IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Javier Alvarez del Castillo, et al.,	§	
	§	
PLAINTIFFS	§	
	§	
vs.	§	CIVIL ACTION NO. 4:14-cv-03435
	§	
P.M.I. Holdings North America, Inc., et al.,	§	
	§	
DEFENDANTS	§	

MOTION TO DISMISS PLAINTIFFS' FOURTH AMENDED COMPLAINT OF DEFENDANTS PETRÓLEOS MEXICANOS, PEMEX EXPLORACIÓN Y PRODUCCIÓN, AND PEMEX TRANSFORMACIÓN INDUSTRIAL

Defendants Petróleos Mexicanos ("Pemex"), Pemex Exploración y Producción ("PEP"), and Pemex Transformación Industrial, as successor-in-interest[1] to Pemex Refinación ("PXR"), Pemex Gas y Petroqímica Básica ("PGPB"), and Pemex Petroqímica ("PPQ") (collectively, "the Movants"), file this Motion to Dismiss Plaintiffs' Fourth Amended Original Complaint under Federal Rule of Civil Procedure 12(b)(1), (2) and (6).

[1] Per Mexican federal statute, on November 1, 2015, Pemex Gas y Petroqímica Básica, Pemex Refinación, and Pemex Petroqímica ceased operations as subsidiaries of Petróleos Mexicanos. Most of their assets, debts, operations, rights, duties, and obligations were transferred to a new subsidiary of Pemex called Pemex Transformación Industrial.

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NATURE AND STAGE OF PROCEEDINGS

Plaintiffs sued the Movants and a host of other governmental and private Defendants for claims allegedly stemming from an explosion at a facility called the Centro Receptor de Gas y Condensados, also known as the Central de Medición Km 19,[2] in Reynosa, Tamaulipas, Mexico that occurred on or about September 18, 2012. As noted in previous pleadings, the facility is owned by Pemex Exploración y Producción.

Plaintiffs originally filed suit in Harris County, Texas. On December 1, 2014, PMI Comercio removed the case to this Court as permitted under 28 U.S.C. § 1441(d). *See* Dkt. 1. Several Defendants, including PMI Comercio, PMI Holdings, and PPI, moved to dismiss Plaintiffs' Second Amended Original Complaint on various grounds, including a failure to state a claim for relief that is plausible on its face under Rules 8 and 12(b)(6). On June 22, 2015, the Court sustained some of the Defendants' plausibility arguments and granted leave to Plaintiffs to replead.[3] *See* Memorandum and Order at Dkt. 61. Plaintiffs filed their Third Amended Original Complaint on July 16, 2015. *See* Dkt. 68. Plaintiffs filed their Fourth Amended Original Complaint on October 22, 2015.

Motions to dismiss remained pending while Plaintiffs served the remaining foreign defendants. On January 12, 2016, the Movants were served with process via the Hague Convention. Plaintiffs agreed to extend the Movants' response deadline to February 16, 2016.

ISSUES PRESENTED

1. Are the Movants entitled to dismissal under the Foreign Sovereign Immunities Act? The standard of review is de novo. *Kelly v. Syria Shell Petroleum Dev. B.V.*, 213 F.3d 841, 845 (5th Cir. 2000).

[2] In English, the Receiving Center for Gas and Condensates, also known as, the Measuring Central Km 19.

[3] The Court deferred consideration of the motions to dismiss of PMI Comercio, PMI Holdings, and PPI at the parties' request. The arguments the Court sustained, however, were materially similar.

2. Does the court have personal jurisdiction over the Movants? The standard of review is de novo. *Luv N' care, Ltd. v. Insta-Mix, Inc.*, 438 F.3d 465, 469 (5th Cir. 2006).

3. Have Plaintiffs stated a claim against the Movants that is plausible on its face? The standard of review is de novo. *Scanlan v. Texas A&M Univ.*, 343 F.3d 533, 536 (5th Cir. 2003).

SUMMARY OF THE ARGUMENT

The Movants are entitled to dismissal because they were foreign states at the time suit was filed. As no exception under the Foreign Sovereign Immunities Act applies, they are immune from the jurisdiction of the courts of the United States. In the alternative, if the Movants are not foreign states, then the Court lacks personal jurisdiction over the Movants because of their lack of minimum contacts with the forum. Finally, Plaintiffs have failed to state claims against the Movants that are plausible on their face.

Accordingly, the Movants seek dismissal under Federal Rule of Civil Procedure 12(b)(1), (2), and (6).

ARGUMENT AND AUTHORITIES

1. The Movants are immune from the jurisdiction of the courts of the United States under the Foreign Sovereign Immunities Act.

a. Legal background

1. Lack of immunity is a jurisdictional pre-requisite.

The Foreign Sovereign Immunities Act ("FSIA") provides "the sole and exclusive standards to be used" to resolve questions of foreign sovereign immunity in U.S. courts. *Arriba Ltd. v. Petroleos Mexicanos,* 962 F.2d 528, 532 (5th Cir. 1992).

Foreign sovereign immunity is not a defense. Rather, establishing the ***lack*** of immunity of a foreign state is a jurisdictional prerequisite for the Court to hear the plaintiff's case. *See Kelly v. Syria Shell Petroleum Dev. B.V.*, 213 F.3d 841, 847 (5th Cir. 2000). "Under the [FSIA], a foreign state is presumptively immune from the jurisdiction of the United States

courts; unless a specified exception applies, a federal court lacks subject matter jurisdiction over a claim against a foreign state." *Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993); *see also* 28 U.S.C. § 1604; *Arriba*, 962 F.2d at 532. Immunity under the FSIA "is immunity not only from liability, but from the burdens of litigation as well." *Id.*; *see also U.S. v. Moats*, 961 F.2d 1198, 1203 (5th Cir. 1992) ("sovereign immunity is an immunity from the burdens of becoming involved in any part of the litigation process, from pretrial wrangling to trial itself").

Under the FSIA, a "foreign state" includes the state itself, as well as political subdivisions and agencies or instrumentalities of the state.

> (a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

28 U.S.C. § 1603(a). Subsection (b), in turn, defines "agency or instrumentality of a foreign state."

> (b) An "agency or instrumentality of a foreign state" means any entity—
>
> (1) which is a separate legal person, corporate or otherwise, and
>
> (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
>
> (3) which is neither a citizen of a State of the United States as defined in section 1332 (c) and (e) of this title, nor created under the laws of any third country.

28 U.S.C. § 1603(b). Subsections 1332(c) and (e)—which are referenced in subpart (3) above—describe corporations created under the laws of the United States or any of its states or territories, or companies that have their principal places of business in the United States. *See id.* § 1332(c), (e).

2. Majority ownership and "organ" status explained.

As quoted above, Subsection 1603(b)(2) grants instrumentality status to both "organs" of a foreign state and entities that are majority-owned by the state.

Majority ownership has been construed to require first-tier ownership. That is, the foreign state or political subdivision *itself* must hold the ownership interest. *Dole Food Co. v. Patrickson*, 538 U.S. 468, 478 (2003). The level of control exercised by a foreign government over an entity is irrelevant to determine ownership. *Id.*

Determining whether an entity is an "organ" of a foreign state is, by contrast, more nuanced. "[T]here is no 'clear test' for determining agency or instrumentality status under the § 1603(b)(2) 'organ' prong." *Kelly*, 213 F.3d at 847. The Fifth Circuit applies the framework developed by the district court in *Supra Med. Corp. v. McGonigle*, 955 F. Supp. 374, 378–79 (E.D. Pa. 1997). *Id.* As quoted by the Fifth Circuit, the factors set forth in *Supra* are:

> (1) whether the foreign state created the entity for a national purpose; (2) whether the foreign state actively supervises the entity; (3) whether the foreign state requires the hiring of public employees and pays their salaries; (4) whether the entity holds exclusive rights to some right in the [foreign] country; and (5) how the entity is treated under foreign state law.

Kelly, 213 F.3d at 846-47 (quoting *Supra*, 955 F. Supp. at 379). The Fifth Circuit does not apply the *Supra* factors "mechanically or require that all five support an organ-determination." *Id.*

Understanding the origin of the *Supra* factors is important here because, in distilling the factors, the *Supra* court relied heavily on a Ninth Circuit case that determined Pemex Refinación—one of the Movants here—was an "organ" of the Mexican federal government. *See Supra*, 955 F. Supp. at 379 (citing *Corporacion Mexicana de Servicios Maritimos, S.A. de C.V. v. M/T Respect*, 89 F.3d 650, 655 (9th Cir. 1996)). As the Ninth Circuit explained in *Corporacion Mexicana*:

> [Pemex-Refining] is an integral part of the United Mexican States. Pemex-[Refining] was created by the Mexican Constitution, Federal Organic Law, and Presidential Proclamation; it is entirely owned by the Mexican Government; is controlled entirely by government appointees; employs only public servants; and is charged with the exclusive responsibility of refining and distributing Mexican government property. Thus Pemex-[Refining] is a subdivision of the United Mexican States and therefore qualifies for foreign sovereign immunity under FSIA.

Corporacion Mexicana, 89 F.3d at 655. The court's description of Pemex Refinación in *Corporacion Mexicana* remains accurate as to that company and each of the other Pemex Subsidiaries, as described below in Section 1(b)(2) below.

