showing of "additional conduct" was necessary in light of "Asahi's regular and extensive sales of component parts to a manufacturer it knew was making regular sales of the final product in California." *Id.* at 121 (Brennan, J., concurring). Plaintiff here has failed to establish that any of

TPRI's product was ever sold in Vermont, much less that it had the requisite knowledge contemplated by Justice Brennan's concurrence. The State instead argues that because TPRI participated in the "national market" for MTBE and gasoline containing MTBE, and because its product was delivered to PADD 1, it should be subject to personal jurisdiction in every state on the Eastern Seaboard, including Vermont. Opp. at 20. The absurdity of this position is highlighted by Plaintiff's contention that jurisdiction should lie "[e]ven if TPRI *could show* that none of its own gasoline made it to Vermont." *Id.* (emphasis added). Regardless, any lingering questions left open by the concurrence in *Asahi*, have been foreclosed by the Court's opinion in *McIntyre*.

13. As TPRI set forth in its Motion to Dismiss, the plurality in *McIntyre* reiterated that 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) (plurality opinion). "It is the defendant's actions, not his expectations, that empower a State's courts to subject him to judgment." *Id.* at 2789. Plaintiff's Opposition argues that reliance on the plurality opinion in *McIntyre* is improper. Instead it argues that "the rule of law in *McIntyre* is set forth in the concurrence." Opp. at 36. Even assuming the validity of Plaintiff's position, the exercise of personal jurisdiction over TPRI by a Vermont court would still be improper—even under the rule of law set forth in the concurrence.

14. Writing for the concurrence, Justice Breyer concluded that the facts in the record did "not provide contacts between the British [defendant] and the State of New Jersey constitutionally sufficient to support New Jersey's assertion of jurisdiction." *McIntyre*, 131 S.

Ct. at 2791 (Breyer, J., concurring). The facts in *McIntyre* established that the foreign defendant manufacturer (1) sold the allegedly defective product to a customer in New Jersey; (2) engaged the services of a U.S. distributor "as its exclusive distributor for the entire United States;" and (3) attended trade shows in at least six U.S. cities with the stated intention to reach "anyone interested in the machine from anywhere in the United States." *Id.* at 2791, 2796. Yet the concurrence still required the existence of "something more," citing Justice O'Connor's plurality opinion in *Asahi*. *Id.* at 2792. Critical to Justice Breyer was the fact that the record showed no "'regular course' of sales in New Jersey" and "no 'something more' such as special state-related design, advertising, advice, marketing, or anything else." *Id.* Under those facts, the concurrence concluded that the exercise of jurisdiction would be improper:

> I am not persuaded by the absolute approach adopted by the New Jersey Supreme Court and urged by respondent and his *amici*. Under that view, a producer is subject to jurisdiction for a products-liability action so long as it knows or reasonably should know that its products are distributed through a nationwide distribution system that *might* lead to those products being sold in any of the fifty states.

Id. at 2793 (emphasis in original) (internal citations and quotation marks omitted).

15. Plaintiff's argument here is identical. It is foreclosed by the holding in *McIntyre*, regardless of whether this Court looks to the plurality or the concurrence for the applicable standard. Far from establishing a "regular course" of sales in Vermont, Plaintiff has failed to articulate anything more than a possibility that at some point in time, some unknown volume of TPRI's products may have "ended up" in Vermont. *See* Burke Aff. at ¶¶ 23, 24, 25, 27. Plaintiff has further failed to establish the "something more" Justice Breyer's concurrence would require. It is undisputed that TPRI never "made, marketed, advertised, stored, or sold any product containing MTBE in Vermont," and "never entered into any contractual relationship with any jobber or other distributor for the delivery of MTBE or gasoline containing MTBE to . . .

Vermont." Arterburn Aff. at ¶¶ 3, 7. On these facts, the exercise of personal jurisdiction over TPRI would be unconstitutional—even under the rule of law advocated by the *McIntyre* concurrence.

3. Plaintiff's Reliance on Outdated Opinions Issued by the MTBE MDL Court in the Southern District of New York is Improper

16. Plaintiff attempts to disregard controlling Supreme Court precedent by urging this Court to rely on two outdated opinions issued by the Southern District of New York in the MTBE MDL. *See In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.*, Master File No. 1:00-1898, MDL 1358 (SAS), M21-88, 2005 WL 106936 (S.D.N.Y. Jan. 18, 2005); *In re MTBE Prods. Liab. Litig.*, 399 F. Supp. 2d 325, 332 (S.D.N.Y. 2005). Plaintiff argues these cases support its theory that "deliberate participation in the national market for MTBE" shows "intent to serve the market of [Vermont]." Opp. at 22 (citing *In re MTBE*, 399 F. Supp. 2d at 333). Plaintiff's argument ignores the fact that both opinions were decided six years before the Supreme Court's decision in *McIntyre* and nine years before its decision in *Walden*. *See McIntyre*, 131 S. Ct. at 2793 (refusing to confer jurisdiction on the theory that the defendant "kn[ew] or reasonably should [have known] that its products are distributed through a nationwide distribution system that *might* lead to those products being sold in any of the fifty states.") (emphasis in original); *Walden*, 134 S. Ct. at 1122 (reiterating that "[t]he unilateral activity of another party or a third person is not an appropriate consideration when determining whether a defendant has sufficient contacts with a forum State to justify an assertion of jurisdiction.").

17. Plaintiff's argument also ignores a more recent pronouncement from the same New York District Court reaching the opposite conclusion and refusing to exercise personal jurisdiction based on a strict stream of commerce theory in light of *McIntyre* and *Walden*. *See In*

re MTBE Prods. Liab. Litig., Master File No. 1:00-1898, MDL No. 1358 (SAS), No. M21-88, 2014 WL 1778984 (S.D.N.Y. May 5, 2014) (Attached hereto as Exhibit 1). Plaintiff's omission is suspect in light of the fact that TPRI referenced this opinion in its Motion to Dismiss, arguing it is "directly analogous to the present case and in line with the well-established law of Vermont and the United States Supreme Court." Motion at n.1.

18. In *In re MTBE*, defendant Tauber Oil Company ("Tauber") moved to dismiss the complaint brought by the Commonwealth of Puerto Rico for lack of personal jurisdiction. *See* 2014 WL 1778984, *1. From 1985 to 1997, Tauber sold neat MTBE to Phillips Petroleum Company ("Phillips") in Bartlesville, Oklahoma in a series of spot sales. Phillips independently arranged for the delivery of certain batches to its blending facility in Puerto Rico. *Id.* Apart from Phillips' conduct, Tauber maintained no connection to Puerto Rico. *Id.* at *1, 3. "Tauber never manufactured, marketed, traded, stored, sold, solicited, advertised, or otherwise handled finished gasoline, gasoline containing MTBE or neat MTBE in Puerto Rico. *See id.* Tauber was not involved in any decision by any Phillips entity to use or ship MTBE to Puerto Rico." *Id.* at *1. However, there was evidence that Tauber was aware that its MTBE was being transported to Puerto Rico for blending and further distribution. *Id.* at *3.

19. In its Motion to Dismiss, Tauber pointed to the same controlling Supreme Court precedent at issue here. It urged that under the holdings in *Walden* and *McIntyre*, the exercise of personal jurisdiction by the Commonwealth of Puerto Rico would be improper. *See Puerto Rico v. Shell Oil Co.*, No. 1:07-cv-10470-SAS, at Dkt. No. 365 (S.D.N.Y. filed June 12, 2007) (attached hereto as Exhibit 2). The court agreed, noting that "the Supreme Court [had] recently explained the relationship between the defendant and the forum State must arise out of contacts

that the defendant *himself* creates with the forum State." *In re MTBE,* 2014 WL 1778984, at *2 (citing *Walden*, 134 S. Ct. at 1122) (emphasis in original) (internal punctuation omitted).

20. As is the case here, Tauber was mentioned only once in each of the Commonwealth's complaints, "stating that 'Tauber is a Delaware corporation headquartered at 55 Waugh Drive, Suite 700 in Houston Texas 77007.' No allegation in in the pleadings link[ed] Tauber to the refining, supplying, marketing or addition of MTBE to gasoline in Puerto Rico." *Id.* at *3. The court found the Commonwealth's argument regarding the foreseeable nature of deliveries to Puerto Rico unconvincing:

> Even if Tauber knew that the Phillips entities were shipping the MTBE to Puerto Rico, foreseeability alone has never been a sufficient benchmark for personal jurisdiction under the *Due Process Clause.* Instead, due process requires that a defendant be haled into court in a forum State based on *his own* affiliation with the State, not based on the random, fortuitous, or attenuated contacts he makes by targeting other persons affiliated with the State. Here Tauber never manufactured, marketed, delivered, or sold its MTBE in Puerto Rico. Nor did it solicit or advertise in Puerto Rico. Instead, Tauber merely sold MTBE to the Oklahoma-based Phillips entities in a series of isolated spot sales. The independent decision of the Phillips entities to ship the MTBE to Puerto Rico does not establish jurisdiction over Tauber.

Id. (emphasis in original) (internal citations and quotation marks omitted). The jurisdictionally relevant facts are directly analogous to the present case. The only material difference is the fact that Plaintiff here has no evidence that *any* of TPRI's product ever actually reached the State of Vermont. Otherwise, the facts are identical and this Court's analysis should end in the same result. The fact that a third party may have delivered an unknown volume of TPRI's product to Vermont at some point in time cannot suffice to support personal jurisdiction.

4. Other Second Circuit District Courts have Supported the *McIntyre's* Conclusion that Participation in a National Market is Not Enough

21. Other district courts in the Second Circuit have reached similar conclusions following the Supreme Court's pronouncement in *McIntyre.* In *Boyce v. Cycle Spectrum, Inc.*,

the court refused to exercise jurisdiction over a foreign manufacturer of bicycle component parts and rejected plaintiff's theory "that defendant established the requisite minimum contacts with New York by placing its goods into the national stream of commerce." No. 14-CV-1163, 2014 WL 3472508, at *3 (E.D.N.Y. July 15, 2014). The court noted that the defendant had not entered into any distribution or sales agreements that would have given rise to the reasonable expectation that its product would be used in New York. "The reasonable expectation test . . . is not satisfied by '[t]he mere likelihood that a product will find its way into the forum state . . . ." *Kernan v. Kurz-Hastings, Inc.*, 997 F. Supp. 367, 372 (W.D.N.Y. 1998) (quoting *Courtlandt Racquet Club, Inc. v. Oy Saunatec, Ltd.*, 978 F. Supp. 520, 523 (S.D.N.Y. 1997). The court also addressed the constitutional implications of the Supreme Court's opinion in *McIntyre*, and reached the same conclusion. The court found it dispositive that the defendant "did not target the New York market." *Boyce*, 2014 WL 3472508, at *3 (citing *McIntyre* for the proposition that "The defendant's transmission of goods permits the exercise of jurisdiction only where the defendant can be said to have targeted the forum.").

22. In *Roberts Gordon LLC v. Pektron PLC*, the Western District of New York based its finding of personal jurisdiction on the fact that the defendant had not "simply [placed its] product in the stream of commerce," but rather had "purposefully targeted New York by contracting with a New York company." 999 F. Supp. 2d 476, 481–82 (W.D.N.Y. 2014) (citing *Asahi*, 480 U.S. at 112 and *McIntyre*, 131 S. Ct. at 2788 for the principle that "to satisfy due process, placing a product in stream of commerce must be coupled with some act targeting the forum State"). Here TPRI did nothing to specifically to target the State of Vermont.

23. The Southern District of New York addressed a similar argument in *Eternal Asia Supply Chain Mgmt. (USA) Corp. v. Chen*, No. 12 Civ. 6390 (JPO), 2013 WL 1775440 (S.D.N.Y

Apr. 25, 2013). The court found plaintiff's factual allegation that "Defendant placed goods into the stream of national commerce with knowledge that some of those goods might end up in New York, a major electronics center," insufficient to support the exercise of personal jurisdiction. *Id.* at *7. The court looked to the concurrence in *McIntyre*, and noted that "in the absence of a 'regular . . . flow or 'regular course' of sales to a state," and the absence of "something more such as special state-related design, advertising, advice, marketing, or anything else,' the Constitution does not allow jurisdiction on the basis of a stream of commerce theory." *Id.* As is the case here, "Plaintiff [had] not alleged a regular course of sales in [the forum State], nor [had] it alleged anything 'more' that reveal[ed] a particular targeting of [the forum State]. Rather Plaintiff allege[d] only that Defendant intended to place goods into a national stream of commerce and knew (or should have known) that some of them might end up being sold in [the forum State]." *Id.*

24. Finally, the Eastern District of New York in *Dejana v. Marine Tech. Inc.*, adopted the opinion of the *McIntyre* plurality and refused to exercise jurisdiction over an out-of-state manufacturer where the manufacturer "ought to have predicted that its boats would reach New York," but did not "'target[]' New York within the meaning of the Supreme Court's minimum contacts jurisprudence." No. 10-CV-4029 (JS) (WDW), 2011 WL 4530012, at *5 (E.D.N.Y. Sept. 26, 2011). The court reasoned that "[s]omething more than foreseeability is required before the Court can exercise jurisdiction over Defendants." *Id.* at *6.

25. In light of the foregoing body of recent case law confirming that mere participation in a national stream of commerce is not sufficient to support the exercise of personal jurisdiction, it would be improper for this Court to rely on the outdated opinions issued

in *In re MTBE*.[1] The foundation of both of those opinions has been overruled by more recent case law including an opinion recently issued by the exact same court. *See In re MTBE*, 2014 WL 1778984.

5. Vermont Precedent is in Accord the Supreme Court and Courts in the Second Circuit

26. In *Emery v. Shell Oil Company,* the Washington Unit of the Vermont Superior Court was presented with the same unconvincing argument being asserted by Plaintiff here. No. 80-2-09 Wncv (Vt. Super. Ct. Jan. 14, 2011) (Attached hereto as Exhibit 3). The *Emery* plaintiffs alleged Mr. Emery suffered injury due to his exposure to benzene-containing products that were manufactured and distributed to Vermont by a number of defendants, including Cleveland Lithichrome ("Cleveland"). *Id.* at 1. Cleveland, in turn, filed a third-party complaint, seeking indemnification from Barton Solvents based on the theory that any injury suffered by Mr. Emery resulted from exposure to benzene-containing components that were manufactured by Barton. Barton, an out-of-state defendant with no presence in Vermont, filed a motion to dismiss for lack of specific personal jurisdiction. *Id.*

27. Cleveland's argument in support of personal jurisdiction rested on the allegation that "Barton Solvents knew that its product was being incorporated into Cleveland Lithichrome products that would be distributed nationally." *Id.* at 6. After a thorough discussion of the

[1] Each of the remaining cases cited by Plaintiff to support its position involve "something more" than mere participation in a national market. In *Kaplan v. DaimlerChrysler*, defendant, DaimlerChrysler, maintained a wholly owned subsidiary for the exclusive purpose of distributing its vehicles in the United States. 99 F. Supp. 2d 1348, 1350 (M.D. Fla. 2000). The record also showed that DaimlerChrysler had altered the design of its product "to meet the requirements of the United States government's environmental regulations." *Id.* at 1352. In *R. & J. Tool Inc. v. Manchester Tool Co.*, defendant "established and maintain[ed] business relationships with New Hampshire entities, thereby creating a regular distribution channel through which its products are marketed and sold in this forum"). No. CIV. 99–242–M, 2001 WL 1636435, at *4 (D.N.H. April 21, 2001). *N. Am. Phillips Corp. v. Am. Vending Sales, Inc.* involved two defendant manufacturers, each of whom "entered into contracts to sell video games with two distributors based in Illinois," "had ongoing business relationships with their Illinois customers, including visits . . . to promote sales of their products to those customers," and "participated in trade shows in Illinois to promote sales of their products." 35 F.3d 1576, (Fed. Cir. 1994).

controlling Supreme Court precedent in *World-Wide Volkswagen* and the divided opinion of the Court in *Asahi*, the Vermont court summarily rejected Cleveland's argument:

> This argument has several defects. First, Cleveland's argument reflects an even broader stream-of-commerce theory than even Justice Brennan endorsed in [his concurrence] in *Asahi*. Justice Brennan's analysis was not that Asahi should be subject to the jurisdiction of every state because it was aware that its products were being marketed nationally. Asahi specifically knew that the stream of commerce was taking its products to California routinely, not incidentally. Contacts thus were sufficient in California [according to the standard set forth in his concurrence]. The United States Supreme Court has never endorsed a stream of commerce theory as broad as that apparently advocated here by Cleveland.

Id. The opinion was issued just a few days after *McIntyre* was argued before the Supreme Court, foreshadowing the rule of law ultimately announced a few months later in the *McIntyre* concurrence confirming that a manufacturer's mere knowledge that "its products are distributed through a nationwide distribution system that *might* lead to those products being sold" in the forum State is insufficient to establish personal jurisdiction. *McIntyre*, 131 S. Ct. at 2793 (Breyer, J., concurring).

28. Each of the Vermont cases cited by Plaintiff in its Opposition involve some affirmative conduct on behalf of the defendant to serve the Vermont market beyond mere participation in an alleged national market. For example, in *Northern Aircraft v. Reed*, the defendant sought out the services of a Vermont-based distributor in selling aircraft owned by the defendant. 572 A.2d 1382, 1384 (Vt. 1990). In a breach-of-contract suit later brought by Northern Aircraft, defendant moved to dismiss for lack of personal jurisdiction. The Vermont Supreme Court denied the motion based on the fact that "defendant initiated the contact with plaintiff in Vermont. He purposefully sought out and directed his activity towards a Vermont corporation. Defendant's contact with the state [was] neither fortuitous, attenuated, nor random, but rather the result of an intentional act to advance his commercial interests." *Id.* at 1387.

29. In *Pasquale v. Genovese,* the defendant foreign manufacturer, Volkswagenwerk A.G., entered into a contractual relationship with its wholly owned subsidiary, Volkswagen of America, Inc., for the distribution of Volkswagen automobiles throughout the United States. 392 A.2d 395, 397 (Vt. 1978). While the existence of such a distribution agreement is not at issue here, the reasoning of the Vermont Supreme Court in *Pasquale* has been overruled by the Supreme Court's opinion in *McIntyre* wherein the Court concluded that the engagement of a U.S. distributor by a foreign manufacturer was insufficient to support personal jurisdiction. *See McIntyre*, 131 S. Ct. 2780.

30. Plaintiff also cites to a number of Vermont cases where defendants placed advertisements for their products in publications that reached customers in Vermont. *See* Opp. at 14-15 (citing *Dall v. Kaylor*, 658 A.2d 78 (Vt. 1995); *Brown v. Cal. Dykstra Equip. Co., Inc.*, 740 A.2d 793 (Vt. 1999); *Sollinger v. Nasco Int'l, Inc.*, 655 F. Supp. 1385, 1388 (D. Vt. 1987)). Because TPRI has conclusively established that it did not "advertise . . . any product containing MTBE in Vermont," each of these cases is wholly irrelevant to the Court's analysis.

6. The Fact that TPRI did not Challenge Jurisdiction in Previous Vermont Cases Consolidated in MDL 1358 is not Relevant to this Court's Analysis

31. Plaintiff makes the assertion that "although TPRI was a named defendant in the two Vermont cases consolidated in MDL 1358, it did not challenge Vermont's exercise of jurisdiction in those cases." Opp. at 2-3, 20. Although Plaintiff makes no attempt to identify the relevance of this point, TPRI presumes the State is suggesting that TPRI's failure to contest personal jurisdiction in those matters acts as a waiver of its right to do so here. Plaintiff, however, cites to no authority to support its repeated suggestion, and persuasive authority from other jurisdictions, in fact, holds just the opposite. For example, "[t]he Ninth Circuit has held that even if actions are closely related—as when different plaintiffs sue the same defendant in

different cases based on the same facts—defendants do not waive their personal jurisdiction defense by raising it only in a later action . . . ." *In re Cathode Ray Tube (CRT) Antitrust Litig.*, MDL No. 1917, 2014 WL 1091044, at *3 (N.D. Cal. Mar. 13, 2014) (citing *Dow Chem. Co. v. Calderon*, 422 F.3d 827, 835-36 (9th Cir. 2005) (wherein the court ruled that "defense on the merits in a suit brought by one party cannot constitute consent to suit as a defendant brought by different parties).

32. TPRI (f/k/a TOTAL PETROCHEMICALS USA, INC.) was not named as a defendant in either of the previous Vermont MTBE cases until October 29, 2004, months after the motions to dismiss for lack of personal jurisdiction were already on file. TPRI made a strategic decision to join the Rule 12(b)(6) motions rather than the 12(b)(2) motions given the procedural posture of the case. Further, by the time TPRI was added to the Vermont cases, sixty-one cases had already been transferred to MDL 1358, only four of which had been selected as Focus Cases slated for expedited discovery. No other discovery was to proceed in any of the non-focus cases, including the two cases filed in Vermont. *See In re MTBE Products Liability Litigation*, Master File No. 1:00-1898, MDL 1358 (SAS), No. M21-88, (S.D.N.Y. October 19, 2004) (unpublished "Case Management Order #4" attached hereto as Exhibit 4). The Vermont cases were never actually litigated and were eventually consolidated in an omnibus settlement agreement resolving sixty cases in seventeen states. The minimal burden suffered by TPRI in remaining a defendant in those two small matters where discovery was never even conducted cannot compare to the burden it would suffer here in defending a state-wide action alleging widespread contamination of the waters of a foreign jurisdiction. *See* Complaint at ¶ 1.

B. TPRI's *de minimis* Contacts with the State of Vermont Cannot Support General Jurisdiction

33. As TPRI conclusively established in its Motion to Dismiss, its contacts with the State of Vermont do not even approach the kind of contacts which are "so constant and pervasive as to render it essentially at home in the forum State." *Daimler AG v. Bauman*, 134 S. Ct. 746, 751 (2014) (citing *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2851 (2001) (internal quotations and punctuation omitted). Plaintiff cites to no case law to support any theory that the limited sales and temporary storage of polypropylene could render it subject to the general jurisdiction of this Court. *See* Motion at ¶ 23 for contrary authority; *see also Viko v. World Vision, Inc.*, No. 2:08-CV-221, 2009 WL 2230919, at *16 (D. Vt. July 24, 2009) ("This Court and this Circuit have found mere sales . . . to be an insufficient basis for general jurisdiction." (citations omitted)). Plaintiff only makes a cursory mention of those facts in its Opposition. Opp. at 26. Plaintiff's attempt to compare the revenue derived from TPRI's minimal sales of polypropylene in Vermont to the "*tens of billions* of dollars [made by Lyondell from] selling a variety of chemicals nationwide over the last two decades . . . [that] are used to produce plastics such as foam cups and containers . . . that are sold in every state in the nation," is plainly unavailing. Opp. at 27 (citing *In re MTBE Products Liability Litig.*, 2005 WL 106936, at *10 n.106 (emphasis in original)). Plaintiff's baseless allegations that TPRI "sells chemical products in every state including Vermont" and that it "maintains regular sales relationships with Vermont distributors" are wholly unsupported by any facts in the record. Opp. at 27. In sum, Plaintiff has failed to establish that TPRI's limited sales of an unrelated product in Vermont operate to subject TPRI to the general jurisdiction of this Court.

34. Instead, Plaintiff seeks to establish general jurisdiction over TPRI through factual allegations that pertain to TPRI's corporate parent, TOTAL S.A., and Bostik, a wholly-owned

subsidiary of TOTAL S.A. As an initial matter, neither TOTAL S.A. nor Bostik are defendants in this matter, and therefore their purported contacts with the State of Vermont are irrelevant to the jurisdictional analysis as it pertains to TPRI. Courts uniformly refuse to attribute the contacts of a corporate parent to a subsidiary without evidence that the parent "exerts such dominance and control over the [subsidiary] that the two companies should be deemed the same corporation for purposes of jurisdiction." *In re Ski Train Fire in Kaprun, Austria on November 11, 2000*, 343 F. Supp. 2d 208, 216 (S.D.N.Y. 2004); *see also Universal Trading & Inv. Co. v. Credit Suisse (Guernsey) Ltd.*, 560 F. App'x 52, 55 n.1 (2d Cir. 2014) ("As our Circuit has held, a parent company's control over a subsidiary is generally not enough to subject the subsidiary to suit . . . jurisdiction is only proper when the activities of the parent show a disregard for the separate corporate existence of the subsidiary"); Allen-Sleeper v. Fed. Exp. Corp., No. 5:09-CV-151-CR, 2010 WL 3323660, at *3-4 (D. Vt. Apr. 14, 2010) (The Vermont "approach is consistent with that taken by other courts which hold that the mere presence of a subsidiary in the forum and a parent's resulting control over that subsidiary is insufficient, without more, to provide the basis for general jurisdiction." (citing Pasquale v. Genovese, 136 Vt. 417, 420, 392 A.2d 395 (1978))).. Plaintiff has not even alleged that TOTAL S.A. maintains control over the operations of TPRI or that it ever exhibited a disregard for the corporate separateness of its subsidiaries. Plaintiff's attempt to attribute the actions of Bostik to TPRI would require this Court to "undertake 'a double piercing' of the corporate veil" to find TPRI subject to personal jurisdiction "by virtue of the existence of [its] sister subsidiary." *Basler Securitas Versicherungs-Aktiengesellschaft as subrogor of Bay AG v. Panalpina Transportes Mundiales, S.A.*, No. 09 CIV 4521 PKC, 2010 WL 5393500, at *4 (S.D.N.Y. Oct. 27, 2010). Again, such an exercise is not

supported by the record, in which Plaintiff has failed to allege that either TOTAL S.A. or TPRI ever maintained any measure of control over Bostik's operations.

35. Even if the Court were to disregard the corporate separateness of TPRI and its corporate parent, jurisdiction would still be improper because TOTAL S.A. could not be subject to personal jurisdiction in Vermont. In considering a motion to dismiss brought by TOTAL S.A. in *In re MTBE Products Liability Litig.*, the Southern District of New York found that TOTAL S.A. could not be subject to personal jurisdiction in Puerto Rico:

> Because [TOTAL S.A.] is a holding company that has never operated in Puerto Rico or participated directly in the MTBE market, Puerto Rico lacks personal jurisdiction over it with respect to the claims alleged.

959 F. Supp. 2d 476, 491-492 (S.D.N.Y. 2013). The exact same analysis is applicable here. Plaintiff has not demonstrated that TOTAL S.A. ever directly participated in the Vermont market for MTBE or gasoline containing MTBE or maintained any jurisdictionally relevant contacts with the State of Vermont.

C. Absent a Showing of Minimum Contacts, Asserting Jurisdiction over TPRI would Offend Traditional Notions of Fair Play and Substantial Justice

36. Plaintiff asserts that the assertion of jurisdiction over TPRI is fair and just principally because of the State's interest in bringing this suit on behalf of the public to prevent pollution of the State's groundwater *resources*. Opp. at 28. While such an interest is arguably legitimate, it cannot overcome TPRI's lack of minimum contacts with the State. *See e.g., Metro. Life Ins. Co. v. Robertson-CECO Corp.*, 84 F.3d 560, 568 ("[I]f the constitutionally necessary first-tier minimum [contacts are] lacking, the inquiry ends."). Courts have rejected similar arguments made by other States asserting a strong desire to protect their citizens. In *Asahi*, the Supreme Court rejected the Supreme Court of California's argument that "the State had an interest in 'protecting its customers by ensuring that foreign manufacturers comply with the

state's safety standards." 480 U.S. at 106. In *McIntyre*, the Supreme Court similarly disregarded "the State's 'strong interest' in protecting its citizens from defective products." 131 S. Ct. at 2791 ("That interest is doubtless strong, but the Constitution commands restraint before discarding liberty in the name of expediency."). TPRI's lack of a meaningful connection to the State of Vermont cannot be cured by the State's interests, however strong it may allege them to be.[2]

D. Only the Affidavit of Kim Arterburn Should be Considered by the Court

37. "An affidavit used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated." V.R.C.P. 56(c)(4). The only affidavit that meets those requirements is that of Ms. Arterburn.

1. The Affidavit of Kim Arterburn Meets All Legal Requirements to Support a Motion to Dismiss for Lack of Personal Jurisdiction

38. Plaintiff's argument that the affidavit of Kim Arterburn is not based on personal knowledge and is, therefore, insufficient is unfounded. As specifically stated in Ms. Arterburn's affidavit, the facts contained therein are within her personal knowledge and are true and correct. Arterburn Aff. at ¶1. Ms. Arterburn's affidavit also complies with the additional requirements of Vermont Rule of Civil Procedure 56(c)(4) because it details the jurisdictional facts that would be admissible in evidence and specifically states that Ms. Arterburn is over eighteen (18) years of age, has never been convicted of a felony, is fully competent to make the affidavit, and that the matters stated in the affidavit are within her personal knowledge as Senior Manager, Financial

[2] The primary case cited by Plaintiff in support of its argument that the exercise of jurisdiction over TPRI would be "fair and just" bears no resemblance to the facts of this case. In *State of Vermont v. MPHJ Tech. Inv., LLC*, defendant sent "'hundreds or thousands' of letters to businesses in Vermont alleging potential patent infringement," and, in fact, "threatening litigation." No. 282-5-13 Wncv, at 2 (Vt. Super. Ct. August 28, 2014) (Opp. at Ex. E). The Vermont Superior Court found personal jurisdiction particularly appropriate in that case because the letters themselves were alleged to be "violations of the law, purposefully directed at Vermont residents." *Id.* at 6. No such facts are present in the case at bar.

Accounting, for TPRI. Arterburn Aff. at ¶¶ 1-2. Moreover, as evidenced by her position at TPRI, Ms. Arterburn is in the distinct position to attest to the financial and business activities of TPRI, as reported in her affidavit. *See id.* Plaintiff's allegation that Ms. Arterburn is nothing "more than a mere fact witness" is nonsensical. Opp. at 32. TPRI has never claimed Ms. Arterburn is an expert, only that she is competent to testify to those matters within her own personal knowledge—including those set forth in her affidavit.

39. Plaintiff's complaint that Ms. Arterburn's Affidavit does not describe in detail the methods by which she gained the knowledge contained in her affidavit is entirely unsupported. Indeed, none of the cases cited by Plaintiff support its theory. For example, in *U.S. Bank*, the court found an affidavit insufficient for summary judgment purposes because it was "[f]raught with contradictions and evidently lacking information based on personal knowledge[.]" *U.S. Bank Nat'l Ass'n v. Kimball*, 27 A.3d 1087, 1093 (Vt. 2011). The affidavit at issue in that case attested to an "endorsement that supposedly took place several years before [the affiant's] company began servicing" the loan in question, and thus created the inevitable, and unanswered, question of how the affiant gained the information. *Id.* These facts are not present here. Ms. Arterburn's Affidavit does not contain any contradictions and, as explained above, all the facts contained therein are based on her personal knowledge as Senior Manager, Financial Accounting, at TPRI. Similarly, the *Gerling-Konzern* case quoted by Plaintiff is inapposite because the court did not analyze or rule on the sufficiency of the submitted affidavit. *Gerling-Kinzern Gen. Ins. Co.--U.K. Branch v. Noble Assur. Co.*, No. 2:06-CV-76, 2006 WL 3251491, at *8 n. 11 (D. Vt. Nov. 1, 2006). The court merely denied a motion to strike an affidavit as moot and reminded the parties "that should SPI renew its 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.'" *Id.*

40. The two additional cases cited by Plaintiff are likewise irrelevant. In *Levy*, the affidavit at issue contained assertions based "upon information and belief," rather than the affiant's "personal knowledge," as is the case here. *Levy v. Town of St. Albans Zoning Bd. of Adjustment*, 564 A.2d 1361, 1365 (1989). In *Alpstetten*, the "affidavit" at issue was a signed set of interrogatory answers relied on in support of summary judgment. *Alpstetten Ass'n, Inc. v. Kelly*, 408 A.2d 644, 647-48 (1979). The court found that the interrogatory answers were not sufficient to overcome the allegations in the complaint because they were only signed by one officer of the company and, "[e]ven if the one officer purported to speak for all agents of the corporation, his representations as to their knowledge would be hearsay, which cannot supply the basis of a summary judgment affidavit." *Id.* The affidavit was thus discredited because it was not based on the affiant's personal knowledge.

41. Plaintiff's argument is also unavailing because the State seeks to rely in its own Opposition on affidavits Ms. Arterburn and other TPRI employees submitted on the basis of their personal knowledge in other matters. *See* Opp. at Ex. C, Ex. D. Plaintiff cannot credibly ask this Court to rely on sworn affidavits submitted by Ms. Arterburn and others for the purposes of its Opposition while at the same time seek to discredit Ms. Arterburn's Affidavit for purposes of Defendant's Motion. Ms. Arterburn's uncontroverted affidavit meets all legal requirements and is sufficient to support a dismissal based on lack of personal jurisdiction. *See, e.g., King v. Washington Adventist Hosp.*, 2 F. App'x 140, 141 (2d Cir. 2001) (granting a Rule 12(b)(2) motion to dismiss based on an affidavit stating that the defendant was not licensed to practice in the forum State, was not served with process in the forum State, did not transact business in the

forum State, did not solicit or engage in business in the forum State, and did not have any real property or bank accounts in the forum State).

2. The Affidavit of Bruce Burke Should Be Disregarded by the Court

42. Conversely, the *opinions* contained in the affidavit of Plaintiff's expert, Bruce Burke, do not meet the requirements of Rule 56. As referenced above, "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-Kinzern*, 2006 WL 3251491, at *8 n. 11 (quoting Fed. R. Civ. P. 56(e)).

43. The statements in Mr. Burke's affidavit are not facts based on personal knowledge, but rather premature and improper expert opinions. *Compare* Burke Aff. at p. 1 (My "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 [TPRI]"), *with Neewra, Inc. v. Manakh Al Khaleej Gen. Trading & Contracting Co.*, No. 03 CIV. 2936 (MBM), 2004 WL 1620874, at *2 n. 3 (S.D.N.Y. July 20, 2004) (disregarding an affidavit that made allegations "based on [a] review of the documents and conversations with various persons."). Consequently, any allegations or opinions set forth in Mr. Burke's affidavit should be disregarded by the Court. *Neewra, Inc.*, 2004 WL 1620874, at *2 n. 3 ("To the extent [a] declaration asserts facts that are not based on [] personal knowledge, [the] declaration will be disregarded." (citations omitted)); *see Schwartz v. Frankenhoff*, 733 A.2d 74, 78 (Vt. 1999) (Evidence in support of personal jurisdiction should include "a verified statement of jurisdictional facts, based on personal knowledge, showing specific tortious or unlawful acts by each of the additional defendants, sufficient to demonstrate . . . minimum contacts.").

3. Plaintiff's Remaining Attached and Referenced "Evidence" is Objectionable

44. Plaintiff's Opposition references in its text and/or attaches a number of materials that Plaintiff presumably wants this Court to consider as evidence. Although TPRI is entitled to dismissal even if the Court takes all of Plaintiff's assertions as true, it objects to Plaintiff's "evidence" for the record. In addition to the objections to the Burke Affidavit raised above, TPRI objects as follows. The "Petroleum Product Inter-PADD Pipeline Movements, 2010" table (Opp. at 6) is not attributed to any source and therefore lacks authentication and foundation, and is hearsay. Further the table purports to be for the year 2010, which is several years after MTBE gasoline ceased being distributed in Vermont, thus it is plainly irrelevant. *See* Vt. Stat. Ann. tit. 10 § 577 (2013). Plaintiff also attached email correspondence (Exhibit B), and cites the Court to several internet websites (Opp. at 7-8, 26). These materials also lack authentication and foundation, and are hearsay. TPRI would also point out that numerous times in its Opposition, factual statements (arguments really) are made by counsel which are unsupported by any citation, or which are cited to a source which does not contain the alleged fact. *See e.g.* Opp. at 11 (incorrectly citing the affidavit of Mr. Knight for the statement that certain entities "delivered gasoline with MTBE to Vermont" and further alleging that "gasoline radiated out from the New Jersey nucleus to New England, including Vermont" with no foundation whatsoever—not even Plaintiff's expert describes the physical process by which gasoline is delivered to Vermont).

E. The Court Should Deny Plaintiff's Request for Jurisdictional Discovery

45. Plaintiff's request for jurisdictional discovery is unwarranted. To be entitled to jurisdictional discovery, a plaintiff must "establish a prima facie case that the district court [has] jurisdiction over a defendant," or at least show "specific, non-conclusory facts that, if further developed, could demonstrate substantial state contacts." *Viko*, 2009 WL 2230919, at *16; *see Best Van Lines, Inc. v. Walker*, 490 F.3d 239, 255 (2d Cir. 2007) ("We conclude that the district

court acted well within its discretion in declining to permit discovery because the plaintiff had not made out a prima facie case for jurisdiction." (citing *Jazini v. Nissan Motor Co.*, 148 F.3d 181, 186 (2d Cir. 1998))).

46. As detailed in this Reply, Plaintiff failed to make a prima facie showing of personal jurisdiction or to assert any specific, non-conclusory facts that could establish personal jurisdiction. Indeed, Plaintiff's argument for personal jurisdiction is based on its overly expansive view of the stream-of-commerce theory, supported by the expert *opinions* of Bruce Burke, not on any disputed facts. *See* Plaintiff's Rsp. at pp. 13-27. The question before the Court is thus one of law, not facts. The four "jurisdictional subjects" on which Plaintiff claims it needs discovery are not "specific, non-conclusory facts that, if further developed, could demonstrate substantial state contacts," but rather vague categories of tenuous connections to Vermont *and the surrounding area*. *Id.* at p. 35.

47. Moreover, the two "jurisdictional subjects" asserted by Plaintiff that relate to Vermont have already been explained in detail in Ms. Arterburn's Affidavit and have not been disputed by Plaintiff. *Id.*; Arterburn Aff. at ¶¶ 3-13. The only two subjects related specifically to Vermont are: (1) "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 (2) "TPRI's business activities in Vermont, including more than $1 million in polypropylene sales TPRI admits to transacting in Vermont." Opp. at 35. TPRI has already fully addressed both of these categories in Ms. Arterburn's Affidavit. Arterburn Aff. at ¶ 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."), ¶¶ 4-13 (detailing all of TPRI's business activities,

or lack thereof, in Vermont and all revenue TPRI received from sales in Vermont). Plaintiff provides no facts disputing any of the statements in Ms. Arterburn's Affidavit, nor does it explain how additional discovery relating to the subjects set forth will impact the determination of personal jurisdiction, especially in light of the well-established rule that sales, especially *de minimis* sales, do not create general jurisdiction. *Daimler*, 134 S. Ct. at 761-62; *Viko*, 2009 WL 2230919, at *16. Further, Plaintiff has demonstrated that it already has information pertaining to "TPRI's sales of MTBE-containing gasoline to PADD 1," and "TPRI's exchange agreements" by the inclusion of such data within the affidavits attached to its Opposition as Exhibit C. As Plaintiff is aware, none of that information depicts any sales directed to the State of Vermont. Further investigation into these topics would be futile.

48. Consequently, because Plaintiff did not make a prima facie showing of personal jurisdiction or assert any specific, non-conclusory facts that would establish jurisdiction, Plaintiff's request for jurisdictional discovery should be denied. *See Viko*, 2009 WL 2230919, at *16-17 (refusing to permit jurisdictional discovery where the plaintiff had "not made a prima facie showing of jurisdiction [or] provided any basis for the good faith belief that further discovery [would] establish the contacts required before this Court may exercise general jurisdiction over a foreign defendant"); *see also Jenkins v. Miller*, 983 F. Supp. 2d 423, 446-48 (D. Vt. 2013) ("Given the dearth of specific facts that connect [the defendant] with tortious activity directed against Plaintiffs, their request for jurisdictional discovery is denied.").

49. Plaintiff's request for jurisdictional discovery is also untimely. Plaintiff had notice of all facts supporting TPRI's Motion to Dismiss on August 21, 2014, the day it was filed. If it considered jurisdictional discovery necessary, it could and should have notified TPRI when it sought assent to file its Motion for Extension of Time to Respond to TPRI's Motion to

Dismiss. Its request to seek jurisdictional discovery at this stage of the pleadings when briefing on TPRI's Motion is complete and the matter has already been set for oral hearing would only serve to delay this Court's inevitable ruling. Should the Court elect to consider Plaintiff's request for jurisdictional discovery, Plaintiff should be required to file a motion seeking leave to serve limited jurisdictional discovery and attach copies of all proposed requests so that they may be properly evaluated by this Court. TPRI has sought dismissal of this action on the basis that it is not subject to the personal jurisdiction of this Court. Any jurisdictional discovery granted should therefore be as narrowly tailored as possible to accomplish the State's goals without subjecting TPRI to unnecessary and undue burden.

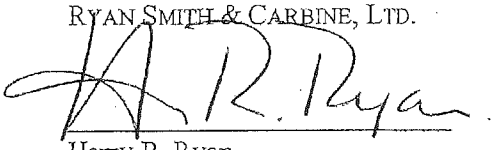
IV. CONCLUSION

50. Based on the foregoing, Plaintiff has not met its burden of establishing personal jurisdiction over TPRI, and any attempt to amend the Complaint or engage in jurisdictional discovery would be futile. TPRI therefore respectfully requests that this Court issue an order dismissing Plaintiff's Complaint against TPRI with prejudice.

Dated: October 3, 2014

Respectfully submitted,

RYAN SMITH & CARBINE, LTD.



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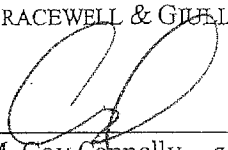

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EXHIBIT 1

EXHIBIT 1

Slip Copy, 2014 WL 1778984 (S.D.N.Y.)
(Cite as: 2014 WL 1778984 (S.D.N.Y.))

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Only the Westlaw citation is currently available.

United States District Court,
S.D. New York.
In re METHYL TERTIARY BUTYL ETHER ("MTBE") PRODUCTS LIABILITY LITIGATION.
This document relates to: Commonwealth of Puerto Rico et. al., v. Shell Oil Co. et al., 07 Civ. 10470 and 14 Civ. 1014.

Master File No. 1:00–1898.
MDL No. 1358 (SAS).
No. M21–88.
Singed May 5, 2014.

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Michael A. Walsh, Esq., Strasburger & Price, LLP, Dallas, TX, for Defendant Tauber Oil.

OPINION AND ORDER

SHIRA A. SCHEINDLIN, District Judge.

I. INTRODUCTION

*1 This is a consolidated multi-district litigation ("MDL") relating to contamination—actual or threatened—of groundwater from various defendants' use of the gasoline additive methyl tertiary butyl ether ("MTBE") and/or tertiary butyl alcohol, a product formed by the breakdown of MTBE in water. In this case, the Commonwealth of Puerto Rico ("the Commonwealth") alleges that defendants' use and handling of MTBE has contaminated, or threatened to contaminate groundwater within its jurisdiction. Familiarity with the underlying facts is presumed for the purposes of this Order.

Tauber Oil Company ("Tauber") now moves to dismiss the Commonwealth's complaints [FN1] for lack of personal jurisdiction.[FN2] For the following reasons, the motion is granted.

FN1. Tauber moves to dismiss both the Third Amended Complaint ("TAC") in the 07 Civ. 10470 case (*"Puerto Rico I"*) and the Complaint ("Compl.") in the 14 Civ. 1014 case (*"Puerto Rico II"*).

FN2. Tauber styles its motion as a motion to dismiss but submitted a Local Rule 56.1 Statement. Because motions to dismiss for lack of personal jurisdiction are governed by Rule 12(b)(2), the Court will deem the motion brought pursuant to Rule 12(b)(2). However, Tauber's Local 56.1 Statement ("Def 56.1"), the Commonwealth's Opposition to Tauber's 56.1 Statement and Additional Facts ("PI.56.1"), and Tauber's Amended Rule 56.1 Statement and Opposition to Plaintiffs' Rule 56.1 Statement ("Def. Reply 56.1") will nonetheless be considered because "a district court may [consider materials outside the pleadings] without converting a motion to dismiss for lack of personal jurisdiction into a motion for summary judgment." *Dorchester Fin. Sec., Inc. v. Banco BRJ, S.A.*, 722 F.3d 81, 86 (2d Cir.2013).

II. BACKGROUND[FN3]

FN3. Where the parties have conducted jurisdictional discovery, a court may consider affidavits and other materials outside the pleadings. *See id.* at 85 ("[After discovery], the prima facie showing must be fac-

tually supported.").

Tauber is a Texas-based marketer of energy products.[FN4] From 1985 to 1997, Tauber sold MTBE to Phillips Petroleum Company ("Phillips Petroleum"), Phillips 66 Company, and Phillips Chemical Company ("Phillips entities")—all located in Bartlesville, Oklahoma—in a series of "spot sales."[FN5] Tauber had no distribution or agency agreements with any Phillips entity.[FN6] Because all MTBE sales were governed by Free on Board contracts, title transferred from Tauber to the Phillips entities in Texas.[FN7] Tauber had no title on the vessel that transported the MTBE and no involvement in determining the MTBE's ultimate destination.[FN8]

FN4. *See* Declaration of Kevin Wilson ("Wilson Decl."), Vice President of Tauber, ¶ 4.

FN5. *See id.* ¶¶ 30, 33. A spot sale is a stand-alone agreement for a purchase of a specified quantity "on the spot," reflecting the current market price of the commodity. *See id.* ¶ 30 n. 1.

FN6. *See id.* ¶ 37.

FN7. *See id.* ¶ 44; 12/16/13 Deposition of Kevin Wilson ("Wilson Dep."), Ex. A to the Declaration of Michael A. Walsh, counsel for Tauber, ("Walsh Decl."), at 73:13–75:6. The only exception is a 1996 transaction where Tauber acquired MTBE through an intermediary in Venezuela and sold the MTBE to Phillips 66 in Oklahoma. In that transaction, title transferred in Venezuela. *See* Reply Declaration of Kevin Wilson ("Wilson Reply Decl.") ¶ 5.

FN8. *See* Wilson Dep. at 73:13–75:6, 133:13–23.

Instead, Phillips Petroleum independently arranged for the shipment of neat MTBE to Puerto Rico for gasoline blending at Phillips Chemical Puerto Rico Core facility ("Core facility").[FN9] The Core facility sold gasoline to the wholesale market both in Puerto Rico and elsewhere.[FN10] However, the gasoline was not always blended with MTBE.[FN11] The Core facility sometimes used other octane enhancers.[FN12]

FN9. *See* Core Facility's Second Amended Objections and Responses to Plaintiffs' First Set of Interrogatories and Request for Production of Documents, Ex. B to the Walsh Decl., at 6.

FN10. *See* Declaration of Hector A. Marin ("Marin Decl."), Electrical Design Engineer at the Core facility, Ex. G to the Walsh Decl., ¶ 8.

FN11. *See id.* ¶ 3.

FN12. *See id.*

Tauber never manufactured, marketed, traded, stored, sold, solicited, advertised, or otherwise handled finished gasoline, gasoline containing MTBE, or neat MTBE in Puerto Rico.[FN13] Tauber was not involved in any decision by any Phillips entity to use or ship MTBE to Puerto Rico.[FN14] Nor was Tauber's price for MTBE contingent on the ultimate destination of the MTBE.[FN15]

FN13. *See* Wilson Decl. ¶¶ 6, 7.

FN14. *See id.* ¶¶ 36, 39.

FN15. *See id.* ¶ 42.

III. LEGAL STANDARD

A. Rule 12(b)(2) Motion to Dismiss

"The plaintiff bears the burden of establishing personal jurisdiction over the defendant."[FN16] "[W]here ... discovery has not begun, a plaintiff need only allege facts constituting a prima facie showing of personal jurisdiction to survive a Rule 12(b)(2) motion."[FN17] However, "[a]fter discovery, the plaintiff's prima facie showing, necessary

to defeat a jurisdiction testing motion, must include an averment of facts that, if credited by the trier, would suffice to establish jurisdiction over the defendant." FN18 Conclusory allegations are insufficient-"[a]t that point, the prima facie showing must be factually supported." FN19 When a "defendant rebuts plaintiffs' unsupported allegations with direct, highly specific, testimonial evidence regarding a fact essential to jurisdiction—and plaintiffs do not counter that evidence—the allegation may be deemed refuted." FN20

FN16. *MacDermid, Inc. v. Deiter,* 702 F.3d 725, 727 (2d Cir.2012) (internal citations omitted).

FN17. *M & M Packaging, Inc. v. Kole,* 183 Fed. App'x 112, 114 (2d Cir.2006).

FN18. *Dorchester,* 722 F.3d at 85.

FN19. *Id.*

FN20. *In re Stillwater Capital Partners Inc. Litig.,* 851 F.Supp.2d 556, 567 (S.D.N.Y.2012) (internal citations omitted).

***2** To determine whether it has personal jurisdiction over a party, a court conducts a two-part analysis. "First, it must consider whether the state's long-arm statute confers jurisdiction, and then it must determine whether such exercise comports with the Due Process Clause of the United States Constitution." FN21

FN21. *Glenwood Sys., LLC v. Med–Pro Ideal Solutions, Inc.,* 438 Fed. App'x. 27, 28 (2d Cir.2011).

B. Specific Jurisdiction Under Puerto Rico's Long Arm Statute

"Puerto Rico's long-arm statute allows Puerto Rico courts to exercise jurisdiction over a nonresident defendant if the action arises because that person: (1) '[t]ransacted business in Puerto Rico personally or through an agent'; or (2) 'participated in tortious acts within Puerto Rico personally or through his agent.' " FN22 "Puerto Rico's long-arm statute is coextensive with the reach of the Due Process Clause." FN23 Thus, the present inquiry is guided by "whether the exercise of personal jurisdiction [ ] would abide by constitutional guidelines" of Due Process. FN24

FN22. *Negron–Torres v. Verizon Commc'ns, Inc.,* 478 F.3d 19, 24 (1st Cir.2007) (quoting L.P.R.A., Tit. 32, App. III, Rule 4.7(a) (1)).

FN23. *Carreras v. PMG Collins, LLC,* 660 F.3d 549, 552 (1st Cir.2011) (citations omitted). *Accord Pritzker v. Yari,* 42 F.3d 53, 60 (1st Cir.1994) (citations omitted) (stating that Rule 4.7 "extends personal jurisdiction as far as the Federal Constitution permits").

FN24. *Gonzalez–Diaz v. Up Stage Inc.,* No. 11 Civ. 1689, 2012 WL 2579307, at *1 (D.P.R. July 3, 2012).

3. Due Process

The Supreme Court set forth the requirements of Due Process in *International Shoe v. Washington:* that a defendant "not present within the territory of the forum" have "certain minimum contacts with it such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." FN25 This analysis requires both a "minimum-contacts" test and a "reasonableness" inquiry.

FN25. 326 U.S. 310, 316 (1945) (quotation marks and citations omitted).

First, to satisfy minimum contacts for due process, the plaintiff must demonstrate that "the defendant purposely availed itself of the privilege of doing business in the forum and could foresee being haled into court there" and that "the claim arises out of, or relates to, the defendant's contacts with the forum." FN26 As the Supreme Court re-

cently explained, "the relationship [between the defendant and the forum state] must arise out of contacts that the 'defendant *himself* creates with the forum State." FN27 Though "a defendant's contacts with the forum State may be intertwined with his transactions or interactions with the plaintiff or other parties[,] a defendant's relationship with a plaintiff or third party, standing alone, is an insufficient basis for jurisdiction." FN28 "Due process requires that a defendant be haled into court in a forum State based on his own affiliation with the State, not based on the random, fortuitous, or attenuated contacts he makes by interacting with other persons affiliated with the State." FN29 As such, the "unilateral activity of another party or a third person is not an appropriate consideration when determining whether a defendant has sufficient contacts with a forum State to justify an assertion of jurisdiction." FN30

FN26. *Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez,* 305 F.3d 120, 127 (2d Cir.2002) (quotation marks and citations omitted).

FN27. *Walden v. Fiore,* —— U.S. ——, 134 S.Ct. 1115, 1122 (2014) (quoting *Burger King v. Rudzewicz,* 471 U.S. 462, 475 (1985)).

FN28. *Id.* at 1123 (citations omitted).

FN29. *Id.* (quotation omitted).

FN30. *Helicopteros Nacionales de Colombia, S.A. v. Hall,* 466 U.S. 408, 417 (1984).

Second, if the defendant's contacts with the forum state satisfy this test, the defendant may defeat jurisdiction only by presenting "a compelling case that the presence of some other considerations would render jurisdiction unreasonable." FN31

FN31. *Burger King,* 471 U.S. at 477. *Accord Chloe v. Queen Bee of Beverly Hills, LLC,* 616 F.3d 158, 173 (2d Cir.2010).

IV. DISCUSSION

***3** The Commonwealth mentions Tauber by name only once in each of its complaints, stating that "Tauber is a Delaware corporation headquartered at 55 Waugh Drive, Suite 700 in Houston, Texas 77007." FN32 No allegation in the pleadings links Tauber to the refining, supplying, marketing, or addition of MTBE to gasoline in Puerto Rico.

FN32. Compl. ¶ 81; TAC ¶ 64. In fact, Tauber is a Texas corporation. *See* Wilson Decl. ¶ 4.

Nevertheless, the Commonwealth now contends that Tauber "knew that its MTBE was destined for Puerto Rico" where it would be "blended into gasoline [at the Core facility] and distributed throughout the island." FN33 To support its contention, the Commonwealth cites assorted documents, including: (1) faxes and emails from Phillips' entities to Tauber that identify Puerto Rico as the destination for the vessels; FN34 (2) Tauber invoices and bills of lading from the Core facility; FN35 (3) various documents from non-party Tauber Petrochemical Company ("TPC"), Tauber's wholly owned subsidiary. FN36

FN33. Pl. Mem. at 7.

FN34. *See* Nomination Documents, Ex. 2 to the Declaration of Justin A. Arenas, counsel for the Commonwealth ("Arenas Decl.").

FN35. *See* Invoices, Ex. 10 to the Arenas Decl.; Bills of Lading, Ex. 9 to the Arenas Decl.

FN36. *See, e.g.,* Faxes and Letters, Ex. 3 to the Arenas Decl.

None show that Tauber "purposefully avail[ed] itself of Puerto Rico's laws. FN37 *First,* Tauber never solicited the destination information, and it was immaterial to Tauber's transactions with the Phillips entities. FN38 Although the Phillips entities

occasionally volunteered the destination information, they did so only *after* the parties had agreed on the terms of each transaction.[FN39] Even if Tauber knew that the Phillips entities were shipping the MTBE to Puerto Rico, " 'foreseeability' alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause." [FN40] Instead, "[d]ue process requires that a defendant be haled into court in a forum State based on *his own* affiliation with the State, not based on the random, fortuitous, or attenuated contacts he makes by interacting with other persons affiliated with the State ." [FN41] Here, Tauber never manufactured, marketed, delivered, or sold its MTBE in Puerto Rico.[FN42] Nor did it solicit or advertise its MTBE in Puerto Rico.[FN43] Instead, Tauber merely sold MTBE to the Oklahoma-based Phillips entities in a series of isolated "spot sales." [FN44] The independent decision of the Phillips entities to ship the MTBE to Puerto Rico does not establish jurisdiction over Tauber.

FN37. *Goodyear Dunlop Tires Ops., S.A. v. Brown,* —— U.S. ——, 131 S.Ct. 2846, 2854 (2011) (citing *Hanson v. Denckla,* 357 U.S. 235, 253 (1958)).

FN38. *See* Wilson Dep., Ex. A to the Walsh Decl., at 133:20–135:21.

FN39. *See id.* Only one agreement between Tauber and the Phillips entities referred to Puerto Rico. *See* Wilson Reply Decl. ¶ 5. There, Tauber purchased MTBE from Ecofuels and sold it to Phillips 66 in Venezuela, where the MTBE was retained for testing. *See id.* Title passed simultaneously from Ecofuels to Tauber to Phillips 66, and the shipment to Puerto Rico remained the responsibility of Ecofuels. *See id.* Tauber did not import the MTBE to Puerto Rico. *See id.* This transaction does not prove that Tauber had "minimum contacts" with Puerto Rico.

FN40. *World—Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 295 (1980).

FN41. *Walden,* 134 S.Ct. at 1123 (emphasis added). *Accord World—Wide Volkswagen,* 444 U.S. at 298 ("[T]he mere 'unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State.' ").

FN42. *See* Wilson Decl. ¶ 6.

FN43. *See id.* ¶ 7.

FN44. *See id.* ¶ 30.

Second, the Commonwealth's evidence fails to show that Tauber "knew its MTBE was blended into gasoline [at the Core facility] and then distributed" throughout Puerto Rico.[FN45] The Commonwealth cites to Tauber invoices as evidence that Tauber received payments from the Core facility.[FN46] In fact, these invoices indicate that the Phillips entities paid Tauber, and several months later, the Core facility paid the Phillips entities. There is no evidence that Tauber received payments from the Core facility or from any other Puerto Rico-based entity. In addition, the Commonwealth cites to bills of lading to show that the Core facility sometimes sold gasoline within Puerto Rico, and that this gasoline may have contained Tauber's MTBE.[FN47] Even accepting this assumption, the Core facility's records—which Tauber did not see until discovery—do not track "whether a sale of gasoline contained MTBE or not, nor do they reference or identify the batch from which a sale was derived." [FN48] As such, when Tauber transacted with the Phillips entities, it had no way of knowing whether its MTBE would ultimately be distributed within Puerto Rico.