3. Instrumentality status is determined on the date suit was filed.

The determination of an entity's status on the FSIA must be made as of the ***date the suit was filed***. *Dole Food Co. v. Patrickson*, 538 U.S. 468, 478 (2003) (construing the present-tense "is" as used in 28 U.S.C. § 1603(b)(2) to fix the determination of sovereign status as of the date suit was filed).[4] This lawsuit was filed on September 17, 2014.

4. Procedure.

Once the defendant alleges that it is a foreign state, the plaintiff bears the initial burden to produce some evidence refuting the assertion or showing that an exception applies that would allow the Court to exercise jurisdiction. *Arriba*, 962 F.2d at 532; *see also Bell Helicopter Textron, Inc. v. Islamic Republic of Iran*, 734 F.3d 1175, 1183 (D.C. Cir. 2013). If the plaintiff has met his burden to bring forth evidence, then the sovereign bears the ultimate burden of persuasion on the issue. *Id.*

[4] Although the Supreme Court focused on the second half of Subsection 1608(b)(2)—the majority-ownership portion—Congress used the same present tense "is" in the first half where the word "organ" appears. *See* 28 U.S.C. § 1608(b)(2) ("which ***is*** an organ of a foreign state or political subdivision thereof") (emphasis added). Thus, the reasoning and conclusion would be the same for either.

5. Exceptions to immunity.

The exceptions to FSIA immunity are found in 28 U.S.C. §§ 1605 and 1607. Although Plaintiffs have still not pleaded any exceptions to the FSIA against any of the foreign-state Defendants despite four amended complaints, the Movants anticipate that Plaintiffs may assert the most common exception: the "commercial activities exception," which is found in subsection 1605(a)(2). Subsection 1605(a)(2) states that:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—
>
> > (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

28 U.S.C. § 1605(a)(2). "Commercial activity" is defined in Subsection 1603(d):

> (d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

Id. § 1603(d).

"A foreign sovereign, however, does not abrogate its sovereign immunity simply because it conducts commercial operations that have a connection with the United States." *Stena Rederi AB v. Comision de Contratos del Comite Ejecutivo Gen. del Sindicato Revolucionario de Trabajadores Petroleros de la República Mexicana, S.C.*, 923 F.2d 380, 386 (5th Cir. 1991). "Not only must there be a jurisdictional nexus between the United States and the commercial acts of the foreign sovereign, there must be a connection between the plaintiff's cause of action and the commercial acts of the foreign sovereign." In other words, "[m]erely showing that a

foreign state or its instrumentality has engaged in 'commercial activities' within the meaning of the Act is not sufficient: only those commercial activities with a sufficient 'jurisdictional nexus' to the United States fall within the exception." *Arriba*, 962 F.2d at 533.

Thus, "[t]he connection between the cause of action and the sovereign's commercial acts in the United States must be *material*." *Stena Rederi*, 923 F.2d at 387 (emphasis in original). "Isolated or unrelated commercial actions" do not establish an exception. *Id.* Instead, "[i]n order to satisfy the commercial activities exception to sovereign immunity, the commercial activity that provides the jurisdictional nexus with the United States must also be the activity on which the lawsuit is based." *Id.* Thus, as the Fifth Circuit explained, "[t]he requirement under the FSIA of a connection between the plaintiff's cause of action and the commercial acts of the foreign sovereign is a significant barrier to the exercise of subject matter jurisdiction in United States courts." *Id.* By way of comparison, several courts have explained that the substantial, material contacts required to establish the commercial-activity exception typically exceed the types of contacts that would establish "minimum-contacts" with a forum needed for purposes of specific personal jurisdiction. *See, e.g.*, *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 90 (D.C. Cir. 2002) (collecting cases).

b. The Pemex Defendants are foreign states.

As explained below, on the date that this lawsuit was filed, all of the Movants were agencies or instrumentalities of a foreign state as defined under 28 U.S.C. § 1603(b). And, accordingly, each is a foreign state under 28 U.S.C. § 1603(a).

1. Petróleos Mexicanos (Pemex) is wholly owned by the Mexican government.

Pemex was created in 1938 by Special Decree of the Mexican Congress as the state-owned monopoly to exploit all hydrocarbons in Mexico. As of the date this lawsuit was filed,

Pemex was, per federal statute, a "productive State enterprise" which remains the "exclusive property of the [Mexican] Federal Government".[5] *See* Estatuto Orgánico Petróleos Mexicanos (Petróleos Mexicanos Organic Statute), Title 1, Article 2, Published April 28, 2015;[6] 28 U.S.C. § 1603(a), (b)(1)-(2); *see also* Declaration of Miguel Angel Ortiz Gómez, attached as Exhibit 1, ¶¶ 3-6. Pemex is not a citizen of the United States as defined under 28 U.S.C. § 1332(c) or (e) because it is not incorporated in the United States and does not have its principal place of business in the United States. *See* 28 U.S.C. § 1603(b)(3); Ortiz Declaration, ¶ 7. Because it meets the criteria set forth in 28 U.S.C. § 1603(b), it is a foreign state per 28 U.S.C. § 1603(a).

[5] Prior to August 2014, Pemex was a decentralized agency of the Mexican Federal Government. *See, e.g., Marathon Intern. Petroleum Supply Co. v. I.T.I. Shipping, S.A.*, 728 F. Supp. 1027, 1028 (S.D.N.Y. 1990) ("Pemex is a decentralized agency of the Mexican government charged with the exploration and development of Mexico's petroleum resources. It is a separate legal person having been created in 1938 by Special Decree of the Mexican Congress. It is not privately owned and has no shares of stock. Pemex is a "foreign state" within the definition of 28 U.S.C. § 1603(a)–(b) of the FSIA.").

Courts have held consistently that Pemex, as a decentralized agency of the Mexican government, is a foreign state under the FSIA. *See, e.g., United States v. Moats*, 961 F.2d 1198, 1204, n. 7 (5th Cir. 1992) ("It is undisputed that PEMEX, the nationalized petroleum company of Mexico, falls within the definition of foreign state for purposes of sovereign immunity."); *Stena Rederi AB v. Comision de Contratos del Comite Ejecutivo General*, 923 F.2d 380, 382, n. 2 (5th Cir. 1991) ("Petroleos Mexicanos is an agency of the United Mexican States charged with the obligation to preserve, explore and produce Mexico's hydrocarbon resources.").

Even though Pemex's status under Mexican law has changed, it remains a foreign state as defined under the FSIA. Pemex's change of status from a decentralized agency to a productive State enterprise has no effect on the outcome of the FSIA analysis because Pemex remains (1) a separate legal person, (2) wholly owned by Mexico, and (3) not a citizen of the United States under 28 U.S.C. § 1332(c) or (e).

[6] Article 2, translated into English, states:

"Petróleos Mexicanos is a productive State enterprise, the exclusive property of the Federal Government, with legal personhood, and its own assets, which enjoys technical, operational and managerial autonomy, as provided in the Law of Petróleos Mexicanos."

Available at http://www.dof.gob.mx/nota_detalle.php?codigo=5390323&fecha=28/04/2015.

2. Pemex Exploración y Producción (PEP), Pemex Refinación (PXR), Pemex Gas y Petroqimica Basica (PGPB), and Pemex Petroqímica (PPQ) (collectively "the Pemex Subsidiaries") are organs of the federal government of Mexico.

At the time suit was filed, the Pemex Subsidiaries were all organs of the federal government of Mexico. Though not necessary, they each satisfy ***every factor*** of the *Supra* test. *See Kelly*, 213 F.3d at 846-47 (a court should not apply the factors "mechanically or require that all five support an organ-determination"). As noted above, the Ninth Circuit's analysis of Pemex Refinación's status as an organ of the Mexican government was the origin of the factors. *See Corporacion Mexicana*, 89 F.3d at 655.

The very same factors cited by the *Corporacion Mexican* court as applying to Pemex Refinación apply to all of the Pemex Subsidiaries. As of the date this lawsuit:

- Each of the Pemex Subsidiaries were created with a separate legal existence in 1992—the same time and by the same law cited by the *Corporacion Mexicana* Court. *Corporacion Mexicana*, 89 F.3d at 655. *See* Declarations of Juan Carlos González Magallanes and Sergio Nettel López, attached as Exhibits 2 and 3, at ¶¶ 3 and 4, respectively.

- They shared the same governmental purpose: to fulfill the then-existing mandate of Article 27 of the Mexican Constitution for the exclusive state-owned exploitation of Mexico's mineral resources. González Declaration at ¶ 4; Nettel Declaration at ¶ 5.

- They were decentralized agencies of the Mexican federal government, entirely owned by the Mexican federal government. González Declaration at ¶ 5; Nettel Declaration at ¶ 6.

- They were controlled entirely by government appointees. González Declaration at ¶ 6; Nettel Declaration at ¶ 8.

- They employed only public servants. González Declaration at ¶ 7; Nettel Declaration at ¶ 9.

- Each was charged by law with specific areas of exclusive responsibility for exploration, production, refining, distribution, and sale of hydrocarbons which, under the Mexican Constitution, were government property. González Declaration at ¶ 5; Nettel Declaration at ¶ 7.

Additionally, none of the Pemex Subsidiaries is a citizen of the United States because they are not incorporated in the United States and none has its principal place of business in the United States. *See* 28 U.S.C. § 1603(b)(3). *See* González Declaration at ¶¶ 13-14; Nettel Declaration at ¶¶ 6, 13.

Thus, because they each meet the criteria set forth in 28 U.S.C. § 1603(b), they are foreign states per 28 U.S.C. § 1603(a).

Plaintiffs may argue that the analysis changes in light of the recent energy reforms in Mexico because those reforms altered the legal status of the Pemex Subsidiaries. Although the Movants believe that the Court would reach a similar conclusion under current Mexican law, the change in the status of the Pemex Subsidiaries from decentralized agencies to state productive enterprises did not occur until more than a year after this suit was filed. Under the *Dole* case, the relevant date is the date suit was filed. *Dole Food*, 538 U.S. at 478. Accordingly, the proper inquiry is the one described above.

c. Plaintiffs have not established and cannot establish any exception to immunity against Pemex or the Pemex Subsidiaries.

Having established a prima facie case that Pemex and the Pemex Subsidiaries are foreign states, the burden shifts to Plaintiffs to bring forth evidence refuting immunity. *Arriba*, 962 F.2d at 532. Plaintiffs have not pleaded any facts, nor will they have any evidence, that the activities of Pemex or the Pemex Subsidiaries, commercial or otherwise, have a sufficient jurisdictional nexus to the explosion to waive foreign sovereign immunity.

PEP does not dispute that it owns the facility at which the explosion in question occurred. Further, there is no dispute that the facility was located in Mexico and the explosion occurred in Mexico or that the facility collected Mexican gas and Mexican condensate from Mexican fields owned by the Mexican government employing Mexican workers.

Plaintiffs make two sets of factual allegations in an attempt to connect the Movants' alleged conduct in the US, the explosion, and the lawsuit.

First, they allege that some natural gas present at the facility at the time of the explosion came from the United States. Note, however, they do *not* allege that the presence of that gas caused the accident. *See, e.g.*, Dkt. 130 ¶ 34 ("The LNG and/or natural gas that is the subject of this suit and [sic] purchased in Texas, was transported through a pipeline system in Texas, metered at a metering station in Mexico and then processed at the gas processing plant outside of Reynosa."). Plaintiffs allege that Pemex-affiliated trading companies bought the gas in the United States, but acknowledge they do not know which company or companies supposedly bought the gas or when they supposedly did it. *Id.* ("This LNG and/or natural gas was purchased by P. M. I. Comercial Internacional, S. A. de C. V. and/or P. M. I. Norteamerica, S. A. de C. V., P. M. I. Norteamerica Services S. A. de C. V., and/or P. M. I. Procurement, Inc. and/or P. M. I. Holdings North America, Inc. Until discovery is undertaken it is impossible to actually know which company actively engaged in which commercial activity either in concert or separately."). In an attempt to connect the other Pemex entities to the alleged US transaction, Plaintiffs claim, without any factual allegation, that "[i]t is known that these entities regularly engage in these and other commercial activities on behalf of the various PeMex companies involved in the case. It is also known that they do not operate as entirely separate legal entities but act in concert or jointly as needed to accomplish the business of PeMex." *Id.* ¶ 34.

Second, Plaintiffs try to suggest that commercial activity in Mexico gave rise to effects in the United States. They allege that "[t]he explosion and the gas released by the explosion directly impacted the citizens of Hidalgo County, Texas, especially those who live or work in close

proximity to the border. Glass was shattered, windows were broken, and gas escaped and endangered residents of Hidalgo County, Texas."

Neither of these sets of allegations is sufficient to establish the required jurisdictional nexus. As to the first set, the alleged purchase of US gas, the allegations are simply wrong as a matter of fact. At the time the facility exploded, it was collecting only Mexican and condensate from Mexican fields. *See* González Declaration at ¶ 11 ("The Central de Medición Km 19 does not import or export gas or condensate to or from the United States. Thus, none of the gas and condensate at the Central de Medición Km 19 on or about September 18, 2012 originated from the United States."). Second, even if the allegations were true, aside from a baseless alter-ego argument, Plaintiffs do not allege that the gas was purchased by any of the *Movants* here or that it was the gas that *caused* the explosion. Thus, the purchase could not be a commercial activity of the *Movants* in the United States that *gave rise* to the litigation.

Plaintiffs claim that the Movements are alter egos of one another and of PMI Comercio, PMI Holdings, and PPI, but provide no factual basis for the bald conclusion. As discussed in Section 3(b)(7) below, their pleadings on alter ego are insufficient to even *allege* veil-piercing under Mexican, Texas, or Delaware law. Further, they face an even greater procedural hurdle because, in FSIA cases, "[f]oreign instrumentalities and agencies are accorded a presumption of independent status." *Arriba*, 962 F.2d at 532 (citing *First National City Bank v. Banco Para El Comercio Exterior de Cuba (Bancec)*, 462 U.S. 611, 624 (1983)).

> [T]he presumption will be negated only (1) "where a corporate entity is so extensively controlled by its owner that a relationship of principal and agent is created" or (2) where recognizing the presumption "would work fraud or injustice."

Sachs v. Republic of Austria, 695 F.3d 1021, 1024 (9th Cir. 2012) (quoting *Bancec*, 462 U.S. at 629). The burden rests on the Plaintiff to negate the presumption with evidence because the

presumption acts as an exception to the general rule that the foreign sovereign bears the ultimate burden of persuasion. *Arriba*, 962 F.2d at 532.

As discussed in detail in Section 3(b)(7) below, Plaintiffs have not sufficiently pleaded facts that would support the conclusion they seek, nor will they be able to meet their evidentiary burden. But even if any Pemex affiliates' conduct could be imputed to the Movants, merely purchasing gas in the United States to send to a facility in Mexico—whether that gas later exploded or not—*did not give rise to the explosion* and is not the type of "substantial," "material" connection with the United States required by the FSIA. In other words, Plaintiffs are not suing the Movants for ***buying gas***—the only alleged commercial activity in the US. *See, e.g.*, *Stena Rederi*, 923 F.2d at 387 ("[T]he commercial activity that provides the jurisdictional nexus with the United States must also be the activity on which the lawsuit is based."); *Arriba*, 962 F.2d at 534 ("The fact that Pemex has some commercial operations in or affecting the United States is inadequate to support a finding of subject matter jurisdiction under the FSIA. The only relevant acts for purposes of jurisdiction under the FSIA are those acts that form the basis of the plaintiff's complaint.").

The second set of alleged contacts, supposed damage to windows in McAllen, is equally insubstantial. First, Plaintiffs need to prove that the alleged damage has actually occurred. Second, they need to prove that their lawsuit arises from this damage—even though they have not pleaded any facts suggesting that they own windows in the United States that were damaged by the blast. (And, at best, jurisdiction would be limited under the FSIA only to those claims.) And third, broken windows are not the type of substantial, direct, and foreseeable effect in the United States of commerce occurring abroad that is sufficient to confer jurisdiction under the FSIA. *See Stena Rederi*, 923 F.2d at 390 (explaining standard).

d. Plaintiffs are not entitled to discovery.

As explained above, Plaintiffs have not pleaded or established an exception to immunity. Assuming Plaintiffs request discovery on the immunity issue, the request should be denied. The Fifth Circuit's opinion in *Evans v. Petroleos Mexicanos* is on point. In that case, the plaintiff alleged that he was injured while working as an employee for a contractor of Pemex and PEP. *Evans v. Petroleos Mexicanos (PEMEX)*, 05-20434, 2006 WL 952265, at *1 (5th Cir. Apr. 13, 2006). Like Plaintiffs here, the plaintiff in *Evans* failed to plead facts establishing the commercial exception to foreign sovereign immunity in his complaint. The district court dismissed the suit for lack of subject-matter jurisdiction and also denied the plaintiff's request to take discovery to gather facts to establish an exception to immunity. The Fifth Circuit affirmed both the dismissal and denial of discovery, explaining

> Evans argues that he should be allowed to proceed with discovery. In so arguing, he fails to appreciate the broad scope of protections that sovereign immunity affords a defendant. Sovereign immunity comprises more than just immunity from liability; rather, it is an immunity from the burdens of becoming involved in any part of the litigation process. As the facts alleged by Evans are insufficient to support a § 1605(a)(2) exception to FSIA, Evans is not entitled to burden Appellees with the lengthy and costly process of discovery to build his case.

Id. at *2 (internal quotation marks omitted).

The Fifth Circuit has explained that FSIA discovery—in the limited instances in which it is allowed—is only permitted to attempt to prove "allegations of *specific facts* that, if proved, [would] sustain[] a nexus between particularized commercial activity and the claims asserted by the plaintiff." *Arriba*, 962 F.2d at 537 n.17 (emphasis added). Like the Plaintiff in *Arriba*, the Plaintiffs here have failed "to plead how Pemex" or the other Movants "achieved the jurisdictional nexus necessary to support subject matter jurisdiction in this country." *Id.* at 534. Thus, they are likewise not entitled to discovery.