FN45. Pl. Mem. at 6.

FN46. *See* Pl. 56.1 ¶ 73 (citing Invoices, Ex. 10 to Arenas Decl.).

FN47. *See* Pl. Mem. at 6.

FN48. Marin Decl. ¶ 8.

*4 *Third,* the Commonwealth attempts to establish jurisdiction over Tauber based on the actions of Tauber's subsidiary, TPC.[FN49] The Commonwealth argues that TPC sold neat MTBE to Puerto Rico, knowing that it would be blended with gasoline and distributed throughout Puerto Rico.[FN50] However, " '[t]he mere fact that a subsidiary company does business within a state does not confer jurisdiction over its nonresident parent, even if the parent is sole owner of the subsidiary.' "[FN51] Courts in the First Circuit require a "plus factor," such as a finding of an agency relationship between the two corporations, the parent corporation exercising "greater than ... normal [ ]" control over the subsidiary, or the subsidiary acting as "merely an empty shell" for the parent's operations.[FN52] The Commonwealth asserts that TPC and Tauber share office space and three of the same employees.[FN53] But an overlap in office space or employees is within the bounds of normal corporate structure.[FN54] Because the Commonwealth has not demonstrated the existence of a "plus factor," such as agency, extraordinary control, or shell, the Court cannot attribute TPC's actions to Tauber for jurisdictional purposes.[FN55]

FN49. *See* Pl. Mem. at 1.

FN50. *See id.*

FN51. *Negron–Torres,* 478 F.3d at 27 (quoting *Escude Cruz v. Ortho Pharm. Corp.,* 619 F.2d 902, 905 (1st Cir.1980)).

FN52. *Donatelli v. National Hockey League,* 893 F.2d 459, 466 (1st Cir.1990) (quotation marks and citations omitted).

FN53. *See* Pl. 56.1 ¶¶ 68, 70.

FN54. *See Escude Cruz,* 619 F.2d at 905 (noting that allegations of interlocking directorates will not suffice to show that the activities of the subsidiary should be attributed to the parent); *In re Lupron Mktg. & Sales Practices Litig.,* 245 F.Supp.2d 280, 292 (D.Mass.2003) (holding that customary incidents of a parent-subsidiary relationship—ownership, common personnel, profits, and managerial oversight—are not suspect and are insufficient for vicarious jurisdiction); *Ferreira v. Unirubio Music Publ'g,* No. 02 Civ. 805, 2002 WL 1303112, at *2 (S.D.N.Y. June 13, 2002) (holding that evidence of shared office space, address, telephone, and fax number will not alone cause the Court to disregard corporate formalities).

FN55. *See Donatelli,* 893 F.2d at 465–66 (citations omitted). Although Tauber raised lack of personal jurisdiction in its first responsive pleadings in both *Puerto Rico I* and *Puerto Rico II,* the Commonwealth argues that Tauber failed to preserve the defense because it engaged in merits-based discovery and only advised the Commonwealth about its Rule 12(b)(2) motion on February 21, 2014. *See* Pl. Mem. at 10. However, Tauber only noticed a single deposition, which it never took, and served a set of interrogatories. Both were focused on jurisdictional facts. It also presented Wilson for deposition on questions related to Tauber's lack of knowledge that MTBE was being shipped to Puerto Rico. Conducting jurisdictional discovery does not constitute waiver. In fact, the Second Circuit has expressly stated that a motion to dismiss for lack of personal jurisdiction in an MDL case is timely where, as here, it is raised before a transferee court at any time during the pre-trial proceedings. *See Hamilton v. Atlas Turner, Inc.,* 197 F.3d 58, 61–62 (2d Cir.1999) ("During the three years that this and similar cases were pending before the MDL, [defendant] could have raised its jurisdictional challenge before the transferee court.").

V. CONCLUSION

For the foregoing reasons, Tauber's motion is GRANTED. The Clerk of the Court is directed to close this motion (Doc. No. 364 in 07 Civ. 10470; Doc. No. 34 in 14 Civ. 1014).

SO ORDERED:

S.D.N.Y.,2014.
In re Methyl Tertiary butyl Ether (MTBE) Products Liabilyt Litigation
Slip Copy, 2014 WL 1778984 (S.D.N.Y.)

END OF DOCUMENT

EXHIBIT 2

EXHIBIT 2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re: Methyl Tertiary Butyl Ether ("MTBE") Products Liability Litigation

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This Document Relates To:
Commonwealth of Puerto Rico, et al. v. Shell Oil Company, et al.,

Case No. 07-CV-10470-SAS
Case No. 14-CV-1014-SAS

MDL No. 1358
C.A. No. 1:00-1898 (SAS)
M21-88

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT TAUBER OIL COMPANY'S MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION

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COMES NOW Defendant Tauber Oil, Company ("Tauber"), through undersigned attorneys and hereby submits this its Memorandum of Law in Support of its Motion to Dismiss Plaintiff's Third Amended Complaint filed in Case No. 07-CV-10470-SAS and Plaintiff's First Amended Complaint filed in Case No. 14-CV-1014-SAS pursuant to Federal Rule of Civil Procedure 12(b)(2).

I. Preliminary Statement

Tauber engaged in "spot sales" [1] in Texas of MTBE with Phillips in Bartlesville, Oklahoma and nothing more. There is no allegation nor is there any evidence of any conduct on the part of Tauber that connects Tauber to any claim in this case. The Court lacks personal jurisdiction over Tauber, a Texas company, which had and has no involvement in the refining, marketing, and supplying of MTBE or gasoline containing MTBE in the Commonwealth of Puerto Rico (the "Commonwealth"). Tauber has and had no presence whatsoever in the Commonwealth and the facts set forth below demonstrate that Tauber has not availed itself of the protections of Puerto Rico law and is not subject to jurisdiction in this case.

II. Factual Background

Tauber is a Texas based marketer of energy products that engaged in spot sales of MTBE with Phillips Petroleum Company ("PPC") and the following related divisions, Phillips 66 Co. ("Phillips 66") and Phillips Chemical Co. ("PCC"), all located in Bartlesville Oklahoma. As detailed below, every sale was Free on Board (FOB)[2] outside of Puerto Rico. Tauber never

[1] Spot and forward contracts are based on cargo-by-cargo transactions. Spot transactions mean those with schedules within fifteen days to one month (oil trading for delivery on the same day is rare). A spot sale is a term to distinguish the sale from other sales such as those under a supply agreement. *See* Declaration of Kevin Wilson at fn.1.

[2] Free on Board describes the terms of a transaction where the seller agrees to make the product available within an agreed-upon time period at a given location. U.C.C. § 2-319.

contracted with any Puerto Rico entity for the sale or delivery of MTBE into Puerto Rico.[3]

The Declaration of Kevin Wilson, sworn to on February 26, 2014 (the "Wilson Declaration") establishes that Tauber has no contacts with the Commonwealth to establish either general or specific jurisdiction. The Wilson Declaration establishes that:

- Tauber is a Texas company, incorporated and registered in Texas. *Id.* at ¶4.
- Tauber's principal place of business is in Texas. *Id.* at ¶5.
- Tauber has never manufactured, marketed, traded, stored, sold or otherwise handled finished gasoline, gasoline containing MTBE, or MTBE in Puerto Rico. *Id.* at ¶ 6.
- Tauber, its distributors, and agents have never solicited, advertised or marketed the sale of gasoline or MTBE in Puerto Rico and have never taken any actions to create a market for gasoline or MTBE in Puerto Rico. *Id.* at ¶ 7.
- Tauber does not have a distribution agreement with any person, company, or agent to distribute gasoline containing MTBE, or MTBE in Puerto Rico. *Id.* at ¶ 8.
- Tauber has never entered into a distribution agreement with a person, company, or agent to solicit, advertise, market, or sell MTBE or gasoline containing MTBE in Puerto Rico. *Id.* at ¶ 9.
- Tauber never designed MTBE, gasoline containing MTBE, or any product to be specifically used in Puerto Rico. *Id.* at ¶ 10. Tauber has never had any of its officers, directors, employees or agents travel to Puerto Rico for any business-related purpose or activity. *Id.*
- Tauber has never filed, and is not required to file, any tax returns in Puerto Rico and has never paid taxes in Puerto Rico. *Id.* at ¶ 11.
- Tauber owns no real or personal property located in Puerto Rico. *Id.* at ¶12.Tauber has never leased real or personal property in Puerto Rico. *Id.* at ¶ 13.
- Tauber has never maintained, controlled, leased, or operated storage tanks, pipelines, or service stations in Puerto Rico. *Id.* at ¶ 14.
- Tauber has never maintained a place of business or office in Puerto Rico and employs no agents or employees in Puerto Rico. *Id.* at ¶ 15.

[3] Tauber is not alleged to have sold gasoline containing MTBE that was delivered to Puerto Rico, nor is Tauber aware of any evidence from any party establishing or inferring that Tauber sold MTBE gasoline that was delivered to Puerto Rico.

- Tauber has never had any officers, directors, employees or agents acting on its behalf present in Puerto Rico, including any agent for service of process in Puerto Rico. *Id.* at ¶ 16.

- Tauber has never had a bank account, phone number, fax number, or any corporate records located in Puerto Rico. *Id.* at ¶ 17.

- Tauber has not initiated litigation in Puerto Rico. *Id.* at ¶ 18.

- Tauber has not engaged in any commercial activity to purposefully avail itself of the protections of the laws of Puerto Rico and has not engaged in conduct purposefully directed at Puerto Rico. *Id.* at ¶ 19.

- Tauber has not delivered its goods, including MTBE, in the stream of commerce with the expectation that they would be purchased by Puerto Rico users. *Id.* at ¶ 20.

- Tauber has not participated in any conventions, meetings or sales events in Puerto Rico or engaged in conduct "targeting" Puerto Rico for its products. *Id.* at ¶ 21.

- Tauber's website did not promote the sale of MTBE or gasoline containing MTBE in Puerto Rico. Tauber's website is in English and is not translated to Spanish or otherwise targeted to customers in Puerto Rico. *Id.* at ¶ 23.

- Tauber has never refined and/or manufactured petroleum products, including, but not limited to, gasoline, gasoline containing MTBE, and MTBE. *Id.* at ¶ 24.

- Tauber has never sold or distributed MTBE or gasoline containing MTBE at any station, port, or any other location in the Commonwealth of Puerto Rico. *Id.* at ¶ 25.

- Tauber has never blended finished gasoline or added chemicals such as MTBE to gasoline for shipment or sale in Puerto Rico. *Id.* at ¶ 26.

- Tauber has not traded gasoline for sale in Puerto Rico. *Id.* at ¶ 27. Tauber has not traded gasoline containing MTBE for sale in Puerto Rico. *Id.* at ¶ 28.

- Tauber has reviewed its records and hereby states that Tauber sold MTBE to Phillips Petroleum Company ("PPC") and the following related divisions, Phillips 66 Co. ("Phillips 66") and Phillips Chemical Co. ("PCC") in "spot sales." *Id.* at ¶ 30.

- Other than the listed Phillips entities, Tauber has located no records concerning any other party to Commonwealth's Third Amended Complaint in action 07-cv-10470 or the First Amended Complaint in action 14-cv-1014 indicating that such party purchased MTBE from Tauber and that such MTBE was shipped to Puerto Rico. Id. at ¶ 31.

- Upon information and belief, no Phillips entity (PPC, PCC or Phillips 66) to which Tauber sold and delivered title to MTBE was or is located in Puerto Rico. *Id.* at ¶ 32.

- Tauber is a trader of energy products and the total volume of spot sales by Tauber to PPC, Phillips 66 and PCC represent a negligible percentage by volume of petrochemicals sold by Tauber during the relevant time period. *Id.* at ¶ 35.

- Tauber had no involvement in any decision by any Phillips entity to use MTBE, including that it did not provide any economic analysis of MTBE versus any other oxygenate to substitute for lead. *Id.* at ¶ 36. Tauber has no distribution or agency agreement with any Phillips entity. *Id.* at ¶ 37.

- Tauber had no discussions with any Phillips entity concerning any purported economic "advantage" to using MTBE over any other alternative. *Id.* at ¶ 38.

- Tauber did not market or sell TBA to Phillips or any other party for delivery or use in Puerto Rico. *Id.* at ¶ 39.

- PPC, PCC and Phillips 66 took delivery at locations outside of Puerto Rico in each of the sales of MTBE by Tauber. *Id.* at ¶ 41. No sale was ever made by Tauber to Phillips Puerto Rico Core, Inc. or any entity in Puerto Rico. *Id.* at ¶ 44. All sales were between Tauber and PPC, PCC or Phillips 66, all located in Bartlesville, Oklahoma, and title transferred in all FOB outside of Puerto Rico. *Id.*

At the deposition of Tauber's FRCP 30(b)(6) witness Kevin Wilson, Tauber was questioned at length concerning Plaintiffs' sole jurisdictional allegation that Tauber knew that "Phillips" was shipping MTBE to Puerto Rico and that knowledge somehow confers jurisdiction. But Tauber's testimony established that (1) the Phillips entities with which Tauber transacted sales were all located in Oklahoma and (2) the ultimate destination of the MTBE, or any petrochemical product, was not a term of the sale and is not information that Tauber customarily receives. Tauber testified as follows:

> Q. And the destination is completely and wholly irrelevant?
> A. It's irrelevant to Tauber. It's irrelevant to TPC.[4]
> Q. Okay.
> A. The only people that it would be relevant to here is SGS [others involved in aspects of the shipment such as the inspection company].

See Deposition Testimony of Kevin Wilson 69:8-24 (Exhibit A attached to Declaration of Michael A. Walsh).

[4] TPC is Tauber Petroleum Corporation. Mr. Wilson was offered as a witness to testify on behalf of defendant Tauber Oil. Tauber Petrochemical Corp. is not a party to this case.

When questioned on whether Tauber even has knowledge of where the product it had sold was going or if it had any way to testify as to where the product it sold was actually delivered, Tauber testified that cargo destination is commercially sensitive information that is customarily not provided to Tauber. Tauber testified as follows:

> Q. Do you have any reason -- any independent fact to believe that the MTBE that is the subject of this file did not get discharged in Puerto Rico?
> A. I don't. I don't know. I don't have discharge documentation here to know if that is, in fact, where it went. I can only presume that's the case.
> Q. Would it be common to have discharge documents?
> A. No. In fact, it's strictly forbidden, generally speaking.
> Q. And why is it strictly forbidden?
> A. Because it's a FOB transaction, and it's quite commonplace in this industry, and just in general, that you're limited to your -- you know, the knowledge is limited to what you transact to do and that -- that's it. The industry as a whole maintains that because of proprietary information. They don't want -- if I were to purchase product from Dow and sell it to Chevron, and that purchase from Dow was made through an intermediary like Vitol, Vitol purchased it from Dow and sells it to me and Vitol knows where my customer takes it, why would Vitol want us in the middle of that transaction?
> People don't share this type of information. Not in this business.
> Q. And the type of information, much of it relating to --
> A. Destination.
> Q. -- destination, and the identity of --
> A. Of who's -- who's receiving it ultimately.
> Q. -- the entities that are purchasing it?
> A. No. The entities that are ultimately consuming it or, in many cases, the entities who are producing it.

Id. at 73:13-75:6. Plaintiffs' counsel was relentless, repeatedly attempting to frame his question in a manner to suggest a fact that Tauber simply is not capable of establishing; that is, that any MTBE it sold to PPC, PCC or Phillips 66 was used in Puerto Rico. In this regard, Tauber testified as follows:

> Q. Do you have any independent facts to indicate that this shipment of MTBE was not discharged in Puerto Rico?
> A. I cannot tell where any of these discharge, because, again, once they're -- the FOB transactions occur and we pass title at the rail, the receiver can take it wherever they want, as often occurs. On many transactions that I do, they ultimately end up in Asia. This happens to me all the time.

Id. at 103:16-104:2.

> Q. And in a circumstance where a port is labeled, do you have specific knowledge of that port changing?
> A. ...no. I don't.
> Q. Do you have any independent facts that leads you to believe that the particular shipment of MTBE that's identified in Exhibit No. 10 was not discharged in Puerto Rico?
> A. That's something you would have to go to Phillips for. I mean, in each case that I'm being asked that, I have no way of knowing.

Id. at 104:16-105:3.

> Q. So with your communications with Marilyn Dugan [PPC], you would never, under no uncertain circumstances, discuss the destinations for products?
> A. It's none of Tauber's business.
> Q. But you -- I understand you're saying it's none of Tauber's business. Did you ever discuss the destination of product?
> A. No. We did not discuss that.

Id. at 133:13-23.

> We have no involvement. It's a free on board contract. It passed at the rail to the ship. We do not have title on the vessel. We do not have any ownership interest whatsoever. We have no loss exposure of the cargo. We do not participate in the inspection at point of discharge. We are done. That [destination information] is there to communicate, and it's there -- and it's quite odd that it's there, because, of all the files that we could go back and we could look at, with many other products over long periods of time, you wouldn't see that information there. Because it's just what Marilyn did. She conveyed it in that way.

Id. at 135:7-19.

Testimony establishes that Tauber had no knowledge or control over the destination and the destination was not information that factored into Tauber's transacting spot sales of MTBE to PPC, PCC and Phillips 66. Tauber's deposition testimony further confirmed that Phillips did not inform Tauber of the destination:

> Q. Did you ever instruct Phillips not to inform you of the intended destination of MTBE you sold to them?
> A. It would be irrelevant. There would be no cause to ask them to inform or not inform.

Id. at 200:23-201:4.

While Plaintiffs may suggest that the Court infer that MTBE PPC, PCC and Phillips 66 purchased from Tauber may have been and resold and shipped to Phillips Core Puerto Rico, what is clear from the deposition testimony is that Tauber had no interest, power, control or knowledge concerning where the MTBE it sold was ultimately delivered. In discovery responses, Phillips admits that PCC supplied MTBE to the Core facility stating: "Phillips Petroleum Company arranged for the supply of MTBE to the Core facility." *See* Exhibit B at page 7 attached to Declaration of Michael A. Walsh. Despite the Commonwealth attempting to implicate Tauber, the discovery establishes that it was a Phillips related entity (PPC, PCC or Phillips 66) that sold or "arranged" for the MTBE it obtained to be shipped to the Commonwealth. In this regard, Phillips Core Puerto Rico witness testified as follows:

> Q. So the purchase of MTBE from whatever source, was that a function of anybody at the Core facility?
> A. Not that I recall.
> Q. So, again, that would be Bartlesville?
> A. I think Bartlesville had more to do with purchasing.

See Exhibit C attached to Declaration of Michael A. Walsh, Dep. of Don Sitton 26:15-21.

> Q. So the Phillips companies, in terms of the materials that were shipped to the plant, essentially bought them?
> A. They were -- there was interaction between the plant and the folks in Bartlesville on purchasing the feedstock, but yes.
> Q. And then Bartlesville arranged to ship them?
> A. Correct.

Id. at 40:8-16.

A declaration provided by Phillips Puerto Rico Core Inc. further supports that it was Phillips, not Tauber, which supplied MTBE to the Core facility:

> COP [ConocoPhillips Company] and CPCPRC [Chevron Phillips Chemical Puerto Rico Core Inc.] have provided discovery in the above-referenced litigation indicating that various "Phillips" entities supplied, purchased, and/or shipped methyl tertiary butyl ether ("MTBE") that was delivered to the Plant.

See Exhibit D attached to Declaration of Michael A. Walsh. Phillips Puerto Rico Core Inc. Declaration of Daryl Vance, dated April 30, 2013 (the "Vance Declaration"). In response to

discovery concerning the supply of MTBE to the Phillips Chemical Puerto Rico Core facility, Phillips responded as follows:

> Defendant [Phillips Petroleum Company] caused neat MTBE to be delivered by ship to Phillips Puerto Rico Core Inc. for gasoline blending at the Core facility.

See Exhibit E at page 7 attached to Declaration of Michael A. Walsh.

Phillips Puerto Rico Core further confirmed that MTBE was supplied by PPC:

> Phillips Puerto Rico Core Inc. never manufactured MTBE. During the relevant time period, Phillips Petroleum Company arranged for the supply of MTBE to the Core facility.

See Exhibit B at 4-5 attached to Declaration of Michael A. Walsh. Even assuming Plaintiffs can infer that MTBE sold by Tauber to PPC, PCC or Phillips 66 was resold and shipped to the Phillips Core Puerto Rico facility, it is not clear that any such MTBE remained in Puerto Rico. On August 9, 2013 Phillips submitted a letter to the Court representing that "[Phillips"] had sales both within and outside Puerto Rico." *See* Exhibit F attached to Declaration of Michael A. Walsh. Core's records do not indicate if MTBE was in gasoline "[t]his is true for gasoline sales both within Puerto Rico as well as off-island sale." *See* Exhibit G at ¶ 8 attached to Declaration of Michael A. Walsh. "The Core facility sold gasoline to the wholesale market in Puerto Rico and elsewhere". *See* Exhibit B at page 12 attached to Declaration of Michael A. Walsh.

Tauber served thirty one (31) interrogatories focused on the jurisdictional facts that the Commonwealth should possess to support any claim of personal jurisdiction in this case. The Commonwealth "responded" to each Interrogatory with a boilerplate response stating that "discovery is ongoing" "Tauber [is] in the best position" to answer its own interrogatories and "Tauber held title to several hundreds of thousands of barrels of neat MTBE over a period of fifteen years that was shipped to Puerto Rico." *See* Exhibit H attached to Declaration of Michael

A. Walsh.[5] Thus, Plaintiffs hinge personal jurisdiction on the conclusory statement that MTBE Tauber sold "was shipped to Puerto Rico" by Phillips coupled with the allegation in the complaints in these cases concluding: "Defendant knew or should have known [products containing MTBE] would be delivered into the Commonwealth."[6]

When Hector Marin, Phillips Core Puerto Rico's R 30(b)(6) witness, was questioned regarding Tauber's purported sales to Phillips Core, he testified as follows:

> Q. Okay. And are you aware generally of an agreement between -- any agreement -- supply agreement between Phillips Puerto Rico Core and Tauber?
> A. In the documents that I've reviewed, I don't have that information.
> Q. Okay. Between the years of 1990 and 2000... Are you aware of any transactions involving Tauber during that time period?
> A. In that period of time, their name is not here.
> Q. Okay. That's not ...exactly answering my question. Are you aware of any transactions between Phillips and Tauber during that time period?
> A. Yes. I understood now. No. I don't have any knowledge of that.

I Exhibit I attached to Declaration of Michael A. Walsh. at 357:10-24; 358:1-12.

Evidence of Tauber's purposeful availment is wholly lacking and, at best, Plaintiffs promise an inference that Tauber knew the MTBE it sold to PPC, PCC and Phillips 66 was going to the Commonwealth. As the case law cited below demonstrates, the facts simply fail the Commonwealth and the Court lacks person jurisdiction over Tauber in both cases.

Ultimately, for Plaintiffs to establish that any MTBE product sold by Tauber is even at issue in this case, Plaintiffs will pile inference upon inference on top of supposition; Plaintiffs must prove that MTBE purchased by PPC, PCC or Phillips 66 purchased from Tauber was (1)

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[5] Prior to the close of discovery, Tauber wrote Plaintiffs requesting that they supplement discovery responses. Plaintiffs wrote Tauber on January 8, 2014 adding to their jurisdictional claim stating "Tauber was informed" and Tauber had knowledge" that MTBE it sold to Phillips Bartlesville was "bound" for the Commonwealth.

[6] *See* Third Amended Complaint in case no. 07-CV-10470 (Dkt. 175) (TAC) at paragraphs 21 and 71 and First Amended Complaint in case no. 14-cv-01014 (Dkt. 1) (FAC) at paragraphs 25 and 90.

was shipped to Puerto Rico, (2) remained in Puerto Rico, (3) blended into gasoline in Puerto Rico, (4) the MTBE gasoline remained on the island and was not shipped off the island, (5) was sold for use in the relevant geographical area or at a focus site, (6) was released into the environment, and (7) contaminated drinking water. The absence of such evidence in these cases renders the Commonwealth unable to establish that any MTBE product Tauber sold to PPC, PCC or Phillips 66 is even at issue in these cases.

III. Procedural Background & Preservation of Jurisdictional Challenge

Tauber procedurally preserved its challenge to Puerto Rico's exercise of personal jurisdiction over Tauber. Tauber timely challenged Plaintiffs' assertion of personal jurisdiction in its first responsive pleadings in cases 07-CV-10470-SAS and 14:-CV-1014-SAS.

To date, Tauber has participated limitedly in this case to obtain discovery from Plaintiff to ascertain any evidence it (or any other party) has in support of the Commonwealth's allegation that the Commonwealth has personal jurisdiction over Tauber. *See* Declaration of Michael A.Walsh at ¶ 11.

IV. Legal Standards

A. Rule 12(b)(2) Personal Jurisdiction Standard of Proof

A plaintiff has the burden of proving personal jurisdiction by a preponderance of the evidence. While the Court construes all allegations in favor of the plaintiff, a "plaintiff may not rely on conclusory non-fact-specific jurisdictional allegations to overcome a motion to dismiss." *Commonwealth v. Shell Oil Co. (In re MTBE)*, No. 1:00-1898, MDL 1358 (SAS), 07-civ-10470, No. 2013 U.S. Dist. LEXIS 99288 (S.D.N.Y. July 12, 2013) (citing *Doe v. Delaware State Police*, No. 10 Civ. 3003, 2013 WL 1431526, at *3 (S.D.N.Y. Apr. 4, 2013) (quotation marks omitted)). Further, when a "defendant rebuts plaintiffs' unsupported allegations with direct highly specific, testimonial evidence regarding a fact essential to jurisdiction – and plaintiffs do

not counter that evidence – the allegation may be deemed refuted." *In re Stillwater Capital Partners Inc. Litig.*, 851 F. Supp. 2d 556, 567 (S.D.N.Y. 2012).

V. The Puerto Rico Courts Lack Personal Jurisdiction over Tauber

This Court lacks both general and specific jurisdiction over Tauber. The TAC sets forth no plausible basis for the Court's exercise of jurisdiction over Tauber. Instead, the TAC identifies Tauber by name in only a single paragraph that recites: "Tauber is a Delaware[7] corporation headquartered at 55 Waugh Drive, Suite 700 in Houston, Texas 77007." TAC ¶64; FAC ¶81. No allegation links Tauber to the refining, supplying, marketing, or addition of MTBE to gasoline destined for Puerto Rico. More significantly, no evidence links Tauber to any activities conducted in the Commonwealth that relate to plaintiff's claims sufficient to confer personal jurisdiction.

A. Puerto Rico Courts do not have General Jurisdiction over Tauber

To establish a court has general jurisdiction over a defendant, the plaintiff must prove that the defendant has engaged in "continuous and systematic" activities within Puerto Rico. *Goodyear Dunlop Tires Opers S.A. v. Brown*, 131 S.Ct. 2846, 2853 (2011); *see also Daimler AG v. Bauman,* 134 S.Ct. 746 (2014) ("Accordingly, the inquiry under *Goodyear* is not whether a foreign corporation's in-forum contacts can be said to be in some sense 'continuous and systematic,' it is whether that corporation's affiliations with the State are so 'continuous and systematic' as to render [it] essentially at home in the forum State."). Tauber has had no such contacts with Puerto Rico to render it "at home" and the Commonwealth does not and cannot allege that Tauber had such contacts.

[7] Tauber is a Texas corporation. *See* Wilson Declaration at ¶ 4.

B. Puerto Rico lacks Specific Jurisdiction over Tauber

1. Under Puerto Rico's long-arm statute, Puerto Rico lacks Personal Jurisdiction over Tauber

Tauber did not have any contacts with Puerto Rico that would reasonably avail Tauber of specific jurisdiction. Puerto Rico's long-arm statute allows courts:

> to exercise jurisdiction over a non-resident defendant if the action arises because that person: (1) transacted business in Puerto Rico personally or through an agent; (2) participated in tortious acts within Puerto Rico personally or through his agent . . . or (5) owns, uses or possesses, personally or through his agent, real property in Puerto Rico.

1:07-CV-10470, Doc. 309 at 22 (citing *Negron-Torres v. Verizon Commc'ns, Inc.*, 479 F.3d 19, 24 (1st Cir. 2007). The jurisdictional inquiry is guided by the constitutional guidelines of Due Process, and a constitutional analysis of the jurisdictional question will satisfy the long-arm statute inquiry. *Carreras v. PMG Collins, LLC*, 660 F.3d 549, 552 (1st Cir. 2011).