2. This Court has no personal jurisdiction over the Movants.

If the Court concludes that any of the Movants is not a foreign state under the FSIA, then it must determine whether Plaintiffs have met their burden to establish personal jurisdiction under the Constitution.[7] For the reasons explained below, the Court lacks personal jurisdiction of the Movants because they lack minimum contacts with Texas and exercising jurisdiction would offend traditional notions of fair play and substantial justice.

a. Background law.

"Where a defendant challenges personal jurisdiction, the party seeking to invoke the power of the court bears the burden of proving that jurisdiction exists." *Luv N' care, Ltd. v. Insta-Mix, Inc.*, 438 F.3d 465, 469 (5th Cir. 2006). After jurisdiction is challenged, the plaintiff must make a *prima facie* showing. The court must resolve all undisputed facts submitted by the plaintiff, as well as all facts contested in the affidavits, in favor of jurisdiction. *Id.*

"Jurisdiction may be general or specific." *Id.* For general jurisdiction, the defendant must have "continuous and systematic general business contacts" with the forum state. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 415 (1984). But even more than that, the continuous and systematic contact with the forum state must render it "essentially at home" in the foreign state. *Daimler AG v. Bauman*, 134 S. Ct. 746, 755 (2014). "[O]nly a limited set of affiliations with a forum will render a defendant amenable to all-purpose jurisdiction there." *Id.* at 760. For a corporation that typically means the principal place of business and place of incorporation. *Id.* As explained in *Daimler*, corporations may be subject to general jurisdiction in other fora, but examples are rare. Even a corporation's "engaging in a substantial, continuous, and systematic course of business" is not sufficient to be "at home" in the forum. *Id.* at 761.

[7] Under the FSIA, the Court automatically has personal jurisdiction if it has subject-matter jurisdiction and the complaint was properly served. *See* 28 U.S.C. § 1330(b).

Further, in cases where foreign defendants are involved like this one, the court must give due regard to issues international comity in determining whether a foreign defendant is subject to general jurisdiction. *Id.* at 763. The Supreme Court's comments suggest strongly that comity favors a narrow view of general jurisdiction. *Id.* ("Considerations of international rapport thus reinforce our determination that subjecting Daimler to the general jurisdiction of courts in California would not accord with the 'fair play and substantial justice' due process demands.").

If the defendant's contacts with the forum are less pervasive, the Court can still exercise specific personal jurisdiction "in a suit arising out of or related to the defendant's contacts with the forum." *Id.* at 414. "A federal court may satisfy the constitutional requirements for specific jurisdiction by a showing that the defendant has 'minimum contacts' with the forum state such that imposing a judgment would not 'offend traditional notions of fair play and substantial justice.'" *Luv N' care, Ltd.*, 438 F.3d at 469 (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945)).

To determine whether those criteria are met, the Fifth Circuit employs a three-step inquiry. The Court asks:

> (1) whether the defendant . . . purposely directed its activities toward the forum state or purposely availed itself of the privileges of conducting activities there; (2) whether the plaintiff's cause of action arises out of or results from the defendant's forum-related contacts; and (3) whether the exercise of personal jurisdiction is fair and reasonable.

Nuovo Pignone v. STORMAN ASIA M/V, 310 F.3d 374 (5th Cir. 2002).

b. No general jurisdiction.

It is unclear from Plaintiffs' live complaint whether they assert that the Movants are subject to general jurisdiction or merely specific jurisdiction. Regardless, the Movants' contacts with Texas are insufficient to be considered "at home" here. At all relevant times:

- The Movants were each created by Mexican statute. Each had its headquarters and principal place of business in Mexico City. *See* Ortiz Declaration at ¶ 7; González Declaration at ¶ 13; Nettel Declaration at ¶ 6.

- None of the Movants had an office in Texas. *See* Ortiz Declaration at ¶ 12; González Declaration at ¶ 15; Nettel Declaration at ¶ 14.

- None of the Movants were domiciled in Texas. *See* Ortiz Declaration at ¶ 11; González Declaration at ¶ 14; Nettel Declaration at ¶ 13.

- The facility where the explosion occurred was in Reynosa, Tamaulipas, Mexico. *See* Ortiz Declaration at ¶ 10; González Declaration at ¶ 8; Nettel Declaration at ¶ 10.

- PEP owns the facility. The rest of the Movants do not. *See* Ortiz Declaration at ¶ 8; González Declaration at ¶ 8; Nettel Declaration at ¶ 11-12.

Accordingly, the Movants here have none of the "limited set of affiliations with" Texas that would render them "amenable to all-purpose jurisdiction." *Daimler*, 134 S. Ct. at 760. Further, as in *Daimler*, international comity here favors a narrow approach to general jurisdiction. *Id.* at 763. Given the Movants' lack of contacts with Texas and their status as Mexican governmental entities, "[c]onsiderations of international rapport" reinforce the conclusion that subjecting the Movants to the general jurisdiction of Texas "would not accord with the 'fair play and substantial justice' due process demands." *Id.*

c. No specific jurisdiction.

In this case, because the lawsuit arose out of an explosion in *Mexico*, there is no basis for imposing specific jurisdiction on any of the Movants—indeed, Plaintiffs' Fourth Amended Complaint does not provide any. Applying the Fifth Circuit's test quoted above makes this clear. As the attached declarations show, the Movants did not direct any relevant activities toward Texas or purposely avail themselves of any relevant privileges of conducting relevant activities in Texas. Further, they had no contacts with Texas that are even remotely related to the explosion giving rise to the lawsuit. Finally, the Movants' lack of relevant contacts with Texas coupled

with the tenuous connection of the lawsuit's allegations to Texas means that the exercise of specific jurisdiction here would not be fair or reasonable. *See, e.g., Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476-77 (1985) (quoting *Int'l Shoe Co.*, 326 U.S. at 319) (describing in detail the inquiry for fairness and reasonableness).

1. No alter ego.

In an effort to claim that PMI Comercio is "at home" in Texas, Plaintiffs allege that the Movants are the alter egos of all the other PEMEX entities, including Texas residents Defendants Pemex Procurement International, Inc. and PMI Holdings, Inc. *See, e.g.*, Dkt. 130, ¶¶ 29, 44. Plaintiffs' alter-ego claim is rebutted at length in Section 3(b)(7) of this Motion below. In the interest of brevity, the Movants respectfully refers the Court to that section.

2. No imputation of contacts from sister/cousin companies for general jurisdiction.

To the extent that Plaintiffs argue they can impute the Texas contacts of the Movants' affiliated companies—Pemex Procurement International, Inc. and PMI Holdings, Inc.—*Daimler* stands for the contrary. *See* Memorandum and Order, Dkt. 61 at p. 9 ("Prior to the Supreme Court's decision in *Daimler*, it is possible that the in-state conduct of a sister company might have been a basis for general jurisdiction. But the recent decision in *Daimler* appears to foreclose that possibility." (citing *Associated Energy Group, LLC v. Air Cargo Germany GMBH*, 24 F. Supp. 3d 602, 608 (S.D. Tex. 2014)).

3. Plaintiffs' allegations against the Movants do not meet Rule 8's plausibility requirement.

In addition to the jurisdictional deficiencies explained above, Plaintiffs have failed to sufficiently plead several causes of action against the Movants that meet the standards of Rule 8.

a. The legal standard.

"To survive a Rule 12(b)(6) motion to dismiss, a complaint 'does not need detailed factual allegation,' but must provide the plaintiff's grounds for entitlement to relief—including factual allegation that when assumed to be true 'raise a right to relief above the speculative level.'" *Cuvillier v. Taylor*, 503 F.3d 397, 401 (5th Cir. 2007) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). In other words, Plaintiffs' complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). A claim has facial plausibility "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* Rule 8's standard "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Id.* "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.' Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Id.* (quoting *Twombly*, 550 U.S. at 555).

As the Supreme Court explained, Rule 8's pleading standard "**does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions.**" *Id.* at 678-79. (emphasis added). Accordingly, in ruling on the motion to dismiss, the court must take only *well-pleaded* facts as true and view them in the light most favorable to the plaintiff. *Shandong Yinguang Chem. Indus. Joint Stock. Co. v. Potter*, 607 F.3d 1029, 1032 (5th Cir. 2010).

b. Plaintiffs' allegations do not meet the* Twombly/Iqbal *standard.

1. Negligence and negligence per se.

In Section V, labeled "Causes of Action", Plaintiffs bring complaints for "negligence, breach of implied warranty, violation of Plaintiffs [sic] civil rights, [and] product liability . . . against the PeMex defendants." Plaintiffs' Fourth Amended Complaint (Dkt. 130) ¶ 134. The

term "PeMex" is defined at Paragraph 44 as "Pemex Exploration and Production, Pemex Refining, PeMex Petrochemicals and Pemex Gas and Basic Petro Chemicals." *Id.* ¶ 44. *Note the definition does* ***not*** *include Petróleos Mexicanos.* Plaintiffs make numerous allegations in the aggregate against the "PeMex Defendants" or the "PeMex defendants"—sometimes the term is capitalized, sometimes not. They do not particularize any specific conduct alleged against any specific defendant.