2. To Permit Puerto Rico to Exercise Specific Personal Jurisdiction over Tauber would be a violation of the Due Process Clause

"The Due Process Clause of the Fourteenth Amendment requires that the exercise of personal jurisdiction over a nonresident defendant comports with traditional notions of fair play and substantial justice. *Am. Distilling & Mfg. v. Amerada Hess Corp. (In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.),* 399 F. Supp. 2d 325, 331 (S.D.N.Y. 2005). "[A]t the most general level, the due process nexus analysis requires that the court ask whether an individual's connections with a State are substantial enough to legitimate the State's exercise of power over him." *Id.* In the Second Circuit, "the due process analysis consists of two components: the 'minimum contacts' test and the 'reasonableness' inquiry." *Id.*

a. Tauber Lacks Minimum Contacts with Puerto Rico to Establish Specific Jurisdiction

"Specific" or "case-linked" jurisdiction "depends on an 'affiliatio[n] between the forum and the underlying controversy'" (*i.e.*, an "activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation"). *Goodyear Dunlop Tires Operations*, 131 S.Ct. 2846 (slip op., at 2). This is in contrast to "general" or "all purpose" jurisdiction, which permits a court to assert jurisdiction over a defendant based on a forum connection unrelated to the underlying suit (*e.g.,* domicile). *Walden v. Fiore*, No. 12-574, 2014 U.S. LEXIS 1635 at fn. 6 (2014).

A court must consider whether contacts "purposefully availed" the defendant to the forum state's jurisdiction. "The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State." *Hanson v. Denckla*, 72 S. Ct. 1228 (1958). "[I]t is essential in each case that there be 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." *Amerada Hess Corp.*, 399 F. Supp. 2d at 331. Mostly recently, a Supreme Court addressed minimum contacts stating: As an initial matter, we reiterate that the "minimum contacts" inquiry principally protects the liberty of the nonresident defendant, not the interests of the plaintiff. *Walden*, 2014 U.S. LEXIS 1635 at fn. 9 (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U. S., 286, 291–292 (1980)).

"A court may subject a defendant to judgment only when the defendant has sufficient contacts with the sovereign such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *McIntyre Machinery, Ltd. v. Nicastro*, 131 S. Ct. 2780, 2787 (2011) (quoting *International Shoe Co. v. Washington*, 66 S. Ct. 154 (1945)). The defendant must "purposely avail" itself of the privilege of conducting activities within the forum

State and could foresee being haled into court there. *Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez*, 305 F3d 120, 127 (2d Cir. 2002) (quotation marks omitted). Moreover, the claim must arise out of, or relate to, the defendant's contacts with the forum. *Id.*[8] "The principal inquiry in cases of this sort is whether the defendant's activities manifest an intention to submit to the power of a sovereign." *Nicastro*, 131 S.Ct. at 2788; *see also SEC v. Compania*, No. 11-civ.-4904 (DLC), 2011 U.S. Dist. LEXIS 83424, *14 (S.D.N.Y. July 29, 2011); *Dejana v. Marine Tech. Inc.*, No. 10-cv-4029 (JS)(WDW), 2011 U.S. Dist. LEXIS 1111080 (E.D.N.Y. Sept. 26, 2011) (applying the plurality rule).

In *Walden v. Fioree*, Nevada residents had cash confiscated in Atlanta and a DEA agent helped draft a probable cause affidavit to support a forfeiture action. No forfeiture complaint was filed and the money was returned to the plaintiffs in Nevada. The Plaintiffs claimed the affidavit was false and sought damages for violation of their Fourth Amendment rights. The District Court ruled that knowledge of causing harm in Nevada did not confer jurisdiction. The Ninth Circuit reversed the dismissal on the grounds the defendant "expressly aimed" his conduct at Nevada with knowledge it would cause harm in Nevada. The Supreme Court rejected the Ninth Circuit's holding allowing a court in Nevada to exercise specific jurisdiction over a defendant on the basis that he knew his allegedly tortious conduct in Georgia would cause harm to plaintiffs in Nevada. In reversing the Ninth Circuit, the Supreme Court noted:

> whether a forum State may assert specific jurisdiction over a nonresident defendant focuses on the relationship among the defendant, the forum, and the litigation For a State to exercise jurisdiction consistent with due process, the

[8] In affirming this court's verdict in the City of New York v Exxon, the Second Circuit stated that tort liability flows not "for the mere use of MTBE, but because [the defendant] engaged in additional tortious conduct, such as failing to exercise reasonable care in storing gasoline at service stations it owned or controlled." *In re MTBE Prods. Liab. Litig.*, 725 F.3d 65, 101, fn 22 (2d Cir. 2013). Thus "something more" than a mere sale of MTBE is necessary for the claim to "arise out of or relate to" Tauber's conduct for jurisdictional purposes.

> defendant's suit-related conduct must create a substantial connection with the forum State. Two related aspects of this necessary relationship are relevant in this case. . . First, the relationship must arise out of contacts that the defendant himself creates with the forum State. Due process limits on the State's adjudicative authority principally protect the liberty of the nonresident defendant - not the convenience of plaintiffs or third parties. We have consistently rejected attempts to satisfy the defendant-focused "minimum contacts" inquiry by demonstrating contacts between the plaintiff (or third parties) and the forum State. The unilateral activity of another party or a third person is not an appropriate consideration when determining whether a defendant has sufficient contacts with a forum State to justify an assertion of jurisdiction. We have thus rejected a plaintiff 's argument that a Florida court could exercise personal jurisdiction over a trustee in Delaware based solely on the contacts of the trust's settlor, who was domiciled in Florida and had executed powers of appointment there. We have likewise held that Oklahoma courts could not exercise personal jurisdiction over an automobile distributor that supplies New York, New Jersey, and Connecticut dealers based only on an automobile purchaser's act of driving it on Oklahoma highways. Put simply, however significant the plaintiff's [or third-party's] contacts with the forum may be, those contacts cannot be "decisive in determining whether the defendant's due process rights are violated… Second, our "minimum contacts" analysis looks to the defendant's contacts with the forum State itself, not the defendant's contacts with persons who reside there.

Walden, No. No. 12-574, 2014 U.S. LEXIS 1635 at *11-*14 (internal citations and quotations omitted). Citing *Hanson*, the Court held "'unilateral activity' of a third-party….cannot satisfy the requirement of contact with the forum State." *Id.* at *24. "[I]t is the defendant, not the plaintiff or third parties, who must create contacts with the forum State. *Id.* at *24-25. Here, Plaintiffs should not be permitted to establish specific jurisdiction over Tauber because of PPC's strong forum connections; the inquiry is whether Tauber itself had those connections and whether those connections relate to the claims at issue. Neither exist in this case.

In *Cecarelli v. CSX Transportation, Inc.*, No. 3:09cv1590 (MRK), 2012 U.S. Dist. LEXIS 122287 (D. Conn. Jan. 10, 2012), the plaintiff was injured in Connecticut when a door fell off a railroad boxcar. Plaintiff sought to add Albany & Eastern Railroad Co. (AERC), an Oregon rail carrier. *Id.* at *2. AERC's involvement was to move railcars along approximately 67 miles of track on its line to an interchange point, where it would hand off the railcars to another

railroad. *Id.* *7-10. Discovery in the case revealed nearly 200 bills of lading showing Connecticut as the destination for railcars moved by AERC. *Id.* at *8.

The District of Connecticut held that the fact that AERC could foresee that a defective boxcar was destined for Connecticut was not determinative of the personal jurisdiction question. *Id.* at *9. Instead, the court found "[I]t is the totality of the defendant's conduct and connection with this state' that must be considered when determining personal jurisdiction, not merely conduct specifically connected to the plaintiff's cause of action." *Id* at *9. The District of Connecticut applied the *Denckla* rule that the unilateral activity of those who claim relationship with the defendant cannot satisfy the contact with the forum state rule. *Id* at *9

In *Nicastro*, the Supreme Court explained that purposeful availment in a products liability case requires a showing that the defendant "seek to serve" that forum's market. *Id.* "The 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." *Id.*

The Supreme Court rejected the New Jersey Supreme Court's holding that New Jersey courts could exercise personal jurisdiction over a foreign manufacturer of a product so long as the manufacturer knows or reasonably should know that its products are distributed through a nationwide distribution system that might lead to those products being sold in any of the fifty states." *Id.* at 2785 (internal citations omitted). The New Jersey Supreme Court premised its decision on the fact that the manufacturer had a distributor agreement with a domestic company to sell that company's machines in the United States; the manufacturer's attendance at trade shows in several states, and the fact that up to four of the manufacturer's machines ended up in New Jersey. *Id.*

The Supreme Court rejected the New Jersey Supreme Court's decision and application of personal jurisdiction. Writing for the plurality, Justice Kennedy emphasized that the true test is one of lawful authority to excise jurisdiction over a defendant where the defendant "purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Id.* New Jersey did not have jurisdiction over the manufacturer because its contacts did not demonstrate a purposeful availment of the protections under New Jersey law. The Supreme Court highlighted that the manufacturer had "no office in New Jersey; it neither paid taxes nor owned property there; and it neither advertised in, nor sent any employees to, the State." *Id.* The defendant did not have a single contact with the forum state short of the product ending up in the forum state. *Id.* While there was intent to serve the U.S. market, this intent did not rise to the level of a purposeful contact that would avail the defendant to the jurisdiction of the courts of New Jersey. *Id.* As such, despite the manufacturer's intent to reach all U.S. markets and the fact that its products did indeed reach New Jersey, the Supreme Court held that the manufacturer had not purposely availed itself to the jurisdiction of the forum State's courts.

Under *Nicastro*, a defendant's participation in the national market for MTBE alone would not constitute a basis for specific jurisdiction as to any forum State not specifically targeted. While Tauber did sell MTBE in Texas, the facts are simply lacking to provide support that Tauber had sufficient contacts or presence in the Commonwealth for this Court to exercise personal jurisdiction.

(i) Tauber Lacks Minimum Contacts to Subject it to Puerto Rico Courts under the *Nicastro* Plurality's Opinion

Puerto Rico courts have adopted the purposeful availment standard articulated by the *Nicastro* plurality. *Carreras*, 660 F.3d at 555. In *Carreras*, the First Circuit held that

"[p]urposeful availment represents a rough quid pro quo: when a defendant deliberately targets its behavior toward the society or economy of a particular forum, the forum should have the power to subject the defendant to judgment regarding that behavior." *Id.* (quoting *Nicastro*,131 S.Ct. at 2787-88). Puerto Rico focuses on "the defendant's intentions" in its purposeful availment analysis, refusing to find jurisdiction exists based on "random, fortuitous, or attenuated contacts." *Id.* (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985)).

Carreras involved a 2008 housing crisis deal gone bad, where two Puerto Rico citizens provided two Florida based companies down payments on two separate condominiums in Miami. *Id.* at 551. The Puerto Rico plaintiffs sued the companies in Puerto Rico to recover the down payments when the financing fell through as part of the 2008 housing crisis. *Id.* After the conclusion of jurisdictional discovery, the Puerto Rico court concluded that neither defendant had contacts with Puerto Rico sufficient to permit the exercise of jurisdiction. *Id.* at 552. The plaintiffs appealed to the First Circuit. *Id.*

The key jurisdictional facts are as follows, the Florida based defendant, an ISG employee, telephoned Puerto Rico plaintiffs in Puerto Rico and offered to sell each plaintiff a condominium located in Miami. *Id.* at 553. The plaintiffs were referred to ISG by a Puerto Rico real estate agent. *Id.* For five years prior to the failed condo deal, the ISG employee had kept in touch with the Puerto Rico real estate agent by periodically sending her ISG listings via e-mail. *Id.* In return for the referrals of plaintiff to ISG, ISG paid the local Puerto Rico real estate agent a finder's fee. *Id.* The initial phone calls between the ISG employee and plaintiffs identified the price of the condominiums, the terms of sale, and the plaintiffs agreed in principle to purchase the condominiums. *Id.* Again, the ISG employee contacted the plaintiffs in Puerto Rico and requested they tender the earnest money. *Id.* at 554. The payments were then sent from Puerto

Rico to Florida. *Id.* at 553. The purchase agreements were mailed to plaintiffs in Puerto Rico and each plaintiff signed the purchase agreement in Puerto Rico. *Id.* In addition, the ISG employee visited Puerto Rico and met with one of the plaintiffs to provide details on the construction of the condominium. *Id.* The same ISG employee tried to sell a condominium in the same complex to plaintiff Carreras's brother. *Id.* None of these contacts were found to confer specific jurisdiction over the Florida based companies. *Id.*

ISG advertised the condominium complex in magazines circulated in Puerto Rico and available on flights to Puerto Rico. *Id.* ISG made sales to other residents of Puerto Rico, ISG representatives periodically called the plaintiffs and other Puerto Rico residents in an effort to market other properties, and an ISG employee made a presentation after the signing of the purchasing agreement regarding the condominium complex at issue and other ISG properties in Panama and New Orleans. *Id.* These contacts were not found to confer jurisdiction over defendants. *Id.*

The First Circuit found that almost all of the contacts were insufficient to support the exercise of personal jurisdiction over the Florida defendants. The First Circuit, however, did remand the case to determine the extent of the relationship between ISG and the Puerto Rico real estate agent and to consider the listings directed to Puerto Rico. *Id.* at 556-57. All of the other contacts were found to be irrelevant or insufficient to permit the exercise of specific jurisdiction over the defendants. *Id.* at 554.

Tauber's contacts do not rise to the level of the contacts in *Carreras*, which were found not establish personal jurisdiction. There is no evidence that Tauber, or any distributor or agent purporting to act on its behalf, ever solicited, advertised or marketed the sale of gasoline or MTBE in Puerto Rico, nor has it ever taken any actions to create a market for gasoline or MTBE

in Puerto Rico. *See* Declaration of Kevin Wilson at ¶ 7. Tauber lacks the minimum contacts to avail itself to the jurisdiction of Puerto Rico courts.

(ii) Tauber's Contacts do not Satisfy the Test for Minimum Contacts in the *Nicastro* Concurrence or Dissent

If this Court applies the narrower rule articulated in the concurrence in *Nicastro*, Tauber lacks minimum contacts to avail itself to Puerto Rico's jurisdiction. Justice Breyer wrote for the concurrence in *Nicastro* and concluded there was no specific jurisdiction over the British manufacturer. *Nicastro*, 131 S.Ct at 2791. Specifically, the American Distributor on one occasion sold and shipped one machine to New Jersey, the British Manufacturer expressed a willingness to the American Distributor to sell the machines to anyone in America that wanted one, and the representatives of the British Manufacturer attended a trade show in Las Vegas. *Id.* There was no effort by the British Manufacturer to advertise, advise or market in New Jersey. *Id.* Further there was no list of potential customers in New Jersey that the British manufacturer met with or targeted. *Id.* at 2792. As such, the Court required "something more" than these contacts to find specific jurisdiction over the British Manufacturer.

Tauber's contacts with Puerto Rico, however, do not even meet the narrower test put forth by Justice Breyer. Like the company in *Cecarelli* that stored and moved boxcars from shippers to Union Pacific train lines, Tauber did not enter into any contracts in Puerto Rico, did not solicit business in Puerto Rico, and did not conduct a course of business in Puerto Rico. Tauber did not have a distributor agreement with a Puerto Rico company. *See Cecarelli*, No. 3:09cv1590 (MRK), 2012 U.S. Dist. LEXIS 122287 at *8-*11.

Tauber made no sales in Puerto Rico. Declaration of Wilson at ¶¶ 31-34. It has only brokered sales in Oklahoma, which were delivered in Texas. *Id.* at ¶44.[9] Tauber does not have distribution relationship with a company to distribute MTBE in or to Puerto Rico. Tauber has no agent that solicited business in Puerto Rico to sell MTBE or gasoline containing MTBE. *Id.* at ¶¶ 7, 9. Tauber was paid the same for its brokerage of the MTBE sale regardless of the ultimate destination of the product. *Id.* at ¶ 42. There was never "something more" as is discussed in the *Nicastro* concurrence. There was no special Puerto Rico related design, advertising, advice, marketing or anything else. *See Nicastro*, 131 S.Ct. at 2791-92.

Even if the Commonwealth could establish that Tauber "knew" its products were being shipped to Puerto Rico, mere knowledge that a product might or may be shipped to the forum state does not constitute purposeful availment as the Supreme Court of the United States confirmed. *World-Wide Volkswagen*, 444 U.S. at 295. Tauber was without any and all rights to information, as well as all power to direct or control the MTBE shipment itself once PPC, PCC or Phillips 66 took title to the MTBE. As Tauber's witness confirmed, Tauber understood that once title transferred, PPC, PCC or Phillips 66 was free to ship the MTBE to any location, resell it, or dispose of it in any way at any destination without Tauber's consent, control or knowledge. In this regard, Kevin Wilson testified as follows:

> Q. Do you have any independent facts to indicate that this shipment of MTBE was not discharged in Puerto Rico?
> A. I cannot tell where any of these discharge, because, again, once they're -- the FOB transactions occur and we pass title at the rail, the receiver can take it wherever they want, as often occurs. On many transactions that I do, they ultimately end up in Asia. This happens to me all the time.

[9] One transaction between Tauber and PCC was made where title transferred to PCC in Venezuela. Under the terms of this transaction, Tauber acquired MTBE from Ecofuel which it simultaneously sold PCC. PCC directed the MTBE to be delivered to Puerto Rico and PCC held title during transport to Puerto Rico. Ecofuel was responsible for insurance in transit to Puerto Rico.

Dep. of Wilson 103:16-104:2. *See* Exhibit A attached to Declaration of Michael A. Walsh)

Q. And in a circumstance where a port is labeled, do you have specific knowledge of that port changing?
A. ...no. I don't.
Q. Do you have any independent facts that leads you to believe that the particular shipment of MTBE that's identified in Exhibit No. 10 was not discharged in Puerto Rico?
A. That's something you would have to go to Phillips for. I mean, in each case that I'm being asked that, I have no way of knowing.

Id. at 104:16-105:3.

Tauber further testified that the destination of the petrochemical products it sold never factored in to the negotiations for the sale of the products. Tauber testified as follow regarding its discussions with PPC, PCC or Phillips 66 for the sale of MTBE:

Q. So with your communications with Marilyn Dugan [PPC], you would never, under no uncertain circumstances, discuss the destinations for products?
A. It's none of Tauber's business.
Q. But you -- I understand you're saying it's none of Tauber's business. Did you ever discuss the destination of product?
A. No. We did not discuss that.

Id. at 133:13-23.

> We have no involvement. It's a free on board contract. It passed at the rail to the ship. We do not have title on the vessel. We do not have any ownership interest whatsoever. We have no loss exposure of the cargo. We do not participate in the inspection at point of discharge. We are done. That [destination information] is there to communicate, and it's there -- and it's quite odd that it's there, because, of all the files that we could go back and we could look at, with many other products over long periods of time, you wouldn't see that information there. Because it's just what Marilyn did. She conveyed it in that way.

Id. at 135:7-19.

In its complaints, the Commonwealth only alleges that "Defendants" "knew or should have known" that gasoline or products containing MTBE would be delivered to the Commonwealth. The Commonwealth alleges no other jurisdictional facts and failed to identify any jurisdictional facts in response to Tauber's jurisdictional discovery. *See* Exhibit H attached to Declaration of Michael A. Walsh. Even under the dissenting opinion in *Nicastro*, Tauber

lacks the contacts with the Commonwealth sufficient to conclude that it availed itself of the jurisdiction of the courts in the Commonwealth and Plaintiff has failed to establish personal jurisdiction over Tauber in this case.

The *Nicastro* plurality and dissent agreed that to confer specific jurisdiction "something more" than merely having a product in the stream of commerce was necessary. For the dissent there was "something more" in *Nicastro*. What the dissent found persuasive for jurisdictional purposes was:

> In a November 23, 1999 letter to McIntyre America, McIntyre UK's president spoke plainly about the manufacturer's objective in authorizing the exclusive distributorship: "All we wish to do is sell our products in the [United] States--and get paid!" . . . the product was built and designed by McIntyre Machinery in the UK and the buck stops here--if there's something wrong with the machine. . . . the manufacturer engaged McIntyre America to attract customers "from anywhere in the United States. . . . In sum, McIntyre UK's regular attendance and exhibitions at ISRI conventions was surely a purposeful step to reach customers for its products "anywhere in the United States. . . Adjudicatory authority is appropriately exercised where "actions by the defendant *himself*" give rise to the affiliation with the forum.

Nicastro, 131 S.Ct. at 2797.

Moreover, the dissent, citing *Asahi*, a case involving a component part manufacturer, stated:

> The Japanese valve-assembly manufacturer was not reasonably brought into the California courts to litigate a dispute with another foreign party over a transaction that took place outside the United States. . . In any event, *Asahi*, unlike McIntyre UK, did not itself seek out customers in the United States, it engaged no distributor to promote its wares here, it appeared at no tradeshows in the United States, and, of course, it had no Web site advertising its products to the world. . . Moreover, *Asahi* was a component-part manufacturer with "little control over the final destination of its products once they were delivered into the stream of commerce." It was important to the Court in *Asahi* that "those who use Asahi components in their final products, and sell those products in California, [would be] subject to the application of California tort law. To hold that *Asahi* controls this case would, to put it bluntly, be dead wrong.

Id. at 2803 (emphasis added) (internal citations omitted).

What is clear from *Nicastro* is that the Supreme Court has rejected the notion that a "stream of commerce" doctrine can displace the requirement that the plaintiffs demonstrate Tauber's purposeful availment to satisfy the constitution's requirement of "fair play and substantial justice." Here, all that can be said of Tauber is that it freely availed itself of its telephone in Houston to transact business with an Oklahoma company for a spot sale of MTBE. One thing no Court has permitted is a defendant such as Phillips, through its own separate jurisdictional facts to somehow confer personal jurisdiction over a defendant such as Tauber.

b. The Exercise of Specific Jurisdiction over Tauber is Unreasonable

This Court's exercise of jurisdiction over Tauber would be unreasonable. Even if the defendant's contacts with Puerto Rico satisfied the test that it has purposely availed itself to the jurisdiction of the forum state, the Tauber may defeat jurisdiction by presenting "a compelling case that the presence of some other considerations would render jurisdiction unreasonable." *Burger King Corp.*, 471 U.S. at 477.

This Court has considered five factors in determining the reasonableness of an exercise of jurisdiction:

> (1) the burden on the defendant, (2) the interests of the forum State, (3) the plaintiff's interest in obtaining relief, (4) the interstate judicial system's interest in obtaining the most efficient resolution of the controversies, [and] (5) the shared interest of the several States in furthering fundamental substantive social policies.

In re MTBE, No. 1:00-1898, MDL 1358 (SAS), 07-civ-10470, 2013 U.S. Dist. LEXIS 99288 at *25-*26 (citing *MacDermid, Inc. v. Dieter,* 702 F.3d 725, 730 (2d Cir. 2012)).

Here, the burden to litigate this case in Puerto Rico would be significant. Tauber is a Texas based company that has no operations, agents, or personnel located in Puerto Rico. Wilson Declaration at ¶¶ 4-17. No Tauber employee or agent has even traveled to Puerto Rico for business. *Id.* at ¶ 10. The Commonwealth delayed over five years in adding Tauber as a

defendant only adding the burden that Tauber would have to endure if required to defend this case in Puerto Rico. As such, in addition to having no contacts with Puerto Rico that allow this Court the exercise of jurisdiction over Tauber, it would be unreasonable to exercise jurisdiction over Tauber.

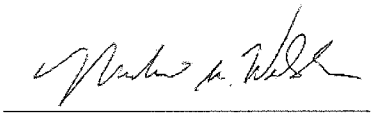
In this action, dozens of the vertical and horizontal participants in the petroleum market – parties who manufactured, labeled, marketed, branded, blended, distributed and allegedly released MTBE gasoline are parties. Beyond the lack of jurisdiction over Tauber and burden on Tauber to litigate in Puerto Rico, Tauber's participation in the case will neither increase nor decrease any potential recovery in this case. Indeed, any potential recovery against Tauber in this case would be a portion of any recovery attributable to its customer Phillips.

VI. Conclusion

Where, as here, there is no evidence supporting specific jurisdiction in the Commonwealth over Tauber, nothing less than the Fourteenth Amendment to the United States Constitution demands that this Court dismiss Plaintiffs' claims for lack of personal jurisdiction.

WHEREFORE, PREMISES CONSIDERED, Defendant Tauber Company respectfully requests that this Court dismiss Plaintiffs' Third Amended Complaint filed in Case No. 07-CV-10470-SAS and Plaintiffs' First Amended Complaint filed in Case No. 14-CV-1014-SAS pursuant to Federal Rule of Civil Procedure 12(b)(2).

Respectfully submitted.



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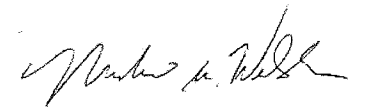
CERTIFICATE OF SERVICE

I certify that on March 3, 2014, a true and correct copy of this Memorandum of Law in Support of its Motion to Dismiss by Tauber Company was electronically served on counsel of record via LexisNexis File & Serve.



MICHAEL A. WALSH

EXHIBIT 3

EXHIBIT 3

STATE OF VERMONT

SUPERIOR COURT
Washington Unit

CIVIL DIVISION
Docket No. 80-2-09 Wncv

Daniel Emery and Liselle Emery
Plaintiffs

v.

Shell Oil Co., et al.
Defendants

DECISION ON BARTON SOLVENTS' MOTION TO DISMISS

Plaintiff Liselle Emery alleges that Daniel Emery, recently deceased, developed a serious illness caused by exposure to benzene in various products he used throughout his career in Vermont's granite industry and at other positions in Vermont. Among the numerous defendants is Cleveland Lithichrome (Cleveland), which is alleged to have sold products into Vermont that included benzene and which caused Mr. Emery's fatal illness.

Cleveland disclaims any knowledge of benzene in its products but alleges that, if there was any, it originated in solvents purchased from Barton Solvents (Barton), which were incorporated into its products from the 1980's to 2000. In a third-party complaint, Cleveland seeks implied indemnification from Barton. There is no first-party claim against Barton. Barton, an Iowa corporation based in Iowa with no presence in Vermont, has filed a Rule 12(b)(2) motion to dismiss for lack of specific personal jurisdiction.[1]

Burden/Standard

Barton is seeking dismissal "on the affidavits," placing the burden on Cleveland to come forward with a prima facie showing of personal jurisdiction. The Vermont Supreme Court has described the burden as follows:

> A defendant asserting that the court lacks jurisdiction over the person may raise such a challenge by motion following service of the summons and complaint. The rule contemplates the determination of jurisdictional issues in advance of trial. In deciding a pretrial motion to dismiss for lack of jurisdiction over the person, a court has considerable procedural leeway, and may determine the motion on the basis of affidavits alone; may permit discovery concerning the motion; or may conduct an evidentiary hearing on the merits of the motion. The latter course is desirable where the written materials have raised questions of credibility or disputed issues of fact. If the court chooses to determine the issues on the basis of affidavits alone without an evidentiary hearing the plaintiff is only

[1] Cleveland concedes that there can be no basis for general personal jurisdiction over Barton in Vermont.

> required to make a prima facie showing of jurisdiction, that is, he need only demonstrate facts which support a finding of jurisdiction in order to avoid a motion to dismiss.

Roman Catholic Diocese v. Paton Insulators, Inc., 146 Vt. 294, 296 (1985) (citations omitted); accord *Godino v. Cleanthes*, 163 Vt. 237, 239 (1995). Neither party has argued that the facts are disputed or that there are any significant credibility issues requiring any evidentiary hearing.

Facts

Barton supported its motion to dismiss with an affidavit. Cleveland opposed dismissal based solely on the allegations of the pleadings, and did not contest any of the allegations in Barton's affidavit, which are consistent with those of the pleadings. After the motion was fully briefed, at oral argument, Cleveland requested an opportunity to conduct jurisdiction-related discovery before a ruling. The court allowed limited discovery for this purpose. Following discovery, Cleveland supplemented the record with the two admissions described below, which are consistent with the pleadings and Barton's affidavit. Cleveland has come forward with no other evidence. Based on the allegations in the pleadings, the affidavit, and Barton's two admissions, the facts are as follows.

Plaintiff alleges (and the court assumes for current purposes) that Cleveland, among others, produced benzene-containing products that were distributed into Vermont, that Mr. Emery came into contact with these products through his work in the stone business, and that the products contributed to his illness. Cleveland is a Kansas corporation with a principal place of business in Kansas. Cleveland alleges that any benzene in its products originated in solvents supplied by Barton that were incorporated without alteration into its own products.

Barton is an Iowa corporation with a principal place of business in Iowa. It is a "stocking wholesale distributor of industrial chemicals, oils, surfactants, and plasticizers." Affidavit of Edward J. Walsh, ¶ 4 (filed Sept. 3, 2009). It has distribution facilities in Iowa, Kansas, and Wisconsin, and serves industrial customers in the Midwestern states. It has never marketed or conducted business in Vermont, never distributed its products into Vermont, never derived any significant revenue from any goods sold or services rendered in Vermont, and it has no other form of contacts with or corporate presence in Vermont. Barton admits that it was generally aware that Cleveland incorporated Barton's products into its own, and that Barton's business included the production of coatings used in the granite industry.