For example, Plaintiffs allege that

> The PeMex defendants had control and were in charge of the engineering of the plant including the use of elbows instead of "T's" at the metering point, making sure the metering was not the source of corrosion or weakening of the pipe, making sure proper safety measures were in place including proper monitoring of gas, pressure and properly measuring the gas, water and condensate running through the plant. The PeMex defendants were ultimately responsible for ensuring that the plant did not explode, that the gas did not catch on fire and that contractor and PeMex personnel were not injured or killed. PeMex was negligent and grossly negligent in all these actions and their negligence and gross negligence was the proximate cause of plaintiffs' damages.

Id. ¶ 74. And

> Further the Pemex defendants were negligent in the operation of their facility in allowing gas to leak undetected leading to the explosion. Despite the allegations against the service personnel and equipment manufacturers and maintenance personnel, the duty to maintain and operate a safe plant remained with PeMex. PeMex was told of various leaks within the system and the problems certain aspects of the system were experiencing. Without the report herein referenced the extent of this knowledge is unknown but it is unquestioned that it was PeMex's duty and obligation to run the plant safely, to avoid explosions of the type that occurred and that PeMex and the various PeMex entities were negligent for allowing the deterioration of plant equipment, the undiscovered defects within the system and the ultimate escape of gas leading to the deaths and injuries.

Id. ¶ 91. And

> The negligence of the PeMex Defendants in failing to have permanent gas detection and monitoring systems is a proximate cause of Plaintiffs damages.

Id. ¶ 99. Yet they appear to acknowledge that PEP owned the facility where the explosion occurred. *Id.* ¶ 106 ("PeMex Exploration and Production, Inc., is one of the PeMex subsidiaries which owned or operated the gas processing plant which exploded in the incident made the basis of this suit.").

Plaintiffs' complaint does not sufficiently separate its allegations against any of the Movants in such a way that gives fair notice to the Movants of what any particular Movant is being accused. As the Court admonished in its Memorandum and Order, Plaintiffs must "[a]t a minimum, . . . endeavor to explain what role each Defendant played in the plant, rather than grouping them together at all times." *See* Memorandum and Order at Dkt. 61 at 12. They have failed to do so despite multiple attempts.

Plaintiffs also make general allegations that "Defendants" failed to follow various "aforementioned" local, state, federal and industry regulations, which caused the accident. *See* Dkt. 130 ¶ 149. But the Complaint does not explain which regulations apply to the Movants, what conduct by those entities allegedly violated applicable regulations, or how those supposed violations allegedly caused the accident giving rise to this suit.

Plaintiffs have thus failed to present well-pleaded facts that, taken as true, would establish their right to relief. Instead, they offer no more than classic "'labels and conclusions"' and "'naked assertion[s]' devoid of 'further factual enhancement.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555). Because the allegations do not meet the Requirements of Rule 8, they must be dismissed. *See id.*

2. Breach of implied warranty.

In Paragraph 134, Plaintiffs reference claims for breach of implied warranty made "in the previous paragraph against the PeMex defendants," but they do not actually make any claims against the "PeMex defendants" for breach of implied warranty anywhere in their Complaint. *See*

Dkt. 130 ¶ 134. Further, they do not list the elements or present any predicate facts in their live complaint that would support such a claim again the Movants. Because they have not pleaded facts against the Movants related to any implied warranty, their claims—to the extent they exist—must be dismissed. *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555).

Further, even if they had pleaded relevant facts, their claims would not survive because they lack standing to assert warranty claims. Suit for breaches of warranty under Texas law can only be brought by the person who buy or leases the goods and services in question or, in limited circumstances, is subject to a sublease. *See, e.g.*, Tex. Bus. & Com. Code Ann. §§ 2.103(a)(1) (goods), 2A.103(a)(14) (leases). Plaintiffs do not allege that they purchased or leased goods from the Movants that caused them injury.

3. Violation of Plaintiffs' civil rights.

Plaintiffs next make outrageous allegations against the Movants that they, in conjunction with various other Pemex entities, conspired to deprive the Plaintiffs of their civil rights by threatening them with "bodily harm and property damage" if they pressed forward with this lawsuit. *See* Dkt. 130 ¶¶ 79-82, 86, 108 and 134. These false, baseless, and offensive allegations are made purely for shock value and utterly fail to meet Rule 8's pleading standard.

For clarity, the factual allegations related to this cause of action are copied in their entirety below.

> 81. The PeMex Defendants, specifically, upon information and belief, persons operating in conspiracy with and on behalf of Defendants PeMex, PeMex Exploration and Production, Inc., PeMex Gas and Basic Petrochemistry, PeMex Petrochemistry and PeMex Refining, along with employees of or persons acting on behalf of, Defendants P. M. I. Comercial Internacional S. A. de C. V., P. M. I. Norteamerica, S. A. de C. V., and P. M. I. Holdings North America, Inc., did engage in and act upon a conspiracy to threaten Plaintiffs with bodily harm and property damage if they proceeded with their claims in this Federal Court of these United States of America, or if they proceeded with their attempts to obtain justice for the deaths and injuries that occurred as a result of the explosion and fire at the gas processing plant owned, operated and maintained by the various

> PeMex defendants or managed and engineered by the various PeMex defendants as more specifically laid out in this complaint. The said individuals, acting in concert and in conspiracy, did act to prevent the Plaintiffs from testifying in this case, and in proceeding with this case in order to protect their rights under the laws and statutes of the United States of America.
>
> 82. The conspiracy consisted of threats to Plaintiffs if they should proceed in this litigation and threats to their financial and economic livelihood should they not dismiss their cases. The threats were made by individuals who were connected with, or in the employment of or under the direction of the PeMex Defendants and the P.M.I. Defendants, and they occurred after the case was removed to this United States District Court, and they were made with the intent to prevent parties and witnesses from accessing, and testifying in this cause of action.

Id. ¶¶ 81-82. Plaintiffs assert that they have thus stated a claim under 42 U.S.C. § 1985(2). *Id.* ¶ 80.

These allegations are no more than mere "'labels and conclusions"' and "'naked assertion[s]' devoid of 'further factual enhancement.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555). Further, even before *Twombly* and *Iqubal*, "a bare allegation of conspiracy was not enough to survive a motion to dismiss." *Cooney v. Rossiter*, 583 F.3d 967, 970 (7th Cir. 2009) (Posner, J.). "[M]ere suspicion that persons adverse to the plaintiff had joined a conspiracy against him or her was not enough." *Id.* at 971.

Here Plaintiffs have not even provided facts sufficient to generate *suspicion*. They do not explain who among them was threatened, what was allegedly said or done that constituted the threat, where the threat was made, when it was said or done, by whom, the facts giving rise to a reasonable inference that the unidentified "said individuals" who did the threatening were "acting in concert and in conspiracy" or were "employees of or persons acting on behalf of" the Movants, or any other meaningful factual information that would put the Movants on notice of the basis of Plaintiffs' claim. As it is, Plaintiffs have not "raise[d] a right to relief above the speculative level." *Twombly*, 550 U.S. 544, 555 (2007).

Finally, Plaintiffs have not even pleaded that the conspiracy occurred ***in the United States***, which is a requirement to relief under 42 U.S.C. § 1985(2). ("If two or more persons ***in any State or Territory*** conspire . . . .") (emphasis added).

For all of these reasons, Plaintiffs' civil-rights claim fails.

4. Product liability.

It is unclear if Plaintiffs alleged that the Movants are liable under product-liability law, as they reference "product liability" in only one sentence in the entire 92 page complaint. In paragraph 134, which was quoted above, Plaintiffs allege that they "incorporate the causes of action for . . . product liability . . . contained in the previous paragraph against the PeMex defendants . . . ." Dkt. 130, ¶ 134. But there are no allegations related to a claim for product liability in the previous paragraph.

Additionally, they do not allege that the Movants placed into the stream of commerce a product that was defective or unreasonably dangerous and that Plaintiffs' injuries were caused by its defectiveness or unreasonable dangerousness. *See Houston Lighting & Power Co. v. Reynolds*, 765 S.W.2d 784, 785 (Tex. 1988) (listing the elements of a products-liability claim under Texas law). Even if their complaint could be construed—which it cannot—to allege that the Movants *procured* a defective product from someone else for use at the facility where the explosion occurred, the claim still fails because procuring a product *from* the stream of commerce is the opposite of placing a product *into* the stream of commerce. *See, e.g.*, *Armstrong Rubber Co. v. Urquidez*, 570 S.W.2d 374, 375 (Tex. 1978) (defendant must "be engaged in the business of introducing the product into channels of commerce").

5. Right to quiet enjoyment.

In Paragraph 151, Plaintiffs assert that they are entitled to the "right of quiet enjoyment." It is unclear whether they assert that the disturbance of this right is a separate cause of action or

merely an additional source of damages beyond their alleged physical and emotional damages. *See* Dkt. 130, ¶ 151 ("In addition to the physical and mental damages resulting from Defendants' actions, Plaintiffs, whether employees, subcontractors' employees, or neighboring land owners are entitled to the "quiet enjoyment" of their work and premises."). Paragraph 151 references only the "PeMex plant owner and operator and the pipeline Defendants" and, thus, specifically appears to exclude all of the Movants except PEP.

Regardless, Plaintiffs have not pleaded any factual predicate for PEP or the other Movants disturbing the "quiet enjoyment" of anyone. Additionally, outside of nuisance law or a contract with a covenant, neither of which has not been pleaded here, a thorough search has revealed no authority suggesting that one owes a "duty" to anyone else for "quiet enjoyment" of their property.

6. Res ipsa loquitur.

Plaintiffs allege "res ipsa loquitur" under a separate heading in Section V "Causes of Action." But "[r]es ipsa loquitur is simply a rule of evidence by which negligence may be inferred by the jury; it is not a separate cause of action from negligence." *Haddock v. Arnspiger*, 793 S.W.2d 948, 950 (Tex. 1990). Thus, insofar as Plaintiffs allege res ipsa as a separate cause of action, it must be dismissed.

7. Alter ego.

Finally, Plaintiffs' complaint repeatedly alleges that all of the PEMEX entities—including PMI Comercio, PMI Holdings, and PPI—are alter egos of one another. *See, e.g.*, Dkt. 130, ¶¶ 29, 30 31, 32, 44, 84, 90, 105, and 159. Plaintiffs thus allege that each of the PEMEX entities is liable for the conduct of all of the others. *Id.* at 145.

Regardless of which state's law governs this inquiry—Mexico, Delaware, or Texas—Plaintiffs have failed to make sufficient allegations to support alter ego.

A. Choice of law.

In FSIA cases, the Court must "apply the choice-of-law rules of the forum state" to all issues except jurisdictional ones. *Northrop Grumman Ship Sys., Inc. v. Ministry of Def. of Republic of Venezuela*, 575 F.3d 491, 498 (5th Cir. 2009). Texas follows the Restatement. *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 421 (Tex. 1984) (law of the state with most significant relationship will govern inquiry).

Here, there are three options: Mexico, Texas, and Delaware. Texas typically applies the law of the state of incorporation for alter-ego analysis. *See, e.g.*, *Alberto v. Diversified Group, Inc.*, 55 F.3d 201 (5th Cir. 1995); *see also* Tex. Bus. Org. Code Ann. §§ 1.102 (law of state of incorporation governs corporations internal affairs), 1.104 (law of state of incorporation governs liability of owner, member, etc. for alter ego inquiry). PMI Holdings and PPI are incorporated in Delaware and have their principal places of business in Texas. The rest of the entities are incorporated in Mexico and have their principal places of business there as well.

Plaintiffs' complaint is not sufficiently clear to determine which entities' conduct they seek to impute to which other entity or entities—i.e., which direction, up or down, they are trying to pierce the veil. Regardless, they have not met the *Twombly*/*Iqbal* pleading standards for alter-ego claims under the laws of either Mexico, Texas, or Delaware.

(a) Mexican Law

There is no precedent under Mexican law that suggests "alter ego" or "piercing the corporate veil" doctrine applies to agencies of the federal government of Mexico, which are not corporations. Since, as of the date the lawsuit was filed, all Movants except Pemex were decentralized agencies of the Mexican federal government, Mexican law does not permit veil piercing against them. It is unclear whether Pemex, as a state-owned productive enterprise, can ever be subject to veil piercing.

As to corporations, the standard in Mexico is similar to Texas and Delaware law. Mexican law limits the doctrine's use to exceptional cases and requires a finding of abuse of the corporate form with the purpose of performing illicit acts. *See* Weekly Reporter of the Judiciary of the Federation and its Gazette, Tenth Epoch, Book XXIII, August 2013, Thesis /I.5, Page 1749.[8]

The party asserting alter ego bears the burden of proof. *See id.* at 1750.[9] Mexican courts consider that there is sufficient cause when a company is incorporated or operated with the sole intention to (i) avoid the enforcement of law, (ii) breach legal obligations, or (iii) perform acts to achieve an unlawful purpose, such as fraud. *Id.* at 1745.[10]

[8] Velo Corporativo. Su levantamiento constituye una solución para evitar el abuso de la personalidad jurídica societaria. Quinto Tribunal Colegiado en Materia Civil del Primer Distrito, Semanario Judicial de la Federación y su Gaceta, Décima Época, Libro XXIII, Agosto de 2013, Tesis /I.5, Pagina 1749 (Mex.) .

In English: Corporate Veil. Its lifting as a solution to avoid abuse of the corporate legal personality. Fifth Collegiate Circuit Civil Court of the First District; Weekly Reporter of the Judiciary of the Federation and its Gazette, Tenth Epoch, Book XXIII, August 2013, Thesis /I.5, Page 1749 (Mexico).

[9] Velo Corporativo. Su levantamiento es de aplicación restrictiva y subsidiaria. Quinto Tribunal Colegiado en Materia Civil del Primer Distrito, Semanario Judicial de la Federación y su Gaceta, Décima Época, Libro XXIII, Agosto de 2013, Tesis /I.5, Pagina 1750 (Mex.).

In English: Corporate Veil. Its lifting is of a restrictive and subsidiary application. Fifth Collegiate Circuit Civil Court of the First District; Weekly Reporter of the Judiciary of the Federation and its Gazette, Tenth Epoch, Book XXIII, August 2013, Thesis /I.5, Page 1750 (Mexico).

[10] Velo Corporativo. Debe levantarse al advertirse el control efectivo que sobre la sociedad mercantil ejerce uno de los socios, al abusar de la personalidad jurídica. Quinto Tribunal Colegiado en Materia Civil del Primer Distrito, Semanario Judicial de la Federación y su Gaceta, Décima Época, Libro XXIII, Agosto de 2013, Tesis /I.5, Pagina 1745-46 (Mex.).

In English: Corporate Veil. Must be lifted once it is discovered that the actual control over the commercial enterprise, is exercised by a partner, abusing the separate legal entity structure. Fifth Collegiate Circuit Civil Court of the First District; Weekly Reporter of the Judiciary of the Federation and its Gazette, Tenth Epoch, Book XXIII, August 2013, Thesis /I.5, Page 1745-46 (Mexico).

(b) Texas Law

"Under Texas law, '[a]lter ego applies when there is such unity between corporation and individual that the separateness of the corporation has ceased and holding only the corporation liable would result in injustice.'" *SEC v. Res. Dev. Int'l, LLC*, 487 F.3d 295, 302 (5th Cir. 2007) (quoting *Castleberry v. Branscum*, 721 S.W.2d 270, 272 (Tex. 1986)). Alter ego "is shown from the total dealings of the corporation and the [alleged alter ego], including the degree to which corporate formalities have been followed and corporate and individual property have been kept separately, the amount of financial interest, ownership and control the individual maintains over the corporation, and whether the corporation has been used for [the purposes of the alleged alter ego]." *Castleberry*, 721 S.W.2d at 272.

But, even with such evidence, disregarding the corporate structure under Texas law requires something more. As the Texas Supreme Court explained:

> Creation of affiliated corporations to limit liability while pursuing common goals lies firmly within the law and is commonplace. We have never held corporations liable for each other's obligations merely because of centralized control, mutual purposes, and shared finances. There must also be evidence of abuse, or as we said in *Castleberry*, injustice and inequity. By "injustice" and "inequity" we do not mean a subjective perception of unfairness by an individual judge or juror; rather, these words are used in *Castleberry* as shorthand references for the kinds of abuse, specifically identified, that the corporate structure should not shield—**fraud, evasion of existing obligations, circumvention of statutes, monopolization, criminal conduct, and the like**. **Such abuse is necessary before disregarding the existence of a corporation as a separate entity.** Any other rule would seriously compromise what we have called a "bedrock principle of corporate law"—that a legitimate purpose for forming a corporation is to limit individual liability for the corporation's obligations.

SSP Partners v. Gladstrong Investments (USA) Corp., 275 S.W.3d 444, 455 (Tex. 2008) (emphasis added).

(c) Delaware Law

Delaware law "will disregard the corporate form only in the 'exceptional case.'" *Winner Acceptance Corp. v. Return on Capital Corp.*, 2008 WL 5352063,*5 (Del. Ch. Dec. 23, 2008) (quoting *Sprint Nextel Corp. v. iPCS, Inc.*, 2008 WL 2737409, at * 11 (Del. Ch. July 14, 2008)). Determining whether to do so

> requires a fact intensive inquiry, which may consider the following factors, none of which are dominant: (1) whether the company was adequately capitalized for the undertaking; (2) whether the company was solvent; (3) whether corporate formalities were observed; (4) whether the controlling shareholder siphoned company funds; or (5) whether, in general, the company simply functioned as a facade for the controlling shareholder.

Delaware law also requires a showing that the "interests of justice" require disregarding the corporate form because matters like fraud, public wrong, or contravention of law are involved. *Id.*; *see also BASF Corp. v. POSM II Props. P'ship, L.P.*, 2009 WL 522721, at *8 n. 50 (Del.Ch. Mar. 3, 2009); *Pauley Petroleum, Inv. v. Cont't Oil Co.*, 239 A.2d 629, 633 (Del. 1968). In other words, like in Texas, the Delaware veil-piercing test is two pronged. The corporation must not have been sufficiently independent of the controlling shareholder per the criteria set out above and the corporate form must have been used to commit fraud or similar injustice.