Vermont's Long-Arm Statutes

As a general matter, Vermont's long-arm statutes reflect "a clear policy to assert jurisdiction over individual defendants to the full extent permitted by the Due Process Clause." *Northern Aircraft, Inc. v. Reed*, 154 Vt. 36, 40 (1990) (so ruling in the context of 12 V.S.A. § 913(b); accord *Bard Bldg. Supply Co., Inc. v. United Foam Corp.*, 137 Vt. 125, 127 (1979) (so ruling in the context of 12 V.S.A. § 855). "The jurisdictional issue must therefore be resolved under federal constitutional law, as defined in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), and its progeny." *Northern Aircraft*, 154 Vt. at 41.

Federal Law

Barton's only alleged contact with Vermont is as the supplier of a component that was incorporated into Cleveland's products that were distributed into Vermont in the stream of commerce. The two key United States Supreme Court cases in this setting are *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980) and *Asahi Metal Industry Co., Ltd. v. Superior Court of California*, 480 U.S. 102 (1987).

In *World-Wide Volkswagen*, the Robinsons had purchased an Audi from an Audi retailer in New York and then moved to Oklahoma. An accident in Oklahoma prompted the Robinsons to file a products liability action—in Oklahoma—against several Audi-related defendants for defective design and positioning of the fuel tank assembly. The defendant retailer and the regional Audi distributor for New York, separate corporations which are wholly independent of the manufacturer, sought dismissal for lack of personal jurisdiction in Oklahoma, neither having ever done any business there. The Oklahoma Supreme Court found jurisdiction in Oklahoma principally because cars are so mobile that the defendants should have foreseen that their products would cause harm there.

The United States Supreme Court reversed. The court explained that foreseeability of harm is not the deciding factor.

> This is not to say, of course, that foreseeability is wholly irrelevant. But the foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State. Rather, it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there. . . .
>
> When a corporation "purposefully avails itself of the privilege of conducting activities within the forum State," it has clear notice that it is subject to suit there, and can act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to customers, or, if the risks are too great, severing its connection with the State. Hence if the sale of a product of a manufacturer or distributor such as Audi or Volkswagen 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 owner 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.
>
> But there is no such or similar basis for Oklahoma jurisdiction over World-Wide [the regional distributor] or Seaway [the local retailer] in this case.

> Seaway's sales are made in Massena, N.Y. World-Wide's market, although substantially larger, is limited to dealers in New York, New Jersey, and Connecticut. There is no evidence of record that any automobiles distributed by World-Wide are sold to retail customers outside this tristate area. 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."

World-Wide Volkswagen, 444 U.S. at 297–98. With that, the Court concluded that any contacts that the defendants had with Oklahoma were too remote to support personal jurisdiction there.

The Court revisited the stream-of-commerce theory in *Asahi Metal Industry Co., Ltd. v. Superior Court of California*, 480 U.S. 102 (1987), a component or supplier case. In *Asahi*, a California tort plaintiff sued a Taiwanese tire tube manufacturer, claiming it was responsible for a blowout in his motorcycle's tire, causing his injuries. The tube manufacturer filed a third-party claim for indemnity in California against its Japanese valve-assembly supplier, Asahi. Asahi sold its valves in Taiwan directly to the tube manufacturer for incorporation into its products, which were distributed worldwide. Asahi's sales to the tube manufacturer accounted for a relatively small percentage of its total sales (though a large number of units), and Asahi knew that a portion of those valves was sold in California every year. The California Supreme Court concluded that personal jurisdiction existed in California because Asahi placed its component products in the stream of commerce and was aware that some would be sold in California.

In a plurality decision, Justice O'Connor, and three other justices, rejected the California's Supreme Court's analysis.

> The placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State. Additional conduct of the defendant may indicate an intent or purpose to serve the market in the forum State, for example, designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State. But 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.

Asahi Metal Industry Co., Ltd. v. Superior Court of California, 480 U.S. 102, 112 (1987). This has become known as the stream-of-commerce-plus theory.

Separately, Justice O'Connor ruled that personal jurisdiction would be unreasonable in any event, offending traditional notions of fair play and substantial justice. California has little interest in an indemnity claim between two foreign corporations that does not affect a California citizen, and the burden on the indemnity defendant would be high since it would have to defend in California as opposed to Taiwan or Japan.

Justice Brennan wrote the principal concurring opinion. He agreed with Justice O'Connor that jurisdiction in California would be unreasonable, and the case was resolved in Asahi's favor on that issue. He, and three other justices, however, disagreed with Justice O'Connor's stream-of-commerce analysis.

Justice Brennan reasoned as follows:

> The stream of commerce refers not to 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. These benefits accrue regardless of whether that participant directly conducts business in the forum State, or engages in additional conduct directed toward that State.

Id. at 117. Justice Brennan concluded that Asahi knew that the distribution chain would sweep its products into California, participated in that distribution chain, thus purposefully took advantage of the California market, and therefore its contact with California was adequate to support jurisdiction there. *Id.* at 121.

Uncertainty following *Asahi's* plurality treatment of the stream-of-commerce theory has led some courts to adopt the Brennan test and some to adopt the O'Connor test. "Other courts, including the Federal Circuit, have avoided adopting either test and instead analyze stream of commerce questions on a case-by-case basis." Megan M. LaBelle, Patent Litigation, Personal Jurisdiction, and the Public Good, 18 Geo. Mason L. Rev. 43, 66 n.134 (2010); accord *Lesnick v. Hollingsworth & Vose, Co.*, 35 F.3d 939, 945 n.1 (4th Cir. 1994) (noting the circuit split).[2]

Analysis

This case falls squarely under *World-Wide Volkswagen* and *Asahi*. The Vermont Supreme Court has not developed the stream-of-commerce theory as reflected in those cases. However, the issue here is fundamentally one of federal due process.

Minimum contacts

In arguing that jurisdiction is proper in this court, Cleveland's argument with regard to

[2] Some clarity may be brought to the matter when the United States Supreme Court decides the appeal from *McIntyre Machinery, Ltd. v. Nicastro*, 987 A.2d 575 (N.J. 2010); 131 S.Ct. 62 (granting cert.). The appeal was argued on January 11, 2011. The transcript is available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/09-1343.pdf.

contacts substantially is this:

> Barton Solvents supplied its products to Cleveland Lithichrome, whose monumental products are nationally distributed. Third-Party Complaint at ¶¶ 6–8. Barton Solvents knew that its products are nationally distributed. Third Party Complaint at ¶¶ 6–8. Barton Solvents knew that its solvents would be incorporated into the products manufactured by Cleveland Lithichrome. See *id.* at ¶ 6. This is not a case where the defendant could not foresee that its product would end up in Vermont. Barton Solvents' market here is not limited to a particular region, as was the case in *World-Wide Volkswagen Corp.* There, the defendant's market was "limited to dealers in New York, New Jersey, and Connecticut. There [was] no evidence of record that any automobiles distributed by World-Wide [were] sold to retail customers outside of this tristate area." 444 U.S. at 298. In contrast, Barton Solvents knew that its product was being incorporated into Cleveland Lithichrome products that would be distributed nationally. See Third-Party Complaint at ¶¶ 6–8.

Cleveland Lithichrome's Opposition to Dismissal at 4 (filed Sept. 21, 2009). In other words, Cleveland argues that Barton should be subject to suit in Vermont because it knew that its products were being marketed nationally and some in fact were sold in Vermont.

This argument has several defects. First, Cleveland's argument reflects an even broader stream-of-commerce theory than even Justice Brennan endorsed in *Asahi*. Justice Brennan's analysis was not that Asahi should be subject to the jurisdiction of every state because it was aware that its products were being marketed nationally. Asahi specifically knew that the stream of commerce was taking its products to California routinely, not incidentally. Contacts thus were sufficient in California. The United States Supreme Court has never endorsed a stream of commerce theory as broad as that apparently advocated here by Cleveland.

Second, even if Cleveland's broad theory were permissible, the facts of this case do not support it. Cleveland cites to paragraphs 6–8 of the third-party complaint in support of the allegation that Barton knew that its products, as incorporated into Cleveland's, were being distributed nationally. The cited paragraphs say no such thing:

> 6. Beginning in the early 1980s and continuing through 2000, Cleveland Lithichrome purchased solvents used to manufacture its products from Barton Solvents.
>
> 7. Cleveland Lithichrome incorporated solvents supplied by Barton Solvents into its products without substantially changing the solvents in any way.
>
> 8. The Cleveland Lithichrome products were in turn supplied by Cleveland Lithichrome to its distributors without any substantial change in the solvents supplied by Barton Solvents and, on information and belief, reached the end users without any substantial change in the solvents supplied by Barton Solvents.

Cleveland Lithichrome's Third Party Complaint at 2 (filed July 7, 2009). There is no allegation in the cited paragraphs, or elsewhere, relating to Barton's knowledge that its products, as incorporated into Cleveland's, were being marketed nationally. Nor is there any allegation in the third-party complaint or elsewhere to the effect that Barton knew that its products were being marketed in Vermont. Rather, the facts are that Barton sold its products in the Midwest and there were never any significant sales in Vermont. If there were sales in Vermont, they were incidental, not something that Barton should have anticipated.

Cleveland Lithichrome has not made a prima facie showing of the minimum contacts necessary to support personal jurisdiction in Vermont.

Reasonableness

Even if it had, jurisdiction in Vermont would be unreasonable. As in *Asahi*, the dispute at issue—third-party indemnification—is completely tangential to the underlying tort case and has nothing to do with Vermont or its citizens. Barton would not be involved in this case but for Cleveland's indemnification claim. Vermont has no interest in an indemnification claim between two out-of-state corporations that has no effect on its citizens. The burden of defending such a claim in Vermont may not be as high as Asahi's burden of defending in California, but it is quite similar. Cleveland is free to bring its claim in another jurisdiction in which due process concerns are more readily satisfied.

Returning to Vermont Law

In briefing, both parties have relied on *O'Brien v. Comstock*, 123 Vt. 461 (1963). In *O'Brien*, Vermont consumers alleged that they were injured by the presence of glass in a can of beans. They sued the out-of-state manufacturer in Vermont. There were *no facts whatsoever* in the record regarding how the can had come to Vermont. The sole jurisdictionally significant allegation was conclusory: that the can had been put into the stream of commerce and somehow ended up in Vermont. *Id.* at 465. That was it. The Court ruled that the bare allegation that the product had moved in the stream of commerce was not sufficient to establish personal jurisdiction in Vermont.

> The vital factor in the statute is the intentional and affirmative action on the part of the nonresident defendant in pursuit of its corporate purposes within this jurisdiction. A single act, purposefully performed here, will put the actor within the reach of the sovereignty of this state . . . . So will active participation in the Vermont market, either by direct shipment, or by way of transmittal through regular distributors presently serving the Vermont marketing area.
>
> The jurisdictional power to deal personally with a nonresident defendant in transitory actions of this type must be generated by the defendant's intentional participation here. Thus when a plaintiff seeks to reach a foreign corporate defendant in personam by service on our secretary of state, it is incumbent upon the claimant to plead sufficient facts to demonstrate that the defendant is causally responsible for the presence of the injuring agency within the State of Vermont.

> Without such a presentation in the record there is no justification for the conclusion that the defendant has yielded to the jurisdiction of our courts by its own volition.

Id. at 464–65.

O'Brien is not helpful authority in this case. At most, given the paucity of facts available for the Court to analyze, *O'Brien* is fairly read as rejecting the theory that even the slightest movement in the stream of commerce necessarily establishes personal jurisdiction. Rejection of such a theory is consistent with *World-Wide Volkswagen* and *Asahi*.

Even if one could locate a distinction between *O'Brien* and subsequent United States Supreme Court authority, it would not matter. *O'Brien* long predates *World-Wide Volkswagen* and *Asahi*, and the inquiry here is a federal constitutional one. If the relevant Vermont long-arm statute is intended by the legislature to reach as far as federal due process permits, and federal due process standards have changed since *O'Brien*, then the federal principles control. Vermont extends personal jurisdiction as far as, but not farther than, federal due process standards permit.

The last time the Vermont Supreme Court cited *O'Brien* was in *Chittenden Trust Co. v. Bianchi*, 148 Vt. 140, 142 (1987), the same year that *Asahi* was decided. The Court reiterated the position of *O'Brien*, that personal jurisdiction over a nonresident defendant must be predicated on "intentional and affirmative action." The *Chittenden Trust Co.* case was decided one month after *Asahi*, included no citation to *Asahi*, and reflects no apparent awareness of *Asahi*. The Vermont Supreme Court has not cited *O'Brien* since. The court finds *O'Brien* unhelpful in this case.

Cleveland has not established a prima facie showing that Barton purposefully availed itself of the privilege of conducting business in Vermont, knew that its products would be marketed in Vermont or purchased by Vermont consumers, and that jurisdiction here would be reasonable and meets due process requirements.

ORDER

For these reasons, Barton's motion to dismiss is granted.

Dated: 11/13/11

Geoffrey Crawford,
Superior Court Judge

EXHIBIT 4

EXHIBIT 4

DOC #383

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re: Methyl Tertiary Butyl Ether ("MTBE") Products Liability Litigation	ORDER
This Document Relates To: All Cases	Master File No. 1:00-1898
	MDL 1358 (SAS) No. M21-88

SHIRA A. SCHEINDLIN, U.S.D.J.:

CASE MANAGEMENT ORDER #4

I. Prior Order: Filing; Service

All case management orders requiring production of documents or other information, previously made by the Court, shall remain in full force and effect. Attached hereto as Appendix A is a list of cases that are currently consolidated in this multi-district litigation, designated MDL 1358, which have either been filed in this Court or transferred to this Court pursuant to 28 U.S.C. § 1407. A copy of this Order shall be filed in each case listed in Appendix A. In cases subsequently filed in, removed to, or transferred to this Court as part of MDL 1358, a copy of this Order shall be provided by the Clerk to each Plaintiff at the time the case is filed in, removed, or transferred to this Court, and each

plaintiff shall promptly serve a copy of this Order on any defendant not previously a party in one or more of the cases listed in Appendix A.

II. Focus Cases

A. For purposes of this Order, the following cases are focus cases: *County of Suffolk and Suffolk County Water Authority v. Amerada Hess Corp., et al.*, 04 Civ. 5424; *Orange County Water District v. Unocal Corp., et al.*, 04 Civ. 4968; *City of New York v. Amerada Hess Corp., et al.*, 04 Civ. 3417; and *United Water New York, Inc. v. Amerada Hess Corp., et al.*, 04 Civ. 2389.

B. For purposes of this Order, all cases not listed in subsection II(A) are non-focus cases at this time.

C. For purposes of this Order, the term "Relevant Geographic Area" shall mean the following:

1. *County of Suffolk and Suffolk County Water Authority v. Amerada Hess Corp., et al.*, 04 Civ. 5424: Suffolk County, New York;

2. *Orange County Water District v. Unocal Corp., et al.*, 04 Civ. 4968: the Orange County Water District service area;

3. *City of New York v. Amerada Hess Corp., et al.*, 04 Civ. 3417: physical area comprising United States of America zip code numbers 11001, 11003, 11004, 11355, 11364, 11365, 11366, 11367, 11368, 11374, 11375, 11385,

11411, 11412, 11413, 11414, 11415, 11416, 11417, 11418, 11419, 11420, 11421, 11422, 11423, 11426, 11427, 11428, 11429, 11430, 11432, 11433, 11434, 11435, 11436, 11451, 11580; and

4. *United Water New York, Inc. v. Amerada Hess Corp., et al.*, 04 Civ. 2389: Rockland County, New York.

The definition of "Relevant Geographic Area" for any focus case may be modified by the parties upon both plaintiffs' and defendants' consent.

III. Discovery

A. Plaintiffs: Liability Discovery in Focus Cases

1. Written Discovery and Production of Documents

Upon entry of this Order, as to those defendants in focus cases who were not parties to *South Tahoe Public Utilities District v. Atlantic Richfield Co., et al.*, No. 999128, Superior Court of the State of California for the County of San Francisco; or *Communities for a Better Environment v. Unocal Corp., et al.*, No. 997013, Superior Court of the State of California for the County of San Francisco or MDL 1358 I (the "Prior MTBE Litigations"), Plaintiffs may engage in written discovery on the following issues:

(i) MTBE's characteristics in groundwater and containment systems;

(ii) taste and odor of MTBE;

(iii) alternatives, including the availability of ethanol;

(iv) knowledge of MTBE's characteristics and industry releases;

(v) the formation of and participation in industry groups or committees relating to MTBE;

(vi) contacts and communications by both refiners and those industry groups with governmental regulators and officials and the substance of those communications relating to MTBE;

(vii) decisions to select an oxygenate for use in gasoline, including the decision to use MTBE, and the decision to use or not to use ethanol;

(viii) the decision to use MTBE to boost octane;

(ix) the decision to use MTBE in conventional gasoline;

(x) the decision to use MTBE in Non-Reformulated Gasoline/Non-Oxy-Fuel areas;

(xi) the foreseeability of contamination, including

knowledge of historical problems associated with underground storage tank systems;

(xii) programs by defendants, their subsidiaries or their affiliates, to identify, prioritize and/or remediate MTBE/TBA contamination within the Relevant Geographic Area of each focus case;

(xiii) warnings relating to gasoline containing MTBE;

(xiv) the decision to discontinue using MTBE in gasoline;

(xv) surveys of the defendants that show the extent of contamination by MTBE;

(xvi) vulnerability studies which describe potential impacts on public drinking water supplies and/or wells in the Relevant Geographic Areas, and/or any programs to require additional and/or different remedial work to prevent MTBE and/or TBA from entering public drinking water supplies and/or wells in the Relevant Geographic Areas; and

(xvii) topics (i)–(xvi) as they relate to TBA.

2. Depositions

On or after March 1, 2005, as to those defendant in focus cases who were not parties in *South Tahoe Public Utilities District v. Atlantic Richfield Co., et al.*, No. 999128, Superior Court of the State of California for the County of San Francisco; or *Communities for a Better Environment v. Unocal Corp., et al.*, No. 997013, Superior Court of the State of California for the County of San Francisco, plaintiffs may take deposition on topics (i) through (xvii) above. Nothing in this Section otherwise limits a party's right to request the production of documents on topics (i) through (xvii) in connection with a deposition so far as permitted by the Federal Rules of Civil Procedure.

3. Liability Discovery from Parties in Prior MTBE Litigation

In accordance with the Court's Order, dated October 18, 2004 ("Oct. 18 Order"), the Special Master shall determine whether documents produced but not copied in prior MTBE cases other than MDL 1358 shall be made available to all parties.

4. Any discovery of the type described in subsections III(A)(1) and III(A)(2) above shall be applicable to and for use in non-focus cases as well, and parties in non-focus cases will be given notice and the opportunity to participate in this discovery.

B. Plaintiffs: Other Discovery in Focus Cases

1. Production of MTBE/TBA Release Information

(a) On or before November 1, 2004, each defendant in *Orange County Water District v. Unocal Corp., et al.*, 04 Civ. 4968, and *City of New York v. Amerada Hess Corp., et al.*, 04 Civ. 3417, shall produce one representative site remediation file, which representative file shall be related to gasoline or MTBE or TBA releases of any kind within the Relevant Geographic Area and relevant time periods applicable to these focus cases.

(b) Each defendant in *County of Suffolk and Suffolk County Water Authority v. Amerada Hess Corp., et al.*, 04 Civ. 5424, and *United Water of New York, Inc. v. Amerada Hess Corp., et al.*, 04 Civ. 2389, shall produce the following:

(i) On or before November 30, 2004, each defendant shall produce all site remediation files in its possession, custody or control for each gasoline station, terminal and bulk storage facility where there has been any release or spill of gasoline, since 1979, within the Relevant Geographic Area covered by these focus cases;

(ii) Subject to all foundational requirements in, and in the format required by, subsection III(B)(2)(a) below, on or before November 30, 2004, each defendant shall identify the address of all gasoline stations that they either own or have owned, operate or have operated, lease or have leased, or are or have been subject to a retail supply contract, and such dates of ownership, operation, lease or retail supply contract, since 1979, within the Relevant Geographic Area covered by these focus cases.

(c) Each Defendant in *City of New York v. Amerada Hess Corp., et al.*, 04 Civ. 3417 (from 1979 to present) and *Orange County Water District v. Unocal Corp., et al.*, 04 Civ. 4968 (from 1986 to present), shall produce the following:

(i) On or before December 31, 2004, each defendant shall produce all site remediation files in its possession, custody or control for each gasoline station, terminal and bulk storage facility where there has been any release or

spill of gasoline within the Relevant Geographical Area covered by these focus cases;

(ii) Subject to all foundational requirements in, and in the format required by, subsection III(B)(2)(a) below, on or before December 31, 2004, each defendant shall identify the address of all gasoline stations that they either owned or have owned, operate or have operated, lease or have leased, or are or have been subject to a retail supply contract, and such dates of ownership, operation, lease or retail supply contract, within the Relevant Geographic Area covered by these focus cases.

(iii) On or before March 15, 2005, the parties shall meet and confer to discuss what additional information is needed to conduct further discovery on this topic.

2. Declarations

(a) On or before December 31, 2004, each defendant, to the extent it is named as a defendant in one or more of the focus cases shall provide declarations, applicable to *County of Suffolk and Suffolk County Water Authority v. Amerada Hess Corp, et al.*, 04 Civ. 5424 (from 1979-present); *Orange County*

Water District v. Unocal Corp., et al., 04 Civ. 4968 (from 1986-present); and *City of New York v. Amerada Hess Corp., et al.*, 04 Civ. 3417 (from 1979-present), based upon all non-privileged information, including documents, within the possession, custody or control of a defendant and retrievable through reasonable effort. The declarations shall identify databases and categories of documents that were used to gather the information contained in the declarations. The declarations shall contain the following information:

(i) defendants in each focus case will identify jobbers supplied by them that provide gasoline containing MTBE to the Relevant Geographic Area;

(ii) manufacturers of neat MTBE and/or TBA will disclose how and where it is made;

(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;

(iv) each refiner will provide a history of ownership, 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 Geographical Area in each focus case;

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

(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;

(vii) for each petroleum product containing MTBE refined and/or marketed by the defendant into the Relevant Geographical Area of each focus case,

the defendant shall disclose the name and grade (if applicable) of the product, the product and product code;

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

(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 cases.

Each defendant will designate, as to each sub-topic, the person(s) most qualified to testify on defendant's behalf based on defendant's investigation.

(b) On or before January 15, 2005, the parties shall meet and confer to arrange a schedule for providing a declaration including the information listed in subsections (a)(i) through (ix) above applicable to *United Water New York, Inc. v. Amerada Hess Corp., et al.*, 04 Civ. 2389.

3. Declaration Depositions

In accordance with the Oct. 18 Order, the Special Master shall determine whether plaintiffs may serve document subpoenas in connection with their "person most knowledgeable" depositions, in accordance with Fed. R. Civ. P. 30(b)(6).

C. Defendants: Motion Discovery in Focus Cases

1. Written Discovery and Production of Documents

(a) Upon entry of this Order, defendants may engage in written discovery as to each plaintiff in the focus cases on the following issues:

(i) pumping data for each well that is impacted by MTBE and/or TBA, including any documents that relate to distribution of water from these wells, and special testing, treatment, or handling of water from those wells;

(ii) the construction or maintenance of each of plaintiffs' wells, including "as built" construction data for each of plaintiffs' wells, including monitoring and potable wells, that are impacted by MTBE and/or TBA

(iii) any contact with governmental and/or other regulatory authorities in addressing releases and remediation activities relating to MTBE and/or TBA releases that have impacted plaintiffs' wells and/or any aquifer supplying water to their wells;

(iv) any releases of petroleum products, including MTBE and/or TBA, from sites owned, controlled and/or operated by plaintiff and any investigative and/or remedial response activities related to such release; and

(v) any complaints from customers and/or purveyors within any plaintiffs' service area or jurisdiction relating to the taste, odor or quality of potable water served in said area or jurisdiction;

(vi) any Wellhead Protection studies or computer modeling of Wellhead Protection Areas, source water assessments, vulnerability studies, or computer modeling of well or aquifer vulnerability and/or § 208 Water Management or Water Basin

studies performed by and/or on behalf of each focus case plaintiff, or that relate to the groundwater or aquifer system located within the Relevant Geographic Area.

In accordance with the Oct. 18 Order, the Special Master shall determine whether defendants may take discovery about contaminants in plaintiffs' wells other than MTBE or TBA, and how plaintiffs have responded to the presence of those contaminants.

2. Depositions

(a) After March 1, 2005, defendants may depose representatives of the plaintiffs in the focus cases concerning any of the topics (i) through (vi) above. Nothing in this Section otherwise limits a party's right to request the production of documents on topics (i) through (vi) in connection with a deposition so far as permitted by the Federal Rules of Civil Procedure.

D. Preemption Discovery

In accordance with the Oct. 18 Order, the Special Master shall determine a schedule for conducting discovery related to defendants' preemption motions and the scope of any such discovery.

E. Non-Party Discovery

1. Upon entry of this Order, the parties may engage in full discovery with respect to non-parties.

2. Upon entry of this Order, the parties shall promptly meet and confer regarding procedures to assure that non-party discovery proceeds in an efficient manner.

F. Non-Focus Cases

1. All discovery previously ordered by the Court shall proceed in non-focus cases.

2. As set forth in subsection III(A)(4) above, the parties in non-focus cases will be given notice and opportunity to participate in liability discovery.

3. No other discovery shall proceed in non-focus cases except as set forth herein or upon further Order of the Court.

G. Preservation Order

1. On or before November 1, 2004, the parties shall submit a document preservation order to the Court applicable to focus and non-focus cases.

H. Prior Depositions

In accordance with the Oct. 18 Order, the Special Master shall determine whether prior depositions taken in Prior MTBE Litigations shall be

applicable to all defendants.

I. Reservation of Rights

Notwithstanding the forgoing, nothing in this Order shall preclude a party from being permitted to object to a discovery request on the grounds that said request is overly broad, unduly burdensome, not designed to lead to the discovery of relevant or admissible evidence, or otherwise not permitted under the applicable Federal Rules of Civil Procedure.

IV. Summary Judgment Motions

A. Preemption

Upon consideration of the parties' submissions, the Court will establish a schedule for filing preemption motions.

B. Statutes of Limitations

1. On or before November 15, 2004, the parties shall meet and confer regarding a stipulation as to recent releases within the *Orange County Water District v. Unocal Corp., et al.*, 04 Civ. 4968, target area, during an agreed-upon time frame, solely for purposes of defendants' motion.

2. On or before January 15, 2005, the parties shall meet and confer to identify focus issues for defendants' statutes of limitations motions applicable to *Orange County Water District v. Unocal Corp., et al.*, 04 Civ. 4968.

3. After March 31, 2005, Defendants may file statutes of limitations motions applicable to the focus cases.

C. Justiciability/No Impact/Lack of Imminent Threat

Upon consideration of the parties' submissions, the Court will establish a schedule for filing any justiciability/no impact/lack of imminent threat motions applicable to the focus cases.

D. Primary Jurisdiction

Defendants may submit this motion on or after February 15, 2005.

E. Lack of Cognizable Legal Interest

On or before January 15, 2005, the parties shall meet and confer regarding discovery related to this motion.

F. All Other Motions

All other motions, other than those subject to an existing scheduling order from the Court, shall be brought only after a pre-motion conference and subsequent Order of the Court.

SO ORDERED:

Shira A. Scheindlin
U.S.D.J.