B. Plaintiffs' allegations are conclusory and insufficient.

Plaintiffs' allegations concerning alter ego are conclusory; they allege almost no actual facts. Even so, taking as true the facts they do cite does not establish their right to relief.

With apologies to the Court for the voluminous quotations, the best way to illustrate the absence of fact factual predicate is simply to copy Plaintiffs' allegations. Below is a verbatim recitation of Plaintiffs' alter-ego allegations. In Paragraph 29, Plaintiffs allege that

> P. M. I. North America Holdings, Inc, specifically through Ismael Hernandez Amor acts as an alter ego or directs P. M. I. Norteamericas S. A. De C. V. and P. M. I. Services North America allegedly a subsidiary of the company. P. M. I. North America Holdings, Inc., and acts as an engineering services company and

> upon information and belief supplies engineers both for training and to provide engineering services between its alter ego, PeMex Exploration and Production, and/or the owner of the plant involved in this accident, either PeMex Exploration and Production, PeMex –Gas and Basic Petrochemistry, or PeMex Petrochemistry, or PeMex Refining. P. M. I. Holdings North America, Inc. also provides engineers employed by the various PeMex defendants to the Shell Oil Company Deer Park refinery.

Dkt. 130, ¶ 29. Paragraph 32 states in relevant part

> P. M. I. Comercio Internacional employee Margarita Perez, who is currently Commercial Director of Products at P. M. I., Comercio Internacional, worked as commercial Deputy Director of the Natural Gas area beginning in 1993. During this same time period, from 1993-1995, Ms. Perez served as Business and Operations Vice President of P. M. I. Holdings North America, Inc., in Houston, Texas, where she took part in the Deer Park refinery joint venture negotiations between PeMex and Shell. Fernando Luna, Chairman of P. M. I. Holdings, Inc., a Houston, Texas based company is an employee of P. M. I. Comercio Internacional S. A. de C. V. The operations of PeMex, PeMex Exploration and Production and the P. M. I. companies are so intertwined so as to be essentially one company. The companies have some of the same management and employees and operate under the same contracts.

Id. ¶ 32. Paragraph 44 states in relevant part

> The various "PeMex" defendants along with the other entities they control, including alleged subsidiary "Mex Gas Internacional, LTD., which is incorporated in the Cayman Islands, but operates, along with PeMex and PeMex –Gas and Basic Petrochemistry and/or PeMex Exploration and Production through its alter egos the various PeMex organizations, collectively own and operate various gas processing plants, including the plant where the accident occurred. The PeMex entities and the wholly owned subsidiaries and alter egso [sic] of PeMex and its four basic subsidiaries, PeMex-Gas and Basic PetroChemicals, PeMex-Refining, PeMex Petrochemicals, and PeMex Exploration and Production own and control the various refineries, gas processing plants and marketing operations of PeMex. The PeMex entities own and operate various pipeline ventures, plants and gas processing plants in which the financing arms of PeMex, led by P. M. I. Comercio Internacional, S. A. de C. V. and P. M. I. Holdings North America, Inc., along with subsidiaries and alter egos, P. M. I. Norteamerica, S. A. de C. V. and PeMex Procurement Internacional, Inc. (a Delaware corporation with its principle place of business in Houston , Texas), finance, manage, trade in hydrocarbons and provide various employees and engineering to the PeMex entities.

Id. ¶ 44. Finally, Paragraph 105 states in relevant part

> PeMex in its common name, PeMex, Inc., Petroleos Mexicanos, Mexican Petroleum and the other entities sued and known as PeMex served either under the Hague Convention or by serving the agent recognized by the Texas Secretary of State, is the alter ego of the other PeMex companies and the parent of each subsidiary. PeMex supervised or controlled the operating arm of PeMex, the other entities or the other companies involved in the suit. PeMex exercised ultimate control over the activities of each subsidiary and caused the negligence which led to this explosion and the catastrophic loss of life involved in this suit.

Id. ¶ 105.

As is evident, Plaintiffs present little more than conclusions. Plaintiffs' only non-conclusory allegations relate to allegedly shared employees—only two of whom, both executives, they actually name. But, commonality of employees is not enough to warrant disregarding the corporate form. *See, e.g.*, *Alpine View Co. Ltd. v. Atlas Copco AB*, 205 F.3d 208, 219 (5th Cir. 2000) (Texas law); *Crosse v. BCBSD, Inc.*, 836 A.2d 492, 497 (Del. 2003) ("To state a 'veil-piercing claim,' the plaintiff must plead facts supporting an inference that the corporation, through its alter-ego, has created a sham entity designed to defraud investors and creditors. [Plaintiff] has failed to allege any facts to support such an inference.").

Further, Plaintiffs have failed to plead facts that, if true, would establish an inference of abuse of the corporate form such that "injustice" and "inequity" would result—a requirement under Mexican, Texas, and Delaware law. *See, e.g.*, *SSP Partners*, 275 S.W.3d at 455 ("Such abuse is necessary before disregarding the existence of a corporation as a separate entity."); *Winner Acceptance*, 2008 WL 5352063, at *5 ("Delaware courts also must find an element of fraud to pierce the corporate veil."); Weekly Reporter of the Judiciary of the Federation and its Gazette, Tenth Epoch, Book XXIII, August 2013, Thesis /I.5, Page 1745 (fraud or other illegal conduct required). Mere collective negligence is not enough. Instead, the abuse of the corporate form must be serious and willful—conduct which has not been alleged here. *See, e.g.*, *SSP Partners*, 275 S.W.3d at 455 (injustice or inequity is caused by "fraud, evasion of existing

obligations, circumvention of statutes, monopolization, criminal conduct, and the like"); *Crosse*, 836 A.2d at 497 (alter ego entity must be a "sham designed to defraud investors and creditors"); Weekly Reporter of the Judiciary of the Federation and its Gazette, Tenth Epoch, Book XXIII, August 2013, Thesis /I.5, Page 1749 (sole intention in forming corporation must be to defraud third parties or avoid application of law).

REQUEST FOR RELIEF

For the reasons described above, the Court should dismiss the Movants for lack of subject-matter jurisdiction because they are immune from this Court's jurisdiction under the Foreign Sovereign Immunities Act. If the Court finds that any of the Movants are not foreign sovereigns, then the Court should dismiss those Movants for lack of personal jurisdiction. If the Court concludes that it has subject-matter and personal jurisdiction over the Movants, then it should dismiss the claims against them because Plaintiffs failed to state a cause of action against them that is plausible on its face. The Movants also request their costs and all other relief to which they show themselves justly entitled.

Dated: February 16, 2016

Respectfully submitted,

BY: /S/ *Ileana M. Blanco*
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ATTORNEYS FOR PETRÓLEOS MEXICANOS, PEMEX EXPLORACIÓN Y PRODUCCIÓN, PEMEX TRANSFORMACIÓN INDUSTRIAL, P.M.I. COMERCIO INTERNACIONAL, S.A. DE C.V., P.M.I. HOLDINGS NORTH AMERICA, INC., AND PEMEX PROCUREMENT INTERNATIONAL, INC.

Certificate of Service

The undersigned certify that a true and correct copy of the foregoing document has been served electronically via the Court's CM/ECF system on February 16, 2016 on all counsel of record.

/s/ *Brett Solberg*
Brett Solberg

Exhibit 1

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Javier Alvarez del Castillo, et al.,	§	
	§	
PLAINTIFFS	§	
	§	
vs.	§	CIVIL ACTION NO. 4:14-cv-03435
	§	
P.M.I. Holdings North America, Inc., et al.,	§	
	§	
DEFENDANTS	§	

DECLARATION OF MIGUEL ANGEL ORTIZ GÓMEZ

1. My name is Miguel Ángel Ortiz Gómez. I am over the age of 18 and competent to make this declaration.

2. I am Gerente Jurídico de Arbitrajes y Asuntos Especiales—in English, Legal Manager of Arbitration and Special Cases—of Petróleos Mexicanos. The facts stated in this declaration are from my personal knowledge in my position as legal representative of Petróleos Mexicanos.

3. Petróleos was created as a separate legal entity in 1938 by Special Decree of the Mexican Congress in accordance with Article 27 of the Mexican Constitution, which vested all ownership of hydrocarbons in the Mexican People and limited their development to the Mexican federal government. The latter provision was amended in 2014 to allow development by private firms with the consent of the Mexican federal government. All initial ownership of hydrocarbons, however, remains with the Mexican People as represented by the federal government.

4. In accordance with the Law of Petroleos Mexicanos published in the Official Gazette dated August 11, 2014, Petróleos Mexicanos was no longer a decentralized agency of the Mexican federal government with monopoly power to develop Mexico's hydrocarbon resources.

5. By Act of the Mexican Congress as part of recent reforms to the Mexican energy industry, Petróleos Mexicanos transitioned from a decentralized agency to a "productive State enterprise". After the transition, Petróleos Mexicanos remains, by federal statute, the exclusive property of the federal government of Mexico.