Dated: New York, New York
October 19, 2004

-Appearances-

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Exhibit A

State	Short Case Name	Court/Index No.
CA	*California-American Water Co. v. Atlantic Richfield Co., et al.*	04 Civ. 4974
CA	*City of Fresno v. Chevron U.S.A. Inc., et al.*	04 Civ. 4973
CA	*City of Riverside v. Atlantic Richfield Co., et al.*	04 Civ. 4969
CA	*City of Roseville v. Atlantic Richfield Co., et al.*	04 Civ. 4971
CA	*Orange County Water District v. Unocal Corp., et al.*	04 Civ. 4968
CA	*People of the State of California, et al. v. Atlantic Richfield Co., et al.*	04 Civ. 4972
CA	*Quincy Community Services District v. Atlantic Richfield Co., et al.*	04 Civ. 4970
CA	*Martin Silver, et al. v. Alon USA Energy, Inc., et al.*	04 Civ. 4975
CT	*American Distilling & Manufacturing Co., Inc. v. Amerada Hess Corp., et al.*	04 Civ. 1719
CT	*Columbia Board of Education v. Amerada Hess Corp., et al.*	04 Civ. 1716
CT	*Our Lady of the Rosary Chapel v. Amerada Hess Corp., et al.*	04 Civ. 1718
CT	*Town of East Hampton v. Amerada Hess Corp., et al.*	04 Civ. 1720
CT	*United Water CT, Inc. v. Amerada Hess Corp., et al.*	04 Civ. 1721
FL	*Escambia County Utilities Authority v. Adcock Petroleum, Inc, et al.*	04 Civ. 1722
IA	*City of Sioux City, Iowa, et al. v. Amerada Hess Corp., et al.*	04 Civ. 1723
IL	*City of Island Lake v. Amerada Hess Corp., et al. (f/k/a Crystal Lake, et al. v. Amerada Hess Corp., et al.)*	04 Civ. 2053
IN	*Town of Campbellsburg v. Amerada Hess Corp., et al.*	04 Civ. 4990

State	Short Case Name	Court/Index No.
IN	*City of Mishawaka v. Amerada Hess Corp., et al.*	04 Civ. 2055
IN	*City of Rockport v. v. Amerada Hess Corp., et al.*	04 Civ. 1724
IN	*City of South Bend, Indiana v. Amerada Hess Corp., et al.*	04 Civ. 2056
IN	*North Newton School Corp v. Amerada Hess Corp., et al.*	04 Civ. 2057
KS	*Chisholm Creek Utility Authority v. Alon USA Energy Inc., et al.*	04 Civ. 2061
KS	*City of Bel Aire v. Alon USA Energy Inc., et al.*	04 Civ. 2062
KS	*City of Dodge City v. Alon USA Energy Inc., et al.*	04 Civ. 2060
KS	*City of Park City, Kansas v. Alon USA Energy Inc., et al.*	04 Civ. 2059
LA	*City of Marksville v. Alon USA Energy, Inc., et al.*	04 Civ. 3412
LA	*Town of Rayville v. Alon USA Energy, Inc., et al.*	04 Civ. 3413
MA	*Town of Duxbury, et al. v. Amerada Hess Corp., et al.*	04 Civ. 1725
NH	*City of Dover v. Amerada Hess Corp., et al.*	04 Civ. 2067
NH	*City of Portsmouth v. Amerada Hess Corp., et al.*	04 Civ. 2066
NH	*State of New Hampshire v. Amerada Hess. Corp.*	04 Civ. 4976
NJ	*New Jersey American Water Co., Inc., et al. v. Amerada Hess Corp, et al.*	04 Civ. 1726
NY	*Basso, et al. v. Sunoco, Inc., et al.*	03 Civ. 9050
NY	*Carle Place Water District v. AGIP, et al.*	03 Civ. 10053
NY	*County of Suffolk v. Amerada Hess Corp., et al.*	04 Civ. 5424

State	Short Case Name	Court/Index No.
NY	*City of New York v. Amerada Hess Corp., et al.*	04 Civ. 3417
NY	*County of Nassau v. Amerada Hess Corp., et al.*	03 Civ. 9543
NY	*Franklin Square Water District v. Amerada Hess Corp., et al.*	04 Civ. 5423
NY	*Hicksville Water District v. Amerada Hess Corp., et al.*	04 Civ. 5421
NY	*Incorporated Village of Sands Point v. Amerada Hess Corp., et al.*	04 Civ. 3416
NY	*Long Island Water Corp. v. Amerada Hess Corp, et al.*	04 Civ. 2068
NY	*Port Washington Water District v. Amerada Hess Corp., et al.*	04 Civ. 3415
NY	*Roslyn Water District v. Amerada Hess Corp., et al.*	04 Civ. 5422
NY	*Tonneson, et al. v. Exxon Mobil Corp., et al.*	03 Civ. 8248
NY	*Town of East Hampton v. AGIP, et al.*	03 Civ. 10056
NY	*Town of Southampton v. AGIP, et al.*	03 Civ. 10054
NY	*Town of Wappinger v. Amerada Hess Corp., et al.*	04 Civ. 2388
NY	*United Water New York Inc. v. Amerada Hess Corp, et al.*	04 Civ. 2389
NY	*Village of Hempstead v. AGIP, et al.*	03 Civ. 10055
NY	*Village of Mineola v. AGIP, et al.*	03 Civ. 10051
NY	*Village of Pawling v. Amerada Hess Corp., et al.*	04 Civ. 2390
NY	*Water Authority of Great Neck North v. Amerada Hess Corp, et al.*	04 Civ. 1727
NY	*Water Authority of Western Nassau v. Amerada Hess Corp., et al.*	03 Civ. 9544
NY	*West Hempstead Water District v. AGIP, et al.*	03 Civ. 10052
NY	*Westbury Water District v. AGIP, et al.*	03 Civ. 10057
PA	*Northampton, Bucks County Municipal Authority v. Amerada Hess Corp., et al.*	04 Civ. 6993

State	Short Case Name	Court/Index No.
VA	*Buchanan County School Board v. Amerada Hess Corp., et al.*	04 Civ. 3418
VA	*Patrick County School Board v. Amerada Hess Corp., et al.*	04 Civ. 2070
VT	*Craftsbury Fire District #2 v. Amerada Hess Corp., et al.*	04 Civ. 3419
VT	*Town of Hartland v. Amerada Hess Corp., et al.*	04 Civ. 2072
W.Va	*Town of Matoaka v. Amerada Hess Corp., et al.*	04 Civ. 3420

VERMONT SUPERIOR COURT
WASHINGTON UNIT, CIVIL DIVISION

STATE OF VERMONT,
Plaintiff,
v.

ATLANTIC RICHFIELD COMPANY, et al.,
Defendants.

2014 OCT -3 P 2:56
Docket No. 340-6-14 Wncv

CERTIFICATE OF SERVICE

Pursuant to V.R.C.P. Rule 5(d), on the 3rd day of October, 2014, I served the following:

- Total Petrochemicals & Refining USA, Inc.'s Reply in Support of Its Motion To Dismiss For Lack of Personal Jurisdiction

on all parties by emailing copies of the same upon:

All Counsel of Record

DATED at Rutland, Vermont this 3rd day of October, 2014.

TOTAL PETROCHEMICALS & REFINING

By: _____

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9366-001/554476

IN THE SUPERIOR COURT FOR THE STATE OF VERMONT

IN AND FOR THE COUNTY OF WASHINGTON, CIVIL DIVISION

STATE OF VERMONT, Plaintiff, v. ATLANTIC RICHFIELD, et al., Defendants.	Docket No. 340-6-14 Wncv 11:24 a.m. November 13, 2014

MOTIONS HEARING
BEFORE THE HONORABLES MARY MILES TEACHOUT
AND BRIAN GREATSON (TELEPHONIC)
JUDGES OF THE SUPERIOR COURT

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I N D E X

(Proceedings commence at 1:05)

THE BAILIFF: All rise.

THE COURT: Thank you. You may be seated. The matter before the Court at this time is Docket Number 340-6-14Wncv. The Plaintiff, State of Vermont; the State of Vermont is represented by Attorneys Kline, Greenwald, Boyles, and Burke.

Defendant, Atlan -- Exxon et al. Representing Exxon is Attorney Berger and we'd like the folks that represent themselves on the Defendant's side.

MR. LENDER: Your Honor, good afternoon. David Lender from Weil Gotshal, co-counsel, arguing the motion to dismiss for Exxon Mobil.

MR. LYNN: Good afternoon, Your Honor.

THE COURT: Thank you. Uh-huh. We'll continue with you.

MR. LYNN: Good afternoon, Your Honor.

THE COURT: Good afternoon.

MR. LYNN: Pietro Lynn. And this is Lisa Meyer, who is also --

MS. MEYER: Good afternoon, Your Honor.

MR. LYNN: -- representing Citgo.

MS. PARKER: Your Honor, Amy Parker on behalf of Total Petro Chemicals and Refining USA, Inc.

MR. SARTORE: Jack Sartore, Your Honor, from Paul,

Frank & Collins, Burlington, for Irving and Highlands, and my colleagues from New York City are James Herschlein and Glen Pogust.

MR. HERSCHLEIN: Good afternoon, Your Honor.

MR. POGUST: Good afternoon.

THE COURT: Afternoon.

MR. RYAN: Harry Ryan, Your Honor, for Sunoco, Hess, Coastal, Total and El Paso.

MR. MILLER: Good afternoon, Your Honor. Eric Miller for the Valero Defendants.

MR. FEWELL: Scott Fewell, Exxon Mobil.

MS. MCDONALD: Good afternoon, Jennifer McDonald for Chevron and behind me is Charles Correll.

MR. CORRELL: Good afternoon, Your Honor.

THE COURT: Any other lawyers?

MR. BRANNEN: Good afternoon, Your Honor, I'm Barney Brannen from Vitt Brannen & Loftus, here on behalf of Conoco Phillips.

MS. HAMMOND: Good afternoon, Your Honor. Heather Hammond here on behalf of Shell Oil with Rick Ross.

MR. ROSS: Good afternoon.

MS. STERN: Good afternoon, Your Honor. Robin Stern from Potter Stewart Law Offices for British Petroleum and Atlantic Richfield.

MR. LAGGINS: Andy Laggins (phonetic) for BP and

Atlantic Richfield, Your Honor. Good afternoon.

THE COURT: Is that everyone? Go ahead.

MS. COPPINGER: Nessa Coppinger on behalf of Sunoco.

THE COURT: Welcome. We're here for a hearing on the motion to dismiss and I assume that we'll be starting with Exxon. I don't know if any, if you've discussed whether anyone else is going to speaking to this or not?

MR. LENDER: Your Honor, I think I'll be only one arguing for the Defendant group.

THE COURT: All right.

MR. LENDER: Shall I begin?

THE COURT: Yes, go ahead.

MR. LENDER: Again, good afternoon, Your Honor. Just again for the record, David Lender from the law firm of Weil Gotshal representing the Exxon Mobil Defendants.

And as Your Honor is aware, Exxon Mobil has moved to dismiss Plaintiff's complaint as time barred under the six year statute of limitations set forth in 12 VSA Section 511.

And let me say up front that Exxon Mobil understands the high standard we need to meet to get a motion to dismiss granted, the Supreme Court of Vermont has been clear about that.

But cases in the Supreme Court of Vermont, such as Fortier and Chaplain, (phonetic), which by the way affirmed a dismissal of the statute of limitation on a motion to dismiss;

has made clear that it is proper to raise a statute of limitations defense on a motion to dismiss where, quote,the complaints may properly when the allegations set forth therein show on their face that the action is barred by the statutes of limitation, and we believe this is such a case.

In our moving papers we set forth why we believe the State's claim is time barred. And it really in a sense falls into three main buckets although there is other things we can point to.

First, specifically the State has known about MTBE for years and has been involved with investigating and remediating MTBE for decades. And we identified several public reports in our papers that made that clear.

Moreover, in the early 2000s, while the Defendants were actually still using MTBE, other states, such as the State of New Hampshire, and in fact two different Vermont municipalities, actually brought suits over the use of MTBE, and these were done in the early 2000s.

And rather than suing at that time, like those defendants did, in those other states, in those other municipalities, the State just sat on the sidelines, and they did nothing.

The legislature banned the use of MTBE in May of 2005, effective 2007. And if you read the basics for why they were banning MTBE, in many ways it could -- reads like the

allegations that are being raised in the complaint.

But what's particularly notable is the fact of the things they referenced as a reason why they were banning MTBE, was the New Hampshire State complaints, and the complaints filed by the two Vermont municipalities. But again in 2005, the State did nothing.

Now, Your Honor, we put in the municipality complaints, and if you actually look at those complaints and compare them to the State's complaints, the allegations are very, very similar. In fact, some of the allegations are copied almost verbatim, and the claims are copied almost verbatim.

And it's really -- this is undisputed. If you read the State's brief, their opposition brief, on page 3, they essentially concede that what they did was copy those other lawsuits. If you go to the top of page 3, and I'll just quote to you what the State actually said in their opposition.

They say, "The State's lawsuit is similar in material ways to those of the other plaintiffs who have sought damages for MTBE contamination." The State alleges that the same oil companies perpetrated the same conduct resulting in the same types of damages alleged in many of the other cases.

So there's no question that they knew about these other lawsuits. They knew about MTBE, but again they sat on the sidelines for decades. And what they did instead, is they

waited 2014, more than seven years after the Defendant stopped using MTBE in their gasoline, to file suit.

And as Your Honor knows, the purpose of a statute of limitation is to represent a balance affording the opportunity to plaintiffs to develop and present a claim while protecting the legitimate interest of defendants in timely assertion of that claim. And that comes from the Investment Property's case in the Supreme Court of Vermont.

THE COURT: But even if they knew about these other lawsuits in the past, it seems to me that in your reply you acknowledge that, on a site specific basis, there could well be things that happen, discoveries that happen during the statute of limitations period.

MR. LENDER: Actually, Your Honor, what we're saying is that what can't bring is the State they've essentially alleged. They've alleged, if you read the complaint, all over the place it alleges a generalized harm to the waters of the State of Vermont.

And that claim, today 2014, could have been brought in 2008, 2007, 2006. Under the State's view they could have brought that whenever they wanted to.

THE COURT: But in their -- in the State's opposition they say that you misunderstand that. They say that you, that you're over generalizing the injury alleged, and that it's actually a collection of different types of injuries. And even

thought harm might be indivisible between Defendants there's -- it's not just one single injury to the whole system.

MR. LENDER: If that's truly what the State is doing, although as we mentioned in our reply brief, the State has not identified a single new site that's been discovered in the last six years. They haven't alleged an tortuous conduct that occurred in the last six years. Nothing.

And if that's the case the State really wants to bring, then what we ask is that the Court makes it clear that the -- a generalized -- a generalized case unmoored to specific sites, that that's not going to be allowed.

If they didn't want to come forward and identify specific sites that they uncovered for the first time within the past six years, where they -- they were not otherwise on diligence notice, that a reasonable objective person otherwise wouldn't have uncovered it.

Then they should be able to -- they should identify those sites and then we could test those individual sites on statute of limitations. Our concern is that the way it's been alleged, it's just this generalized complaint and that shouldn't be permitted.

And I know, Your Honor, they said that in their papers, and again, if that's what they really are doing, that's fine, we should let -- we -- that's one reason why we brought the motion.

But for example, when they opposed -- let me say, when they put in their brief in support of their discovery plan, one of the things they actually claim they want is a statewide testing program. Well, a statewide testing program is only consistent with a general opportunity of generalized harm to the entire state. It's not tied or connected to individual sites.

So the State has been a little schizophrenic in terms of exactly what they want. But, Your Honor, actual -- if at the end of this hearing it's clear, and that's what we really want, but this is going to be site specific -- site -- a site specific case and they have to identify specific sites, when they uncovered them, how they uncovered them, when they started spending money on them.

Because they'll need to test those individually because as Your Honor knows, if for example, they started remediating and spending money more than six years ago on an individual site, they have an individual statute of limitation problem with (indiscernible).

Let me just take a few moments, Your Honor, if I could and just talk about some of the other things that the State says in their papers.

THE COURT: Well, let me just ask one question first.

MR. LENDER: Sure.

THE COURT: Because it follows on what you just said.

Why couldn't you find that out by filing a motion for more definite statement. I mean, are you seriously saying that there are no facts and circumstances alleged in the complaint that would justify --

MR. LENDER: Your Honor, there's not. You can read that complaint cover to cover. They did not identify a single site that they've uncovered for the first time in the past six years, and they haven't identified a single tortuous act by any of the Defendants that occurred in the past six years.

That's the reason why we filed the motion to dismiss to begin with because our view was the complaint as alleged would actually be time barred under the six year statute of limitation.

If what Your Honor wants to do is say, "Okay. Well we're agreeing to site specific case, and then they'll need to identify those sites," we could proceed that way and then we can try to figure out whether any of the specific sites they identified would also be vulnerable to the statute of limitation on an individualized site basis.

That would another way to proceed obviously. But just to be clear, there's nothing in the complaint that identifies anything that's happened in the past six years.

THE COURT: So you're saying that under the rules of pleading, they're just being way too general?

MR. LENDER: Correct. There's only -- there's really

one paragraph in the entire complaint, and it's a conclusory allegation that just says, "We've uncovered new stuff in the past six years." Nothing specific. Absolutely nothing specific.

THE COURT: Go ahead.

MR. LENDER: If you -- I just wanted to comment on three of the things that the State said in their opposition brief, and then, unless there's other questions, I'll let the State proceed.

One is the argument that the State is actually that certain of their claims are exempted from the statute of limitations under Title X, Section 462, because they allege harm to state owned lands. I mean, essentially their view is that the State can bring claims for damages to the state waters whenever they want to. That's ultimately their claim.

But it's really -- there's three problems with the State's claim. One is -- first of all, it's inconsistent with Section 461, which makes clear that the limitations prescribed in that Title shall apply to the State the same as when it's brought by somebody who's not in the State.

Second, it's inconsistent with the position the State actually took in Carroll. In Carroll the State actually admitted that the six year statute of limitation set forth in 12 VSA 511 applies to environment remediation claims.

And third, and perhaps maybe the most important, is

how Section 462 has been applied over and over and over again in the cases. Because Vermont courts have consistently characterized that statute has designed to prevent adverse possession and prescriptive claims against land owned by the states. Or for that matter, for pious entities, that are using the land charitable purposes.

It is not being used to say that if there's damage or harm to the water that you can bring a claim whenever you want. And if you think about it for a minute, if you actually were to accept the State's view, since 462 also applies to charitable organizations, they also would have no statute of limitations for any claim that relates to the charitable organization blend. I think we all agree that that's not what the law is.

The second thing they argue is that -- well, even if the six year statute applies, their claim under the Groundwater Protection Act is not barred because they brought their claims within six years of the enactment of that law. So their view is essentially because they sued within six years of 2008, when that went into effect, they could make a claim back for a hundred years if they wanted to.

And again, there's problems with that. The first is that Section 1390 is actually entitled policy. When you look at the top of the statute, it says policy on it. And in that title, when they wanted to have cause of action, that Section 1410.

Section 1410 is entitled right of action. So if 1390 says policy; 1410, which has been in the law for many, many years, says right of action.

And the second issue, of course, is that as Your Honor knows, it's -- Vermont has a very robust law that generally prohibits the retroactive application of new or amended laws. That's right in the statute, 1 VS 214. And as I mentioned before there has been nothing new alleged. It's all old conduct.

And so under the Supreme Count's decision in Godnik, if we were to apply 1390 here, you'd basically be imposing a new duty based on transactions that occurred well before the Groundwater Act was enacted. So there's several problems with that as well.

Then the last set of arguments, Your Honor, which they've made -- it mainly reinforces the arguments we started with, which is, is this a generalized case or is it a site specific case. Because the remaining arguments they made are they say, "Well, statutes of limitation, there's -- they're factual, there's individual issues."

And we agree, if we're proceeding on a site specific case, then obviously we'd have to address the statutes of limitation on a site specific basis, which is what we're asking for.

So, Your Honor, again, we think it's clear that if

the case is this generalized, the water is harmed, that's a case they can't bring. That case accrued more than six years ago. And if what we really are talking about now is what we think we should be talking about, which is site specific sites that have been uncovered in the past where there was no reason to -- for them to discover them before; then we should get those sites; let's identify those and then we can see whether those individual sites have statute of limitation problems or not.

THE COURT: Even if the -- your motion were granted, wouldn't it just result in a reorganization, perhaps of claims? And doesn't that relate to the overall general principle that a motion to dismiss shouldn't be granted unless there are no facts and circumstances under which a claim can be pursued.

And so isn't it -- wouldn't it really be wasteful to grant the motion and isn't it more constructive to recognize that there's some claims in there perhaps, even if they need to be addressed on a site specific basis, the more efficient and rational thing to do is just down to doing that?

MR. LENDER: And, Your Honor, you know, what I would say about that is that again it's them citing the New Hampshire case, which by the way was tried as a generalized statewide case, is what led us to be concerned that what we were trying to do here is a generalized statewide case.

That is an unwieldy, very expensive endeavor. I was

involved in the New Hampshire case, which is now on appeal in the Supreme Court of New Hampshire.

There would be real value to a decision that made clear that that is not the case we're bringing. Because that case is unmoored and it gets into all kinds of things, major experts, major discovery, that is a very expensive endeavor.

That claim that -- as it basically existed in the complaint should be dismissed, and there would be real value to having that dismissed.

Because if we get the clarity and what we're really dealing with here are specific sites that must have been uncovered within the pat six years, then we are now on a path to actually having a very focused case that we can all deal with.

Because then we can say these are the sites, who's responsible, when the remediation begin, do we have a Carroll problem or not. It's a very different case.

That's why we think the motion should be granted and if the State wants to now amend or bring, make it clear that what they're bringing is a site specific case, and then to identify the sites that are at issue; these new sites; that would enormously valuable and would keep us very focused on what the case should really be about.

THE COURT: In the State's response, even thought it didn't identify specific sites, or amend a complaint; didn't

the State say specifically, "This is not an overall generalized claim. It's a collection of more specific claims that as yet are not identified, site specific, but there are a number of different causes of action, a number of different legal theories and the -- that it shouldn't be thrown out wholesale.

Because there are pieces that put together make it seem indivisible, but it seemed to me the State was not saying, "We're bringing this totally on a --

MR. LENDER: Okay.

THE COURT: -- indivisible basis.

MR. LENDER: Your Honor, I would say two things in response, but one is, I agree 100 percent that if there was literally a brand new site that they uncovered today, that they had no reason to know there was MTBE contamination there, of course that wouldn't be barred under the statute of limitation, right.

Because that would be a brand new site, never uncovered before, no reason to know it was there, not disputing that.

But as I mentioned before, on the one hand they say that, but then as I mentioned, if you look at page 9 of the brief they filed in support of their proposed discovery and case management order.

What they said in that filing, on page 9, is that the claims were for, "widespread contamination of the waters of the

State," and that they were seeking a statewide testing and treatment program.

Well, a statewide testing and treatment program, which is what they sought in New Hampshire, is premised on the notion that we're talking about a generalized statewide injury where you go around the entire state and you try to test wells to see if there's MTBE there.

So on the one hand they say what you said in their opposition, if I agree with you, but then in other places they say something completely different. And that's why we ultimately felt we needed the motion so we --

THE COURT: But the other place is part about prayer for relief; it's not part of the cause of action side.

MR. LENDER: Well, it's in their prayer for relief, but it's also what they specifically said as to why their discovery plan, if the motion to dismiss were to be denied, why it should be -- why that should be part of it.

See to me the discovery that comes out of this, it's a very different -- it's a -- the discovery is different, very different, if we're really focusing on specific sites. Because then the issue is, well, who is responsible for that specific site, causation for that specific site, are there statute of limitation issues associated with that specific site.

A very different type of case, which by the way is how virtually every MTBE case has been tried, except for New

Hampshire. New Hampshire, if you go to the New Hampshire route of this, just generalized harm to the waters, it's just a different -- it's completely different discovery, completely different focus.

And then that is why we think there is value to granting to the motion to dismiss because it makes it clear what we're actually proceeding with going forward on discovery and what we're not.

THE COURT: Aren't there other ways to make that clear?

MR. LENDER: There -- yeah, they're -- there are obviously could be other ways to make that clear. For sure.

THE COURT: Okay. Thank you.

MR. LENDER: Thank you so much.

THE COURT: Good afternoon.

MR. KLINE: Good afternoon, Judge.

Scott Kline representing the State. I think it's important at this point, Judge, to focus back on the motion that's actually before the Court and that you need to decide.

And that motion is solely on statute of limitations and a lot of things were raised in the Defendants' reply memorandum that frankly we don't think need to be reached and should not be reached as issues to decide this motion.

Their motion to dismiss took all the claims, lumped them together, did not differentiate them, and other than the

thir -- the Section 1390 claim which they addressed separately in the reply, they didn't go claim by claim at all, they simply said there is a six year statute of limitations and everything's untimely.

We think the legal analysis to address that type of global motion to dismiss is pretty straightforward and frankly the motion can be -- should be readily denied.

The case for a motion to dismiss is well established and the supreme court said it's disfavored, the bar is exceedingly low to survive such a motion; theses motions should be rarely granted; and in fact they should be only granted where it is beyond doubt, as shown by the moving party here in the Defendants, that there are not facts and circumstances that would entitle the Plaintiff to relief.

And here to win this motion on summary -- on -- on -- excuse me, on statute of limitations, they would have to show beyond doubt that there are not facts and circumstances in which that the State has shown a timely claim. And that's taking all the facts that are alleged as true and it's taking all the reasonable inferences for the State at this juncture, and we don't think their motion shows that.

Now, we can go claim by claim to rebut their arguments, but I don't think there's a need to do that because some of the claims by any stretch, you know, any legitimate statute of limitations analysis we think are timely, and thus

allow the Court to deny this motion without essentially getting into the weeds of these claims.

First, for example, the complaint expressly alleges newly discovered injuries by the Defendants in the last six years, and this is in Sect -- this is in paragraph 172 of the complaint. It alleges that this injuries from MTBE to the groundwater were not known by the State and could not have reasonably --

THE COURT: Oh, sorry. (book dropped)

MR. KLINE: Oh, that's okay.

THE COURT: Go ahead.

MR. KLINE: And that they could not have reasonably been known by the State prior to then.

And contrary to Counsel's statement, the complaint then goes on after one -- it's paragraph 172, and frankly in the next couple of paragraphs, particularly in 173, give more detail of -- for that -- basically detail of that allegation. Saying that in some instances the State has traced these recent initial detections to newly discovered leaks or faults within UST systems, tank systeMs.

In other instances, MTBEs presence in groundwater or soil was unknown, undetected and not reasonably discoverable until a soil testing was prompted by, for example, a newly discovered leaking in UST or UST removal.

And yet in other instances only after subsequent

appearance of petroleum odor in a reasonably enable -- that reasonably, in a well, reasonably enable people to identify the underlying plume.

So there is more detail. There is detail in the complaint.

THE COURT: Is that detail? I mean, it -- you're right that all facts need to be looked at favorably to the Plaintiff in analyzing the motion to dismiss. But the question is at what level of generality should the facts be and the book that I dropped is the Rules of Civil Procedure, and it rally goes back to general pleadings.

And in Rule 9(f) the heading is Time and Place for the purpose of testing the sufficiency of a pleading of averments of time and place are material and shall be considered like all other averments of material matter.

But don't you have to allege some facts? I mean, it's true that the Court needs to accept them as true, but they -- they're -- can you be that general?

In other words, if it were say -- isn't this somewhat analogous to a personal injury case, or a medical malpractice case, where a plaintiff might say there are kinds of things wrong with my health. They're all attributable to the defendant's prescriptions given to me 11 years ago; later on, I'll tell you what they are.

I mean, don't you have to give some content to the

facts alleged?

MR. KLINE: Judge, I think the -- in this case, we are governed by the general pleading standard, which is notice pleading. I don't think we need to -- have to in this complaint list out a laundry list of all the sites because the sites are probably, at least right now, over a 1000.

And there are still, you know, the estimate right now is that there are in the 100s of sites that still have some level of MTBE present.

Rule 9(f), you have to remember that, again, there are these claims go -- they are across the state in the sense of there are distinct injuries well by well, and each one of those, you know, setting aside Section 462, which I want to get to in a couple of minutes.

If we do, if we go well by well, that means there are many, many wells at issue, and we don't the complaint on a -- according to Rule 8, has to be laid out in that detail to give a laundry list of all the sites at this point. That's why we have discovery.

THE COURT: But --

MR. KLINE: They can ask that.

THE COURT: So you're saying that you can be as general as you want and the Court has to just sort of accept --

MR. KLINE: No --

THE COURT: -- the generalized facts are true?

MR. KLINE: I think that what we have to do is give a short and essentially plain statement of -- if we put them on notice of what the claim or claims are, and I think this complaint does that. I don't think there's special pleading requirements like, for example, with fraud where you have to give specifics of things.

And Rule 9(f), if I can address that for a moment. Our Civil Rule of 9(f) is essentially the same as the Federal Rule 9(f), and when you look at Wright & Miller for 9(f), it says -- they say, "It is understood that Federal Rule 9(f) does not require the pleader to set out specific allegations of time and place. It merely states the significance of these allegations when a pleader actually interposes them in a complaint or answer."

And what means is that, if for example, someone says, "Hey, this -- the Defendant ran me over with this car 15 years ago," that could be subject to a motion to dismiss on statute of limitations ground, and actually dismissed on the complaint, because it's -- on the face of it, it shows that it's untimely.

But there's no requirement under 9(f) that there be a specificity or that you have to put in time and place. It's governed by whether you're under the general pleading rule, or whether there's some special rule and our position is there's no special rule. It's simply notice pleading.

THE COURT: It is notice pleading, but under Rule 8A,

no excuse me, B -- no, I'm sorry, A. A short and plain statement of the claim showing that the pleader is entitled to relief. Again, just saying in a general way there are lots of sites across the State of Vermont, we've discovered some things at various sites that -- in the last six years -- is that showing entitlement to relief?

MR. KLINE: I think, Judge, and it goes in the complaint, we also talk about the classes of properties that have been, that we're alleging, asserting have been harmed, for example, lands that are owned in fee by the State --

THE COURT: Right.

MR. KLINE: -- public water supplies, private wells. All those are different classes, but I don't believe we have to go to a level of, again, identifying every site. And again, that would be a very large number of sites at this point.

Again, it's -- that we believe is for discovery. They can ask, you know, identify the sites, and we, you know, part of it is we've offered to have an exchange of preliminary information. We've offered to, you know, we'd like some things from them in terms of their spill records and things like that.

But to begin to produce the electronic files of all the past sites, and that's quite a load, and that will help, that will go a long way in identifying the specific sites. But I think that can be done in discovery rather then, I don't think that's required at the -- in the pleading itself.

THE COURT: Okay. Well, that raises the question that was brought up in the main argument. Are you seeking to proceed in this case along the, what has been described as the New Hampshire global generalized way of bringing the claim, as opposed to a site specific claim?

Or are you agreeing that you have the obligation to pursue site-specific claims, and you're just saying that you don't need to do it at this stage of the pleading because of the general rules of pleading?

MR. KLINE: Judge, what we've said is we think there are multiple distinct claims and if, for statute of limitations purposes, we think that Section 462 in Title VII applies here, and I do want to address that.

THE COURT: I want you to, but I also want you to answer --

MR. KLINE: But that --

THE COURT: this question.

MR. KLINE: It's a -- but if that doesn't -- if the Court were to say that doesn't apply, they disagree with us; then we would say that the analysis for statute of limitations would need to be -- you can say site by site, but more precisely it's really well by well.

And we would say -- and we would also say it's more far than simply those that have been discovered within the last six years. We have, for example, a number of sites, as I

mentioned earlier, a number of sites where there's still MTBE present.

And our position is that for, particularly for certain of the claims; for example, the trespass claim, the nuisance claims, and the public trust resource claims, those are the types of claims where the -- you can use the continuing tort doctrine, and we can talk about that.

But if that's applied then, that allows us to, it may limit the damages, but that allow -- that -- it allows us to bring that as a timely claim when we can show that there's a continuation in the last six years, even if the injuries started outside of the limitation period. And that would cover quite a host of sites just as an example.

THE COURT: Okay. But that's still organizing site by site, isn't it?

MR. KLINE: Yes.

THE COURT: So are you agreeing that the case --

MR. KLINE: If you go --

THE COURT: -- has to be brought site by site as opposed to saying we have a right claim contamination in all the waters of the State of Vermont?

MR. KLINE: Well -- we did not bring -- we did not allege a single indivisible hard to all the waters of Vermont. That's not what the complaint says and that's not what was intended. What we have is we have multiple wells, multiple,

you can call them sites, but multiple sites, multiple wells, and that go across the state.

Because the contamination here is alleged, it was very widespread over a long period of time. That's what we would so and in applying that to the statute of limitations is again, we think 462 says there's no statute of limitations, and I do want to get to that.

But if you don't buy that, if you don't, then we would say the analysis would need to be, would go site, or excuse me, well by well. And where there are wells that are new and distinct, for example, you know, that those would be treated then with the ones perhaps that are tied directly to old wells perhaps.

But we've got arguments -- I think, it's like the layer of the onion; depending on the well --

THE COURT: Uh-huh.

MR. KLINE: -- and the area, and depending on the claim, there's -- there are different analyses that may be brought to that, so it may be that there are different ways to get -- to be able to say it's still timely. That's my point.

THE COURT: Okay.

MR. KLINE: I don't want to have the Court left with the impression that if we say, "Oh, yes; we're going -- we go site by site," it's just -- or well by well, it's just the last six years. That's not the case by a long stretch.

THE COURT: No, I understand that your argument is that even if you go well by well you are going to claim that, even if you don't have discovery of something within the last six years, you may have a claim for that well.

MR. KLINE: Right. And some of -- and -- I'm sorry.

THE COURT: Go ahead.

MR. KLINE: And some of those, again, depending on the doctrine and depending on the claim, some of that -- many of those are -- they need a factual record. If they're going to try on statute of limitations, it needs to be done on a factual record, as opposed to this kind of -- coming back to what's before the Court right now --

THE COURT: Uh-huh.

MR. KLINE: -- it's just this global motion to dismiss. It did not differentiate any of the claims; it just said, six years and they're all out.

THE COURT: Well, the motion to dismiss is global, but isn't the complaint global too? For -- I mean, you've got, I've forgotten exactly, 28 or 29 Defendants, and I don't know the specifics so I'm just envisioning an example.

But let's just say that one of the Defendants had some teeny little piece of the market down in Bennington County or something. And if they read this complaint they're being -- it's reasonable for that Defendant to say, "Wait a minute. Am I being held responsible for the quality of the water up in

Orleans County?"

MR. KLINE: Well, let me try to -- let me -- my answer to that is, Judge, let me step back for a second. The nature of the market for petroleum distribution is it's a national petroleum distribution market.

So for the northeast, for, for frankly the east coast, much, probably more than half of the gasoline comes from one major pipeline, the Colonial Pipeline, that comes from, as my understanding, from the Gulf's, from the Gulf coast.

It goes up and it ends in -- in terminates in New Jersey, and there are tanks. And what happens is there a lot of refineries down in -- down around in Texas, and they put their, they will put their gas, their refined gasoline, at that time with MTBE, and they put them in the tanks with others and they comingle.

And then they put it in a pipeline with other gasoline and they may -- it may -- they put them together and it ming -- comingles there, and it goes up to New Jersey where it goes into other tanks and then it ends -- back from there it ends up being distributed throughout all the northeast including Vermont.

Once the gasoline from the refiner goes -- gets comingled, you can't tell the difference. You can't identify a gallon of gasoline from Shell to Citgo to anybody else. And the nature of that is that, our allegation is, and you'll hear

more about this in detail with the second motion to dismiss, which is, has to do with personal jurisdiction, when Mr. Boyles is up.

But essentially, if you put things into that pipeline, or they get comingled, and just as an example, they then -- they don't know, frankly, they may not be able to tell exactly which molecule is going where, but their gasoline with the MTBE is making into Vermont.

And we would have an expert at trial who would explain that to the jury, who would explain the national distribution system. This was a system that was adopted that was -- that's used by them; it benefits the oil companies because it facilitates getting their products to market.

So I don't think you're going to have a situation, which you posited, which is, they're just down in one little area. We're not really talking about oil companies that -- they may operate or flag gas stations, so to speak, within the State, but these are the, you know, the major players and maybe one tier down, that provided the gasoline with MTBE that made it into our market, and it's basically comingled.

THE COURT: Okay.

MR. KLINE: So there's not going to be this -- that type of unfairness.

THE COURT: But what you're describing suggests that you are going on a theory of a single generalized claim that

any Defendant who participated in this comingled gas is going to be responsible for contamination in all the waters of the State.

MR. KLINE: What we would say, and I think, what we would say, Judge, is that if we go well by well for what's -- If you have a well or a site that's contaminated; what we would say is that you can't tell whose, who -- which refiner's gasoline that is, and that is the allegation of why the harm is indivisible.

Because as for those -- each site, and over multiple sites, you can't tell whose they are, and they intentionally comingle, because that's their mar -- that's the way they market, that's the way they sell, and they distribute.

So that each of them can be held liable, where it's under a traditional causation theory of joint tort feasors who have caused the same injury, an indivisible injury; in this case to a particular well.

Or it's under an alternative theory that we think is available, that we would be able to do that. But it would be, in that particular instance, it would be well by well, for each distinct injury we would say there's an indivisible harm because you can't specifically identify which refiners gasoline is actually, was pumped out, leaked, and went into the groundwater at that particular location.

THE COURT: So at the end of the day, let's -- I --

again, I'm just making up examples. But at the end of day you would say that if there were 30 wells, you're seeking -- that show the contamination, or however you want to measure it; that you would be seeking to hold all of the Defendants liable for whatever contamination there is, based upon this indivisibility of the source of gas?

MR. KLINE: Yes. Unless there is some way that comes out through discovery that one of them can say, you know, my gas, I can show that my gas didn't get -- didn't go to this region, that type of thing.

I mean, there may be oil companies, for example, that they don't ship in the east coast pipelines, they just go west, and we didn't sue them.

THE COURT: Okay.

MR. KLINE: Because --

THE COURT: So you're not trying to show that all waters of Vermont are contaminated, but you are trying to show that where they are everyone participated in contributing to it?

MR. KLINE: We think there are legal doctrines that allow us to say that where there's -- that the system that they set up, that the harm at a particular site is indivisible. That's what's meant by, in the complaint, that indivisibility was the fact that the -- given the nature of the petroleum distribution system, and given the nature of gasoline, and with

containing MTBE. That's the indivisibility.

So --

THE COURT: Okay. So then I just have to ask again. So why shouldn't you be identifying where the contamination occurs?

MR. KLINE: Judge, again, I don't think the rules require us to identify what would be, right now, I think the estimate is something in the neighborhood of 1200 sites, specific sites. So I don't think that the rules require us to do that. I think that's what discovery is for, honestly. I mean --

THE COURT: Well, it really takes me back to my first question about the example of the medical malpractice case. I mean aren't you kind of shifting the responsibility to figure out what the case is all about to the Defendants in discovery rather than defining what your claim is?

MR. KLINE: No, Judge. I think what we've done is. Is we've put them on notice of what the claims are, that there are nine claiMs. We think they differ.

We've given them -- we've given them specifics as to the types of property or waters that have been -- that have been harmed. We've given them all sorts of allegations about their own conduct.

But I don't -- again, if --

THE COURT: You say types. They're categories. I

mean they're not -- they're not defined anywhere geographically in the complaint. It's more they're owned lands, natural resources --

MR. KLINE: That's --

THE COURT: That's the way, in which you've categorized the --

MR. KLINE: That is correct. But, again recall -- I mean just given the number, and the fact that how -- again, how the -- how the gasoline with the MTBE got into the -- into the ground water happens in enumerable ways in the sense that it's not -- we're not talking about like catastrophic -- it's not limited to say catastrophic leaks.

For example, a tank leaked and 500 gallons of gasoline went in the ground. It covers that. Or a tanker that turned over. These are -- also the allegations are that these are small spills and overfills, things that happened on almost like a daily basis that happened that were expected.

And you can anticipate these were going to happen where people are filling their cars up and overfill. Because such a small amount of MTBE can contaminate a great amount groundwater. And so you have overfills, you have spills, so it's -- and the other part of it is.

Once it gets in the groundwater it travels with the groundwater. It doesn't biodegrade nearly as much -- as quickly as -- or as fast as constituents otherwise of gasoline,

so this stuff gets in the groundwater. It's harder to clean up. It can stay basically in -- it stays in the groundwater, and so years later -- years later you may see it pop up with a hit at a well.

And that's why it, in this case given how widespread it is, I don't think we have to at this level go to listing everything.

Now, the -- I do want to turn to Section 462 --

THE COURT: Yeah.

MR. KLINE: -- because I think that would be helpful. Our position is that Section 462, which says nothing contained in this chapter, and that chapter is the statue of limitations, shall extend to -- and then it has language, lands belonging to the State.

And we believe that Section 462, and the Supreme Court's decisions interpreting it stand for the proposition that that Section applies, not only to adverse possession claims, but also the claims where a defendant has impaired a public trust resource.

And the primary case -- there are a series of cases, but the primary case we would point the Court to, in which we did in our brief, is Hazen v. Perkins, which is the 1918 case. And in that the court held that a person could not obtain a prescriptive right to control the level of water in a lake because the statutory predecessor to 462 prohibited the

application of a statute of limitations.

In that case, the party trying to seek that right -- that prescriptive right was a miller who claimed that he and his predecessors had been controlling the water level for 120 years.

And the court held there was no -- no statute of limitations apply, and why? Because the waters were a public trust resource and the defendant's actions impaired or interfered with that resource.

Then later in more contemporary times we have the Central Vermont Railway case in 189, and in that the Supreme Court stated that Hazen, the prior case, involved a claim of right to manipulate water levels rather than a claim of title.

And the court also stated that in several other cases this court has invoked the public trust doctrine in rejecting claims of private rights with respect to public waters.

It's not claimed right as to title or possession, it was that they -- the person wanted to impair or affect a public trust resource.

THE COURT: I'm sorry. Could you back up, I missed that?

MR. KLINE: Sure. So I -- so the point that we had, that 462 as interpreted by the Supreme Court has gone beyond adverse possession, certainly has been applied in that context, no doubt about it, fully admit that.

But there are also a lot of cases, particularly the Hazen case, and other cases where the court has applied that, to say that 462, or it's predecessor, applies in a situation where someone is saying they have a right to affect water levels, and that's because there's no statute of limitations because it's a public trust recourse.

THE COURT: But didn't both of those cases involve asserting prescriptive rights?

MR. KLINE: What the -- what they actually -- what they actually were asserting was they asserted that they had a right to control the water level. They weren't asserting that they owned it, and they weren't asserting some sort of right of possession.

What they said was, we've been controlling the water level for 120 years, and we a have right -- we have acquired a right and the -- to do that. And the court said there's no statute of limitations on it. That that is -- you can't say I've been doing it for 120 years, and therefore you got this right.

And we think that's -- the application here, if I can find it I'll link it up for you. I think the application to our case the -- it's easiest to understand in the situations where we have sites where MTBE is still present.

Because in those kinds of case what it is, is that they're -- the Defendant's MTBE continues to intrude on the

public trust recourse, the groundwater and it should be removed. It's like a physical intrusion on the public trust recourse.

For example, if someone built a wharf on Lake Champlain 20 years ago without authorization, the State would be able to go to court 20 years later and to have it removed and have the site reclaimed without facing an argument that there was -- it was barred by a statute of limitations.

That’s what 462 does; it prevents the application of the statute of limitations for the protection of public trust recourses.

So it's the same with this case, particularly where we have sites where MTBE is still present. MTBE is latent environmental harm traveling with the groundwater. The State as the sovereign is entitled to sue to have the public trust recourse -- to have it protected, have it abated, at the very minimum to have their item, what they put on, we say wrongfully into the groundwater, into the public trust recourse to have it removed.

THE COURT: So in Exxon's motion where they say the State's argument would mean that it's cause of action would be actionable forever; you agree with that?

MR. KLINE: I'd say that --

THE COURT: I mean the argument was that doesn't make sense, there's got to be a statute of limitations somewhere.

But you actually agree that it should be actionable forever?

MR. KLINE: I think where there's a public -- our position is that where there is a public trust resource that a Defendant has impaired, 462 applies, and there's no statute of limitations.

I think the easiest application of it is the one that I just outlined, which is where the MTBE, the physical intrusion is still there. It's like the building that was built on somebody else's property, it's still there. It's basically kind of, you know, you can view it either through 462 or the public trust resource where that it's still there and can be removed.

But we believe 462 has that application that where it is a public trust resource and there's an impairment there's no statute of limitations. Like I said it applies most easiest -- or the smoothest fit would be where there's still the physical intrusion where the item is still in the groundwater.

THE COURT: So how do you reconcile that with 461?

MR. KLINE: Well, 462 -- agree that 461 is -- I don't have the language in front of me, but essentially it says the State will be treated -- I think -- I'm paraphrasing -- will be treated as any other party.

But Section 462 says, nothing contained in this chapter, which includes 461, because that's the section right before it, shall extent to lands belonging to the State.

Our position is, and I think it's -- I mean even under the -- even under the Defendant's construction of the statutes, if you took their argument that 462 doesn't apply because of 461, we wouldn't even get adverse possession.

We get nothing, I mean we kind for write 462 right out. 462 --

THE COURT: Say that again. I'm sorry.

MR. KLINE: If you -- if their position is correct in saying that one of the reasons why 462 doesn't apply, because of 461, there would be nothing left of 462, even the adverse possession claims that they say are the -- are the things that within 462.

Does that make --

THE COURT: I don't see why there would be nothing left. I mean it --

MR. KLINE: Well, there would be nothing left of 462 because as to the State they would be saying 461 says you have a statute of limitations.

Maybe the better way to look at it is the language of 462, again saying nothing in this chapter -- nothing contained in this chapter shall extend to, and it includes lands belonging to the State.

So the, nothing contained in this chapter, includes Section 461. It's all part of the same chapter, which is --

THE COURT: Right.

MR. KLINE: -- the statute.

THE COURT: I mean they have to be read to make sense --

MR. KLINE: Yes.

THE COURT: -- vis-à-vis each other.

MR. KLINE: Yes. So, Judge, again 462 is only where you have lands, and has as been interpreted by the supreme court public trust resource. This -- we're not making a claim -- this is not a civil enforcement case that we've brought.

We have not brought -- we're not asking for civil penalties, that's not this case. We're not ask --

I mean this is a case that centers around the public trust designation of groundwater, not exclusively because we also allege that lands of ours have been harmed.

But a principal part of this is the public trust designation of groundwater and that's what we believe properly construed 462 applies to. And at the --

THE COURT: When you say -- you say this is not a claim for civil damages.

THE CLERK: Civil penalties.

THE COURT: Oh, for --

MR. KLINE: We didn't bring this under the Uniform Enforcement Act --

THE COURT: Okay.

MR. KLINE: -- in Title 10. We're not seeking civil penalties.

THE COURT: Okay. You're seeking --

MR. KLINE: If that helps --

THE COURT: All right.

MR. KLINE: -- with your understanding how this is cavened (phonetic) 2:02:50 off.

THE COURT: So you're seeking civil damages?

MR. KLINE: We are seeking -- I mean the complaint lays it out in prayer, but essentially compensatory damages for the harm to the public trust resource, but also abatement for the things that are still out there.

And in the future we want to have -- and essentially where there are -- where testing should happen, and maybe I should address that, Judge. And

THE COURT: It's --

MR. KLINE: -- because I know we have another motion, but --

THE COURT: But --

MR. KLINE: -- the damage model, I don't think we're -- again, let me -- let's bring it back to where we are.

This is -- the motion that's before the Court is a global motion on statute of limitations only. It's not about the damage model or anything like that and, frankly, this is not the time -- you know, there will be time to talk about

how -- what the damage model looks like.

But essentially what we would be saying is that part of the prayer for relief beyond -- in terms of past -- perhaps past expenditures we want reimbursed and abatement, would be there may also be a need, and we think there is a need for testing of, for example, private wells.

And that can be done in the model if you -- Even if you don't agree with the 462 argument in its totality, and we go -- and we go well by well; it still can have a damage model that is wide in terms of the number of sites and wells that we would be able to show through presumably a damage expert.

We expect to be able to say these are the ones that have a higher potential for risk and that there needs to be testing so people don't discover this for the first time when they taste it or when they get a on MTBE. But that there ought to be some sort of testing mechanism put in place.

And again, this is very early in this case, and we would say you don't have to reach that. Like a lot of the things that were raised in the reply memorandum, this motion doesn't call for the Court to do that.

You know in some ways this case is simple, in other ways this case is going to take some time and there are going to be other junctures where I'm pretty confident the Court is going to have a chance to weigh in on a number of these issues when there's a full record.

THE COURT: Right, now, we're just testing the complaint.

MR. KLINE: For statute of limit -- on statute of limitations.

THE COURT: Statute of limitations is the basis on which the motion to dismiss was brought. Are you -- what about the argument that you've brought it within six years of the -- is it the Groundwater Act? What's it called?

MR. KLINE: But if I can take a couple minutes --

THE COURT: Go ahead.

MR. KLINE: -- to address that. I wanted -- and, frankly, I wanted to move on and move to that if we can.

We don't think that you need to address that issue. This is under Section 1390, the public trust cause and action. I think that's what you're referring to, the statutory claim. There are two statutory claims; one of them is Section 1390.

THE COURT: Right.

MR. KLINE: That we don’t think you need to get there because this is just on the statute of limitations and, frankly, they admit that. I mean they could have made that motion saying you don't have cause of action.

Because what they say is, "Oh, if -- even if that's timely," you know, "you'll have a statute of limitations problem, there's no cause of action."

And we don't think that that's -- you know they could

have made a 12(b)(6) on that, they didn't. They just did it on statute of limitations.

But if you look at the 1390 claim, we think it's clear that in 2008 the legislature formally declared groundwater to be a public trust resource, and they provided for an express cause of action for the State.

Because it -- the wording is a little bit -- a little unusual, but it basi -- it says, "that the designation shall not be construed to allow a new right of legal action by an individual other than the State of Vermont."

Now, I want to come back in another minute and address the relationship between the 1985 amendment to the groundwater statute in relation to the 2008.

But just taking the 2008 amendment on its face, we think the plain language is there was a formal designation of groundwater as a public trust resource and the creation of an express cause of action, and that's consistent with some other states.

For example, in New Hampshire, which recognized that the attorney general in that state has a cause of action for damages to natural resources held in trust by the State.

And that's also consistent with the statement of the Vermont Supreme Court in the Central Vermont Railway case, which is that essentially the public trust doctrine is to be flexible. It's to be, quote; "Be molded and extended to meet

changing conditions and needs of the public it was intended to benefit."

THE COURT: So how do you deal with the problem of retroactivity?

MR. KLINE: Well, the -- we don't -- I -- we don't -- there are a couple of different ways to do that.

One is I don't -- again, don't think you need to get to it, but for this motion to answer this -- to decide this motion.

Secondly, it shouldn't be done simply on a reply memorandum we've had no opportunity to respond to it, but we do have a few responses. Even accepting those --

THE COURT: Well, you're the one who made this argument in your opposition.

MR. KLINE: Well, we didn't talk about retroactivity. I mean --

THE COURT: No, but you are justify opposing dismissal on these grounds.

MR. KLINE: But --

THE COURT: Go ahead.

MR. KLINE: So we -- even accepting their assertion of retroactivity relating to a Section 1930 claim, at a minimum there's no retroactivity for new discovered claims, so anything that was discovered from after June of -- June, I think it's 9 or 7th of '08.

And also we would say that claims that relate to wells or sites that show MTBE contamination after June of '08, they're -- those would not be retroactive as well.

Because in theory we would not be suing them for what they did prior to June of '08, putting -- you know, being responsible for the MTBE getting into the groundwater and contaminating, for example, a well.

But we would be suing them for after June of '08, not removing it, so the act would be with the failure to act after. Kind of essentially like, you know, akin to trespass or, you know, nuisance. The idea being that you put this in, there wouldn't be any retroactivity problem with saying, you -- after the designation, you have to remove it.

But further, even if we -- although we haven't had a chance to brief this issue and would want obviously the chance to do so. At this stage, we don't see that application of Section 1390 raises a retroactivity problem at least back to 1985.

In 1985 the legislature abolished the common law concept of private ownership of groundwater, and at that point then going forward, we believe that the groundwater was owned and common by the people of Vermont. And that, specifically the -- it sites that surface and subsurface water are inherently interrelated in both quality and quantity, and that's in Section 1410(a)(1).

But more importantly, our supreme court has weighed in, and interpreted, and talked about the '85 amendment, the law as it stood in 1985, and that was in the Town (sic) v. Northern Security Insurance case, 184 Vt. 322.

In that case they cited groundwater in the state as a public resource, and it came up in that context --

I believe you were the trial judge --

THE COURT: I was --

MR. KLINE: -- in that case.

THE COURT: -- reversed.

MR. KLINE: And we've dealt with it on a number of other issues.

But as you it came up in the -- it came up in the context -- this did in the context of an insurance policy, and specifically an exclusion for owned property.

And the Supreme Court held that groundwater is not owned by the property owner. And the court further went on to say that groundwater under someone's property is not under the care of the property owner, which was a related exclusion because, quote, "That implies a degree of custody and control over the property inconsistent with the character of groundwater in Vermont as a public resource."

And in the very next sentence the Supreme Court once again referred to ground water as a, quote, "Public resource beneath one's property."

Now, the Towns decision was issued on August 1 of '08, but it cites and interprets the 1985 law.

And apply this to the Section 1390 claim, coming back to us, the jurisprudence on retroactivity is that -- we believe is that where there's an amendment to a statute, in the case the 2008 amendment to Section 1390, and it doesn't change the substantive law.

I.E., the groundwater was still already held in trust by the State, there would be no retroactivity problem applying the existing standard before 2008, at least back to 1985.

Now, having said all that, you know, we believe that the Court, again doesn't have to reach this, and shouldn't reach this at this stage with this motion. This should be -- you know, if this is an issue that they want to litigate, it should be raised in an appropriate way where there's a full record and briefing, and not raised at the point where we are right now with this motion.

We're not conceding anything, but we believe that we've got an answer that it's not retroactive for several different reasons at least, and for one of them at least back to 1985. But this should be fully briefed before the Court weighs in.

And that type of approach for retroactivity, and a number of the other things that have been raised, we think is very consistent with the supreme court's standard for granting

a motion to dismiss, and that is, it's very disfavored.

It's very disfavored, it's a very high bar and why, because they want to -- they want the claims to go forward, the case to be developed, then decide the issues, so that there basically is one appeal after a full record is -- has been developed.

And this is a prime example of one that should be done -- perhaps it needs to be done, but to be done full -- in due course. This is not the time or the place to doing it on the record we have before the Court would weigh in.

THE COURT: So even assuming that they're accepting -- if the Court were to accept your application of the motion to dismiss standard, and say there are claims in here, that they shouldn't be dismissed, as practical matter how would -- how would it get framed going forward?

I think I said this before, but aren't you kind of shifting over to the Defendants the obligation to use discovery as a way of figuring out what the -- what the specifics of the claims are even if you look at it as well by well?

MR. KLINE: I think that, you know, one of the things that we have essentially offered to do was to have the exchange, kind of preliminary exchange of information, and it would again be starting be starting with the electronic files and the site files.

And we're willing to do that in -- you know, in due

course with -- but we were looking for other information out of them.

But that will give them, you know, a lot of the information that they say they need, you know, going forward. But, you know, discovery -- that's I think what discovery is for as opposed to having a complaint that would, I don't know how many pages long to list what would be at this point 1,200 sites, plus wells that -- you know, it's beyond -- these are site files and then we have individual wells.

I mean it's -- you know, I don't underestimate the magnitude of this because it is a large case. But I think that that would be developed in discovery and moving -- and moving forward. And then if there are motions, you know, summary judgment motions or whatever that would frame the particular issues whether they're site by site or otherwise those would happen in due course.

That's what we propose and that was -- and that's what we have proposed on the way forward for this, but not requiring that there be a listing of everything in this complaint.

THE COURT: Okay.

MR. KLINE: Okay.

THE COURT: Thank you.

MR. KLINE: Thank you, Judge.

MR. LENDER: Just a few things I'd like to respond

to, if I could.

The first is, obviously, just so we're clear, our position is that the six-year statute of limitation applies to all the claims, which is why brought the motion the way we did.

Let me start off first by responding to a point that my -- that counsel said, which is he actually said the words to you, he said the time and place is not required. In the pleading that's what he said.

Well, Your Honor, I have spent a fair amount of time reading some of the Supreme Court of Vermont cases and in Fortier vs. Byrnes case, and it's 165 Vt. 189, the Supreme Court said that's exactly what's required.

In that case somebody tried to argue that you can't use a motion to dismiss based on statute of limitations, and Fortier said no, you actually can bring a motion to dismiss under statute of limitations under rule 12.

And then this is what the court said in determining that statute of limitations could be brought under Rule 12, quote -- and this is at 165 Vt. at 193. "This interpretation of Rule 12 is based on rule 9(f) which makes averment of time and place material for testing the sufficiency of a complaint."

That's exactly what you're supposed to do before you bring a complaint, not just allege a conclusory allegation that we found a bunch of stuff.

The other thing I heard is, I heard 1,000 sites,

1,200 sites, and then what I also heard was, well, MTBE is still out there. MTBE being still out there is not enough to stave the statute of limitation, and there's really two reasons for that, and which is why you need to know what the sites are, and when they were discovered, and when money was first spent because I am confident that many, many of those 1,200 sites are going to be barred by statute of limitations.

And there's two major problems they have. One is the Carroll case. Carroll case, Supreme Court of Vermont 175 Vt. 571, that's the case I mentioned earlier where the State agreed that the six year statute of limitations applied to claims seeking remediation for amounts spent cleaning up contamination.

And here's what the Supreme Court said. The Supreme Court said that, quote. "An action for repayment of investigation, remediation and removal costs accrue when the state first expends funds for these distinct purposes." That's at page 573.

So the fact that MTBE may still be out there isn't going to work. If they started spending money cleaning up that MTBE more than six years ago, that was the time to bring the claim on those individual sites and wells, and waiting this long will be time barred.

The other thing I heard was the continuing tort doctrine and, Your Honor, I'd submit that if Your Honor looks

that Gettis case, which is from the Supreme Court 179 Vt. 117, 2005, the court made clear that Vermont has never adopted the continuing tort doctrine, with perhaps the exception of discrimination cases.