6. As of September 17, 2014, the date this lawsuit was filed, the federal government of Mexico controlled Petróleos Mexicanos through Petróleos Mexicanos's Board of Directors. According to the Mexican Constitution and federal Hydrocarbons Law, exploration and extraction of the nation's hydrocarbon resources remain strategic activities of national importance to the Mexican government.

7. Petróleos Mexicanos's headquarters and principal place of business are and always have been in Mexico City.

8. Petróleos Mexicanos did not own the Central de Medición Km 19—in English, the Measuring Central Km 19—or any of the pipelines connected to the facility on or about September 18, 2012.

9. Petróleos Mexicanos did not own any of the hydrocarbons present at the Central de Medición Km 19 on or about September 18, 2012.

10. Petróleos Mexicanos did not buy or sell any of the hydrocarbons present at the Central de Medición Km 19 at Reynosa, Tamaulipas, Mexico, on the day of the explosion, nor did it plan to do so.

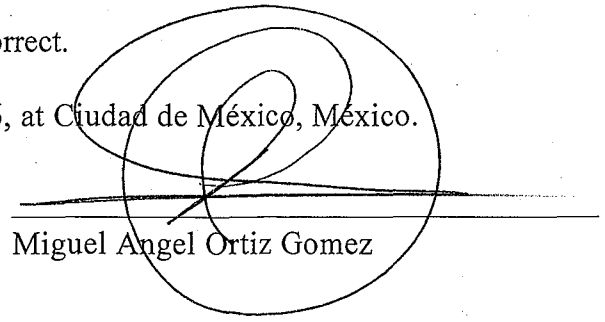
11. Petróleos Mexicanos is not domiciled in Texas.

12. Petróleos Mexicanos does not have an office in Texas.

13. Petróleos Mexicanos does not have a person appointed in the United States to receive service of process.

14. I declare under penalty of perjury under the laws of the United States of America that the foregoing statements are true and correct.

EXECUTED on February 15, 2016, at Ciudad de México, México.



Miguel Angel Ortiz Gomez

Exhibit 2

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Javier Alvarez del Castillo, et al., PLAINTIFFS vs. P.M.I. Holdings North America, Inc., et al., DEFENDANTS	§ § § § § § § § §	CIVIL ACTION NO. 4:14-cv-03435

DECLARATION OF JUAN CARLOS GONZÁLEZ MAGALLANES

1. My name is Juan Carlos González Magallanes. I am over the age of 18 and competent to make this declaration.

2. I am an in-house counsel of Pemex Exploración y Producción ("PEP"). The facts stated in this declaration are up to my personal knowledge in my position as in-house counsel of PEP.

3. PEP was created as a separate legal entity in 1992 by Presidential Proclamation and by Act of the Mexican Congress.

4. PEP was created to assist Petróleos Mexicanos—then a state monopoly—to explore and develop Mexico's hydrocarbons for the benefit of its people in conformity with Article 27 of the Mexican Constitution, which states that all hydrocarbons in Mexico are owned by the Mexican People and—at the time—required all development of hydrocarbons to be done by the State.

5. As of September 17, 2014, PEP was a decentralized agency of the Mexican federal government with exclusive rights to explore and produce hydrocarbons in Mexico.

6. As of September 17, 2014, PEP was controlled by appointees of the Mexican federal government.

7. As of September 17, 2014, all of the employees of PEP were civil servants of the Mexican federal government.

8. On or about September 18, 2012, PEP was the owner of the Central de Medición Km 19—in English, the Measuring Central Km 19— located in Reynosa, Tamaulipas, Mexico.

9. The Central de Medición Km 19 served as a central collection facility for natural gas and natural gas condensate produced by PEP in the Activo Integral Burgos—in English, the Burgos Integrated Asset (or sometimes translated as Business Unit)—a production area in northern Mexico.

10. All of the gas and condensate at the Central de Medición Km 19 on or about September 18, 2012 originated from production within Mexico and was property of the Mexican federal government.

11. The Central de Medición Km 19 does not import or export gas or condensate to or from the United States. Thus, none of the gas and condensate at the Central de Medición Km 19 on or about September 18, 2012 originated from the United States and none of the gas and condensate was being sold to the United States from that facility.

12. From the Central de Medición Km 19, the gas flowed to the Complejo Procesador de Gas—in English, the Gas Processing Complex—in Reynosa, which was owned by PEP's sister agency, Pemex Gas y Petroquímica Básica, now owned by Pemex Transformación Industrial. All gas processed at the Complejo Procesador de Gas was sent to the Sistema Nacional de Gasoductos—in English, National System of Gas Pipelines—for consumption wholly within Mexico.

13. PEP's headquarters and principal place of business are and always have been in Mexico City.

14. PEP is not domiciled in Texas or anywhere else in the United States.

15. PEP does not have an office in Texas or anywhere else in the United States.

16. PEP does not have a person appointed in Texas or anywhere else in the United States to receive service of process.

17. I declare under penalty of perjury under the laws of the United States of America that the foregoing statements are true and correct.

EXECUTED on 15 de febrero de 2016, at Ciudad de México, México

Juan Carlos González Magallanes

Exhibit 3

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Javier Alvarez del Castillo, et al., PLAINTIFFS vs. P.M.I. Holdings North America, Inc., et al., DEFENDANTS	§ § § § § § § § §	CIVIL ACTION NO. 4:14-cv-03435

DECLARATION OF SERGIO NETTEL LÓPEZ

1. My name is Sergio Nettel López. I am over the age of 18 and competent to make this declaration.

2. I am an in-house counsel of Pemex Transformación Industrial. The facts stated in this declaration are up to my personal knowledge in my position as in-house counsel of Pemex Transformación Industrial, and my prior position as in-house counsel of Pemex Gas y Petroquímica Básica, Pemex Refinación and Pemex Petroquímica.

3. Per Mexican federal statute, on November 1, 2015, Pemex Gas y Petroquímica Básica ("PGPB"), Pemex Refinación ("PXR"), and Pemex Petroquímica ("PPQ") ceased operations as subsidiaries of Petróleos Mexicanos. Most of their assets, debts, operations, rights, duties, and obligations were transferred to a new subsidiary of Petróleos Mexicanos called Pemex Transformación Industrial.

4. PGPB, PXR, and PPQ were created as separate legal entities in 1992 by Presidential Proclamation and by Acts of the Mexican Congress.

5. PGPB, PXR, and PPQ were created to assist Petróleos Mexicanos—then a state monopoly—in processing Mexico's hydrocarbons for the benefit of its people in conformity with

Article 27 of the Mexican Constitution, which states that all hydrocarbons in Mexico are owned by the Mexican People and—at the time—required all development of hydrocarbons to be done by the state.

6. On the date this lawsuit was filed, September 17, 2014, PGPB, PXR, and PPQ were decentralized agencies of the Mexican federal government and, thus, were entirely owned by the Mexican federal government. The headquarters and principal places of business of PGPB, PXR, and PPQ were in Mexico City.

7. As of September 17, 2014, per federal statute, PGPB held exclusive rights to process and distribute natural gas and certain basic petrochemicals within Mexico, PRX held exclusive rights to refine and distribute most refined hydrocarbon products within Mexico, and PPQ held exclusive rights to manufacture and distribute bulk chemicals within Mexico.

8. As of September 17, 2014, PGPB, PXR, and PPQ were each controlled by appointees of the Mexican federal government.

9. As of September 17, 2014, all of the employees of PGPB, PXR, and PPQ were civil servants of the Mexican federal government.

10. On or about September 18, 2012, neither PGPB, PXR, nor PPQ owned the Central de Medición Km 19—in English, the Measuring Central Km 19— located in Reynosa, Tamaulipas, Mexico or any of the natural gas or natural gas condensates at the facility.

11. The Central de Medición Km 19, which was owned by PEP, served as a central collection facility for natural gas and natural gas condensate produced by PEP in northern Mexico.

12. From the Central de Medición Km 19, the gas flowed to the Complejo Procesador de Gas—in English, the Gas Processing Complex—in Reynosa, which was owned by PGPB,

now owned by Pemex Transformación Industrial. All gas processed at the Complejo Procesador de Gas on or about September 18, 2012 was sent to the Sistema Nacional de Gasoductos—in English, National System of Gas Pipelines—for consumption wholly within Mexico.

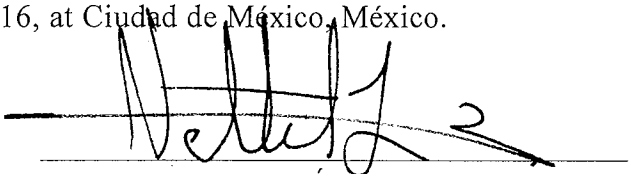
13. PGPB, PXR, and PPQ were not at the time of the explosion or the time suit was filed domiciled in Texas or anywhere else in the United States nor are they now.

14. PGPB, PXR, and PPQ did not at the time of the explosion or the time suit was filed have offices in Texas or anywhere else in the United States nor do they now.

15. PGPB, PXR, and PPQ did not at the time of the explosion or the time suit was filed have persons appointed in Texas or anywhere else in the United States to receive service of process.

16. I declare under penalty of perjury under the laws of the United States of America that the foregoing statements are true and correct.

EXECUTED on February 15, 2016, at Ciudad de México, México.



SERGIO NETTEL LÓPEZ