And then the court went further, and what the court said -- the Supreme Court said is if we're going to adopt, or consider adopting the continuing tort doctrine what is required is that tortuous act be committed within the statute of limitations, not simply the continuing ill affects of prior tortuous acts.

And that's the main -- that is a main problem with this case. They want to say MTBE is still out there. Your Honor, we haven't used MTBE in more than seven years, so there are no new spills of MTBE gasoline.

What they're trying to say is that the continuing tort doctrine allows them to bring claims for wells that were recovered ten years ago because MTBE is still out there.

That’s exactly the opposite of what Gettis said, that if they were ever going to allow the continuing tort doctrine that it would not be permitted. So they're relying on something that’s the opposite of what the Supreme Court of Vermont said.

Next thing, I thought the exchange you had about -- with this issue about they want to find -- I'll use my client as an example. There's a spill in northern Vermont at a

BP site, and they want to say that Exxon Mobile is responsible for that. That is essentially a generalized statewide case.

That's not the way it works in actual practice, right? In actual practice what happens is the Agency of Natural Resources when they find a new spill they identify the responsible party, usually the gas station where the spill occurred.

And that responsible party is the one who's responsible for cleaning up whatever contamination there is, and if that responsible party won't do that remediation, they could then sue that responsible party. That's the way it actually works in the real world here in Vermont.

But what they want to do is they want to transmogrify this case essentially through a generalized statewide case, which is precisely why we filed our motion to dismiss because that claim can't be brought.

In essence, Your Honor, they're saying, well we uncovered a new site and everyone's responsible. Well, seven years ago when they uncovered a new site for the first time they could have brought that generalized state case, but they didn't.

So that was exactly why the issue of identification of the specific sites is so important, right? And why it should be done now, because it allows us to then challenge sites where they are more than six years old, or they weren't

uncovered in the past six years.

And if we actually can have this case, again as I said before, be focused on new sites uncovered in the past six years, we'll have very focused discovery, it'll be a much more manageable case, and that's precisely what 12(b)(6) motions are really all about.

Two other things I wanted to mention, Your Honor, and then I'll -- unless you have other questions, I'll sit down.

462 is absolutely about adverse possession and prescriptive rights. We cited Supreme Court case after Supreme Court case that said that.

Your Honor, he mentioned Hazen, he mentioned the State vs. Central Vermont case. If you read those cases it's exactly what you said, they're absolutely about prescriptive rights.

Let me just read to you what Hazen actually said in that case. What Hazen was about with -- he described the fact well, but I want to talk about what the holding is.

The defendant in that case owned a water privilege to the lake, and he claimed that he was basically exercising his rights to raise the lake and lower the lake.

And here's what the Supreme Court of Vermont said in 1918, quote. "The defendant did not therefore acquire any title to the waters of the lake as such, nor the lands, covered by such waters by grants from private sources."

And then they cited the existing statute, which held that you basically can't use the statute of limitation to eliminate an adverse possession claim.

And then the court concluded with such a statute in force, no prescriptive rights such as here claimed by defendant affecting real property of the State could be acquired. And that's at page 251 -- 105 at 251.

It was exactly about prescriptive rights adverse possession. The defendant was trying to argue that he now had title to the State's land, and the State said you can't do that.

Same thing -- exact same thing came up in then Vermont Railway case. In that case the Railway -- road wanted -- actually wanted to take the State and sell it, and State said, "No, no, no; you get the right to use the land, but you can't -- you don't have title to the land, you can't go and sell that land."

So those case, the two cases they cited 100 percent support our view that 462 is about adverse possession and prescriptive rights. That's how it's been cited over and over again.

The last thing I wanted to mention was just the 1390 claim. I think our position is very clear about the retroactivity, Your Honor. But there is one thing I want to be abundantly clear.

He got up there and said there's an expressed cause of action in 1390. There absolutely is not an expressed cause of action in 1390 and, in fact, there was at point an expressed cause of action in 1390 and the legislature took it out, and we cited that in our pleadings.

The only section in that title that provides for a private cause of action or any cause of action for that matter is 1410, and 1410 has been in the statute for many, many years.

So, Your Honor, unless you have any other questions, we continue to believe that the motion to dismiss should be granted. Thank you.

THE COURT: Thank you. It wasn't entirely clear to me from Judge Toor's notes that today was also going to be a hearing on the other motion to dismiss, but I take from a couple of comments that have been made that some of you thought so?

MS. PARKER: Yes, Your Honor, we do.

THE COURT: All right. Well, go ahead.

MS. PARKER: Again, I'm Amy Parker, and I'm here on behalf of Total Petrochemicals and Refining U.S.A. in support of our motion to dismiss for lack of personal jurisdiction.

I just want to go over quickly a few things that I think the Court needs to be aware of. While we believe very strongly in our papers, I want to highlight some of major themes.

First as it applies to general jurisdiction, we do not believe that there's any credible argument that TPR should be subject to the general jurisdiction of this Court based upon the limited sales of an unrelated product. Those sales are outlined in Barton Solvents affidavit, and they amount to no more than a miniscule faction of one percent of TPRI's total revenue over the years, in which those sales were made.

In pointing to these sales Plaintiff's ignoring binding Supreme Court precedent finding that the assertion of general jurisdiction even where a Defendant's sales are sizeable would be an exorbitant exercise extending beyond the limits of due process.

Instead Plaintiff's intent to rely on the irrelevant conduct of TPRI's foreign parent corporation and sister subsidiary. Plaintiff has not advanced any credible theory as to why the actions of these two companies should be included to TPRI for purposes of this Court's jurisdictional analysis.

The exercise of general jurisdiction would be improper as there are no facts in the record that would support a finding that TPRI is essentially at home in this jurisdiction.

If we set aside all of the clutter and collateral arguments contained in Plaintiff's opposition, what's really at issue here is whether TPRI can be subject to the specific jurisdiction of this Court based solely on its participation in

the so called national market for gasoline containing MTBE.

A decision in Plaintiff's favor would be improper for three main reasons.

First and most importantly, a decision in Plaintiff's favor would be going against binding United States Supreme Court precedent as it has been correctly applied by district courts throughout the Second Circuit, and prior precedent established by this exact same Court on fact virtually identical to those presented here.

The opinion in Emery vs. Shell Oil Company, which was issued by Judge Crawford in 2011, this Court was presented by the same argument Plaintiff asserts here. Mainly that participation in the national market should render a defendant subject to suit in any state, in which its products end up.

Even without the benefit of the United States Supreme Court reasoning in McIntyre the Court found the argument unavailing and contrary to precedent developed in both Worldwide Volkswagen and (indiscernible). As the court noted in reading its -- reaching its decision, the United States Supreme Court has never endorsed a stream of commerce theory as broad as that being advocated here.

Like the present case there were no facts to establish that Barton Solvents took any affirmative acts to market its products in Vermont. It never marketed or conducted business in Vermont, never distributed its products to Vermont,

never derived any significant revenue from the goods sold or services rendered in Vermont, and had no other formal contacts with or corporate presence in Vermont.

The wisdom of the holding in Emery has only been underscored by the Supreme Court precedent that followed. McIntyre was issued just a few months later confirming that a manufacturers mere knowledge of that its products were distributed through a nationwide distribution system that might lead to those products being sold the forum state is insufficient to establish personal jurisdiction over a nonresident defendant.

The court's opinion in Walden versus Fiore was issued just this past February resolving any lingering doubt as to whether the unilateral conduct of a third party can suffice to establish personal jurisdiction over a nonresident defendant.

A unanimous court relied on its own prior precedent to reaffirm the fact that unilateral activity of a third party is not an appropriate consideration in the jurisdictional analysis. Rather it is the defendant's conduct that must form the necessary connection with the forum.

Here it is undisputed that TPRI maintains zero involvement in the Vermont gasoline market. Even if we draw every inference in Plaintiff's favor and accept every conclusion drawn by its expert, the most we can infer is that some unknown volume of TPRI's product may have reached Vermont

at the hands of a third party. Conduct that the supreme court has conclusively established is insufficient to exercise personal jurisdiction over a nonresident defendant.

Second, the MTBE opinions Plaintiffs urge this Court to rely upon most fervently are outdated. They have been overruled by the very court that issued them based upon the more recent supreme court precedent I just outlined.

The opinions were decided in 2005, six years before the court's opinion Walden and -- I mean, excuse me, six years before the court's opinion in McIntyre, and a full nine years before the court's opinion in Walden.

With the benefit of those seminal cases the Southern District of New York has recently reversed its thinking. Just this past May the Southern District issued an opinion in a Puerto Rico MTBE matter dismissing that action as to a nonresident defendant whose only connection to the forum was the knowledge that some of the products it sold may have reached the forum state through the independent decision of the third party.

As the court there noted, Talburn (phonetic) never manufactured, marketed, delivered, or sold MTBE in Puerto Rico, nor did its solicitor advertise in Puerto Rico. Instead Tolbert merely sold MTBE to the Oklahoma based Phillips entities in a series of isolated spot sales.

The independent decision of the Phillips entities to

ship the MTBE into Puerto Rico does not establish jurisdiction over Tolbert. This was true, even in light of the fact that certain shipping contracts and email communications identified Puerto Rico as the delivery point.

The court followed supreme court's recent holding in Walden and required jurisdiction to be based upon conducts that the defendant himself created with the forum, not the conduct of a third party.

The only compelling fact that distinguishes this case from the Puerto Rico matter is the Plaintiff has even less evidence that any of TPRI products was ever distributed to Vermont.

However, even were the Plaintiff to somehow develop any such evidence, all it would establish is that a third party made an independent decision to deliver some amount of TPRI's product to Vermont.

Based upon Supreme Court precedent and their recent holding in the Puerto Rico matter, however, that evidence would be insufficient to establish personal jurisdiction over TPRI. Plaintiff's decision to ignore more recent case law only serves to highlight the failing in its arguments.

Finally, we wish to address the expert opinion attached to Plaintiff's opposition. While we believe it's improper for all of the reasons set forth in our reply, even if the Court were to accept every inference drawn by Mr. Byrne

(phonetic), the most his report can be said to stand for is that some miniscule amount of TPRI's product may have reached the State of Vermont at the hands of a third party.

And what we know from the supreme court's unanimous opinion in Walden is that the unilateral conduct of a third party cannot suffice to confirm jurisdiction over a nonresident defendant.

Thus despite our objections to Mr. Burke's affidavit, even if we accepted every word of it, it would not alter the Court's jurisdictional analysis or the result compelled by biding precedent that the exercise of personal jurisdiction over TPRI would be improper.

Plaintiff attempts to argue that Mr. Burke's opinions establish the existence of a regular course of sales in Vermont. His report however does not identify a single sale in Vermont, nor does it even describe the physical process, by which gasoline actually reaches the state.

Instead he attempts to manufacture a regular course of sales by characterizing the Colonial Pipeline solely as a means of transporting gasoline from the gulf coast to New England. That argument is belied by the very data Plaintiff's admitted in support of its own opposition.

If you look to the affidavit of Kim Arderburn (phonetic) attached as part of Exhibit C to Plaintiff's opposition, it contains a chart listing every shipment of

gasoline containing MTBE to Total Colonial pipeline. Nearly 90 percent of the gasoline shipped was delivered to a third party in Hebert, Texas.

Plaintiff does not explain how any of those sales could possibly establish an intent to serve the Vermont market or establish a regular course of sales within the state.

Next, Mr. Burke points to sales of MTBE, all of which remain at locations is southeast Texas and southern Louisiana. Those sales are no different from those made by Barton Solvent and the chemical component in the Midwest that this exact same Court found insufficient to support general jurisdiction.

Finally, Plaintiffs look to sales that Total made out of two blending tanks maintained in New Jersey. Again, all sales were made -- were sold to third parties in New Jersey, and Plaintiff did not explain how those sales evidence any intent to serve the Vermont market, or whether any of the products sold in New Jersey ever actually reached Vermont.

The fact remains that TPRI has never sold a single gallon of gasoline in Vermont, nor has it ever advertised here, maintained any relationships with distributors to deliver product in the state, maintained any business relationships here or any employees.

For these reasons we believe any jurisdictional discovery would be futile as it would not alter a single fact set forth in Ms. Arderburn's affidavit or change the sales

records Plaintiffs already have in their possession, which they've attached to their own opposition.

Because TPRI has no involvement in the underlying facts at issue in this case, we do not believe it should be subject to the specific personal jurisdiction of this Court. With that, we would be happy to answer any questions the Court has or address any concerns.

THE COURT: Not right now. Thank you.

MR. BOYLES: Thank you, Your Honor. Gavin Boyles for the State.

I think it's worth sort of zooming out for a minute here and highlight what Total is asking for here. Under the standard, under which the Court is to evaluate their motion, the Court has to accept the facts as alleged in the complaint and as set forth in Mr. Burke's affidavit.

Under those facts, what Total is asking the Court to do is to determine that it cannot exercise jurisdiction over Total, even though Total participated in a national market and distribution system that it understood and expected would place it's product in Vermont, and it would also place its product in all of New England and other states, but in Vermont. That's what the affidavit says. That's what the facts are that the Court has to accept.

And it appears that one of the primary reasons that Total is going to make this argument with respect to Vermont is

that Vermont is a small state, and perhaps Vermont was not foremost in the mind of Total executives. That result is absurd, it's not called for by any of the cases cited by Total and nor by any other case.

It would put Vermonters at a profound disadvantage. It would put the State of Vermont at a profound disadvantage. In stream of commerce cases Vermont is always going to be a small player and it is very likely to not be, specifically on the mind of those who distribute their products in national distribution system.

Now, Mr. Kline discussed a bit the -- that distribution system, and I want to spend a little more time on it here because I think it's important to understand both the way the system works and the affect that it has on the gasoline that goes through it.

The fundamental thing to understand is comingling, which Mr. Kline alluded to. Now, the comingling occurs at a variety of places in the distribution system.

It occurs at the tanks at the beginning of the pipeline, the Colonial pipeline that leads from the gulf coast up to northern New Jersey, which supplies the bulk of the gasoline for New England. It occurs in the pipeline itself as different refiners and different tanks place their product into the pipeline.

And this is all in Mr. Burke's affidavit.

It occurs again, at the other end of the pipeline in New Jersey where there is again, a series of tanks, into which gasoline comes out of the pipeline and comes from other sources and is again blended.

The idea here is that the thing that the refiners, and distributors, and sellers of gasoline is that their gasoline meets certain standards. They don't -- there -- particularly where it came from or who made it as long as it's all the same, which it is.

So it's mixed together again there. It's mixed together again as it goes into other vessels for distribution from northern New Jersey into New England.

So we certainly agree with Total's position that they don't -- they don't know if a particular gallon of their gasoline reached Vermont.

But what Mr. Burke says, and what's amply supported by the rest of the facts in his affidavit, and the facts in our complaint, is that they knew, and expected, and understood, throughout this period that both the gasoline that they refined themselves, the MTBE that they sold to others, the gasoline that they bought from others and then resold to others in New Jersey, that all of that would end up throughout New England, including Vermont.

And the evidence -- and this is broadly -- they're things are in paragraphs 21 and forward in Mr. Burke's

affidavit, 21 through 28. Is that based on his experience in this industry, all of the refiners understand this. This is no secret. This is no fortuitous event. This is no surprise. It is no surprise that they might hailed into court in any state.

In fact, the clear implication of Mr. Burke's affidavit and our papers is that it would be quite a surprise to any refiner that put its gasoline or it's MTBE into this national system if it didn't reach all the states. That's what the system is for.

So Total like many other companies did all the things that it could do to ensure that its gasoline reached every state in New England, including Vermont. It placed it in the pipeline. It sold it to others, including Exxon Mobil and other large clearly national scale companies that distributed it themselves and it did all of the things that it needed to do to ensure that its product would reach every state in New England, including Vermont.

And I want to turn now to some of the cases that Total's counsel just discussed.

First the Emery case, which Judge Crawford decided in this Court in 2011. It was about a company called Barton Solvents. And the difficulty there, and the reason that dismissal may have been proper there was that the allegations in the complaint, and the evidence opposing the motion to dismiss didn't include any evidence that Barton knew about the

national distribution that its product would undergo once it was blended into another party's product.

There was -- he says in the decision that there is, quote, "No allegation relating to Barton's knowledge that its products as incorporated into Cleveland's products were being marketed nationally."

Here it's quite the opposite. There is precisely that allegation and precisely those facts are in Mr. Burke's affidavit. They are amply set forth there, again paragraphs 21 through 27 or 28, that TPRI's -- Total's own gas went into a pipeline that was destined for New England, essentially New England and the rest of the northern east coast.

It blended gas inside that region of the country, and it sold neat MTBE to a number of entities that are certainly known to sell and distribute nationwide and certainly throughout New England.

The next case that’s been relied on and discussed fairly heavily is Walden, which first of all is not a stream of commerce case, it just isn't. It was about a police officer of some sort who seized money in Georgia from a person who resided in Nevada. I think it's quite a narrow case. What it holds is just that a plaintiff cannot be the only link between a defendant and a forum.

That’s not our case. Our case is a Defendant who took actions that knew, expected, understood would result in

its product reaching the forum state and reached a number of other states as well, but also the forum, completely different from Walden.

Walden is in that respect an easy case. Well, it says the plaintiff can't be the only link.

And the 2014 Puerto Rico case, I believe counsel just said that it overruled the two 2005 MDL cases, which is not the case. If, Your Honor, wants to read the 2014 Puerto Rico case, it's at 2014 Westlaw 1778984. It does not overrule those prior cases, and it depended on very different facts than were present in the prior cases and very different facts than are present here.

And just to back up a little bit about the multi district litigation, it's as Your Honor knows that it's a federal system where similar cases are consolidated. There have been a number of cases involving MTBE that have been consolidated in the Southern District of New York for years now.

Two of the cases are quite interesting for our purpose here. They involve the Towns of Hartland and Craftsbury, Vermont, and motions to dismiss were filed with respect to those Vermont cases by certain defendants in 2005. Those motions were denied.

Many of the same arguments that are being made now, by Total, were made in those -- in those motions in 2005, the

argument that we only sold a small percentage of our items in North America or in the relevant area.

You know, the plaintiff's in 2005 pointed out, as we do now, that the defendant seeking dismissal then had sold neat MTBE to, among others Exxon Mobil, which distributed nationally. And the court relied on that in denying the motion to dismiss.

The MDL court also relied on the fact that the refiner seeking dismissal was a very large company with a national presence, and held that it should come as no surprise to Lyondell, which was the defendant there, that having made significant revenue on sales throughout the United States, it is subject to suit throughout the United States, no exception for small states with low percentages of sales occurring in them.

And it's important to note too in that 2005 case, which is 2005 Westlaw 106936, it was found by the court that Lyondell didn't sell directly to any Vermont customer. And that did not win the day there. It shouldn’t win the day here.

The other 2005 case, which also involved the Towns of Hartland and Craftsbury and other defendants related to the first, found among other things that by selling large volumes of MTBE containing gasoline to a nationwide distributor, Lyondell CITGO Refining Company expected, or reasonably should have expected it project -- product to reach all the states in

the nation, and that it must have been aware of the national distribution scheme.

And that's the same scheme that I've described, and obviously the forum that was being analyzed, in part there was Vermont.

Now, the 2014 case involves Puerto Rico, and the difference between the 2014 case and two 2005 cases that I've just described is factual. Puerto Rico is part of that national distribution scheme.

If you consult Mr. Burke's affidavit there are some maps in there that describe how the country is split up into regions for distribution purposes. Puerto Rico isn't on those maps, Vermont is.

Vermont is a part of a distribution area that's well understood, and that's Mr. Burke's testimony in his affidavit, which the Court has to accept as true that Vermont is part of the area that these refiners understand, and know, and expect that their product will reach.

The holding in the Tolbert case in 2014 was simply that Puerto Rico is unique. It was a case about isolated, quote, "Spot transactions," and not about the regular flow of gas through the national distribution system as a matter of course. It's just very different from our case.

So just quickly to reiterate the facts that the Court must accept as true at this stage for purposes of this motion,

first, Total made and sold neat MTBE to entities, including BP, Mobil, CITGO, Conoco, Exxon, Exxon Mobil, Shell, Valero and other's of nationwide presences for 23 years according to its own declaration in the multi district litigation.

And because of those sales, as Mr. Burke says in his affidavit, Total expected that it's MTBE would be distributed nationally, including in New England and Vermont.

Number two, Total in a single year, in 1995 sold about a million and a half barrels of its own gasoline that contained MTBE into the Colonial pipeline. And Mr. Burke further says, its more likely than not that some of that reached Vermont.

Third, Total leased storage tanks in Linden, New Jersey, which is in that whole complex that I described is at the northern terminus of the Colonial pipeline, and it blended MTBE into that gasoline there in New Jersey in the same region as Vermont for sale. And the gas was sold in New Jersey to third parties for further distribution.

Mr. Burke says in his affidavit, it's more likely than not that some of that gas reached Vermont. Total didn't address that part of our argument in its reply.

And finally, Total leased other tanks in New Jersey where it imported other refiners MTBE gas, and then sold it onto third parties, and among others it sold that gas to Mobil, Amoco, BP, Shell, Valero, others who are known to deliver MTBE

to Vermont.

And again, Mr. Burke says that it is more likely than not that some of that reached Vermont.

So it's quite clear under the standard here that the refiners understand how this distribution system works. They understand that over time through comingling their product will end up throughout the system. There's no way in which an individual refiner can or does decide that they don't want their gas to reach a particular state, it just doesn't work that way.

This gasoline and the MTBE that Total refined reached Vermont through channels that are completely understood, not fortuitous, not random, it's entirely predictable.

And that is exactly what is in Mr. Burke's affidavit is a description of this system, a description of the refiners knowledge of that system, which he has gained over a long career working in this industry.

So I would close with that, if Your Honor has no further questions, I'm happy to --

THE COURT: So that's your response to Ms. Parker's argument that a -- her client shouldn't have -- be expected to be held in the Court just because a third party took certain actions with respect to its product?

MR. BOYLES: Well, I think there's a couple of responses, one is that particularly speaking what we are saying

is that with respect to all of those four categories that I've just described, their own actions resulted inexorably in their gasoline or their MTBE reaching Vermont so --

THE COURT: Resulted, but you said -- you said that it was extremely predictable, and apparently the Puerto Rico case, which I'll need to take another look at -- or look at had to do with knowledge, whether there is knowledge.

MR. BOYLES: Well, the Puerto Rico case had to do with a series of isolated spot sales that were made by a third party, about which the Tolbert, the defendant who brought the motion, had no reason to -- they had no particular reason to expect that in the ordinary course their product would go to Puerto Rico.

Here the reason that a refiner puts product into the Colonial pipeline, the reason that a refiner sells neat MTBE to an entity like Exxon is because it will be distributed nationwide.

And the Colonial pipeline goes to a particular part of the nation, but having once put a product in there it's entirely predictable, and according to Mr. Burke was predicted by these entities that it would reach all of New England, which includes Vermont. Thank you.

THE COURT: Thank you. Ms. Parker?

MS. PARKER: Thank you, Your Honor. I'd just like to quickly respond to a couple of the arguments made.

First and foremost, Total has never made any argument related to the size of the state. It has nothing to do with Vermont being a small player in the gasoline market in this country.

What it has to do with is the fact that Total is not a player in the Vermont market for gasoline regardless of the size of the state. The fact remains that participation in a national market cannot subject Total to the jurisdiction of every one of the 50 states in this country.

And if you look at this Court's opinion in Emery, the knowledge of Barton Solvents was an issue. Cleveland -- in other words, this has been the Court's opinion -- in other words Cleveland argues that Barton should be subject to suit in Vermont because it knew that its products were being marketed nationally and some in fact were sold in Vermont.

This argument has several defects. First, Cleveland's argument reflects an even broader stream of commerce then even Justin -- Justice Brennan endorsed in Asahi.

Justice Brennan's analysis was that Asahi should be subject to jurisdiction of every state because it was aware that its products were products were being marketed nationally. Asahi specifically knew that the stream of commerce was taking its product to California routinely, not incidentally. Contacts were less sufficient in California.

The United States Supreme Court has never endorsed a

stream of commerce theory as broad as that apparently being advocated here by Cleveland.

The facts of this case are identical. There is no evidence in the record, none submitted by Plaintiffs that Total every had any knowledge that any of its products were ever sold in the State of Vermont. It continues to attempt, to characterize the Colonial Pipeline as being solely a means of shipment from the gulf coast to New England.

When in fact the Colonial Pipeline starts in the gulf coast and has off take points all along the southeast and along the eastern seaboard.

And again, if you look at the sales records the Plaintiff submitted in their own --

THE COURT: What did you just say? The pipeline has what?

MS. PARKER: Off take points.

THE COURT: Off take points.

MS. PARKER: Yes.

THE COURT: Okay.

MS. PARKER: Which means the gasoline that is distributed from refineries in the gulf coast can be distributed to Louisiana, Atlanta, South Carolina, Pennsylvania, many other portions of the United States that have nothing to do with New England.

THE COURT: So is your argument that a business can

sell, participate in the national market, and say all I do is put it out there, I don't know where it goes. Maybe it goes here, maybe it goes there. I couldn't be expected to be hailed into court in a particular state because I don't really know where it goes? It's only if I do happen to learn where it goes that I should be hailed into court?

MS. PARKER: If I learn -- even if I learn where it goes, if it goes to another state at the hands of a third party, and I have no involvement in marketing it in that foreign state and no business relationships in that state, and no contact with that state, then I am not amenable to suit in that state just because the child that I have produced to that state.

THE COURT: Okay. But what about the argument that even if it's a third party, if it is entirely predictable, to use Mr. Boyles' words, that that's what's going to happen; couldn't you be attributed -- shouldn't that knowledge be attributed to you?

MS. PARKER: If we look at the Court's opinion in the Puerto Rico case, there were documents evidencing that Tolbert precisely knew that products were headed to Puerto Rico. It didn't make the decision to direct those products to Puerto Rico, but there were email communications in sales records identifying Puerto Rico as the destination point.

And that knowledge was ruled to be insufficient

because it did not participate in a decision to send those products to the foreign state.

So the only difference between the Tolbert opinion and what's at issue here is that the evidence was stronger. That the Defendant's product actually got there and the Defendant had knowledge that it was headed there.

THE COURT: If I interrupted you -- did you?

MS. PARKER: That's all right.

THE COURT: Okay. So go ahead you can pick up where you left off.

MS. PARKER: Okay.

Plaintiff's only real response to the Court's opinion in Walden, because their argument is that it's not a stream of commerce case. What they neglect to mention though is that it has been used in stream of commerce cases included the Puerto Rico MTBE opinion.

What Walden stands for is the fact that a third party's conduct cannot form the basis of personal jurisdiction.

And finally I just wanted to briefly address the comingled product theory. Plaintiff's affidavit they have submitted from Mr. Burke is based upon a comingled product theory of liability that was established by the Southern District of New York.

It is a causation-based theory that has no application this Court's analysis of the constitutional limits

of due process. Plaintiffs are attempting to blur the line between causation and personal jurisdiction and it should not sway the Court's opinion.

The theory was developed by the exact same court that wrote the recent opinion in Puerto Rico, refusing to exercise jurisdiction even in the fact of direct evidence that the Defendant's product in fact did reach the foreign state. Were causation and personal jurisdiction subject to the same analysis, Worldwide Volkswagen, Asahi, and McIntyre all would have been decided in Plaintiffs favor. There was never any question that the nonresident Defendant had been sold a vehicle in question in Worldwide Volkswagen, supplied the defective bicycle component in Asahi, and manufactured and sold the machine that severed fingers in McIntyre.

Instead they were all decided on the non-resident Defendant's favor because each had failed to establish a sufficient connection to the foreign state.

Causation based theories have no application to this Court's jurisdiction analysis and should not play into the Court's decision in this matter.

Be happy to address any additional questions you might have.

THE COURT: Thank you.

MS. PARKER: Thanks very much.

THE COURT: That completes the arguments on the

motions. I'm aware of a number of other motions related to other issues in the case. Those are all deferred depending on the outcome of these motions.

So I'll be issuing written decisions in these two motions and then we'll see where things are at that point.

UNIDENTIFIED SPEAKER: Thank, Your Honor.

THE COURT: Thank you.

UNIDENTIFIED SPEAKER: Thank you, Judge.

(Proceedings concluded at 3:02 p.m.)

CERTIFICATION

I, Erin Perkins, CET**D-601, a court approved proofreader, do hereby certify that the forgoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter, to the best of my professional skills and abilities.

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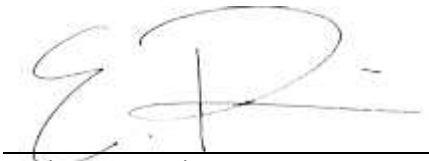

Erin Perkins, CET**D-601 December 18, 2014
Proofreader