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COURT OF APPEALS

STATE OF NEW YORK

NOREX PETROLEUM LIMITED,

Appellant,

-against-

No. 121

LEONARD BLAVATNIK, et al.,

Respondents.

20 Eagle Street
Albany, New York 12207
May 6, 2014

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

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Sharona Shapiro
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Number 121, Norax
2 (sic) Petroleum - - - Norex Petroleum.

3 Counselor, would you like any rebuttal
4 time?

5 MR. OSTRAGER: Yes, Your Honor, four
6 minutes.

7 CHIEF JUDGE LIPPMAN: Four minutes. Go
8 ahead.

9 MR. OSTRAGER: May it please the court. I
10 am Barry Ostrager, and I appear on behalf of Norex.

11 The decision below is the only case in this
12 court's jurisprudence - - - in this state's
13 jurisprudence, which interprets the interplay of CPLR
14 202 and 205 in an illogical manner that - - -

15 CHIEF JUDGE LIPPMAN: Talk to us about the
16 purposes of the two statutes and how they're
17 furthered or not furthered by one result or another
18 that 205 trumps or that 202 does.

19 MR. OSTRAGER: 202 is intended to assure
20 that a nonresident plaintiff does not forum shop.
21 It's also intended, as this court held in the ABB
22 case, to provide uniformity of the law.

23 CHIEF JUDGE LIPPMAN: So when 205 comes
24 into play with it, what's the policy consideration?

25 MR. OSTRAGER: 205, by its literal terms -

1 - - and as I started to say, the decision below
2 disregards the plain language of the statute and
3 fails to give due regard to the purpose behind the
4 statute and fails to harmonize the statutes, as
5 required by well-established canons of constructions.
6 205 has, as its express purpose, to allow a grace
7 period if an action that is timely commenced is
8 terminated in a manner other than the manner in which
9 this case was terminated.

10 JUDGE SMITH: But isn't it settled that
11 under 202 you have to import, from the foreign
12 jurisdiction, the tolling provisions or nontolling
13 provisions, as well as everything else?

14 MR. OSTRAGER: This court - - - I think the
15 short answer to your question, Judge Smith, is
16 sometimes. In the GML case and in the Rescildo case
17 and in the Portfolio Recovery case, this court didn't
18 woodenly apply tolling provisions when they defeated
19 the purpose of the statute.

20 JUDGE GRAFFEO: Well, there's also a
21 corollary. We've said, repeatedly, that when it's an
22 economic injury, we also look to the tolling statute
23 of the situs where the injury occurred.

24 MR. OSTRAGER: The - - - the point here is
25 that when this case was initiated in federal court,

1 and as Judge Lippman said in the Goldstein case, the
2 plaintiff had every right to initiate the case in
3 federal court, it was timely under any statute of
4 limitations, whether it was the Alberta statute of
5 limitations, New York statute of limitation, any
6 statute of limitation.

7 JUDGE SMITH: But Alberta wouldn't have
8 given you a toll for the federal case.

9 MR. OSTRAGER: Well, we don't believe that
10 205 is a tolling provision. We believe that it's a
11 provision that allows a grace period if an action - -
12 -

13 JUDGE SMITH: Alberta wouldn't have given
14 you - - -

15 MR. OSTRAGER: - - - is timely commenced.

16 JUDGE SMITH: - - - a grace period either.

17 MR. OSTRAGER: And this action was timely
18 commenced, and the grace period applies to allow the
19 plaintiff, who's nonsuited in federal court for
20 reasons - - -

21 JUDGE SMITH: Why - - -

22 MR. OSTRAGER: - - - other than the merits.

23 JUDGE SMITH: Why are grace periods treated
24 differently from tolls?

25 MR. OSTRAGER: Because under the terms of

1 the statute, if the stat - - - if - - - if the case
2 filed in New York court after a federal court
3 dismissal would have been timely filed at the time
4 the original action was commenced - - -

5 JUDGE SMITH: Yeah, I mean, I understand
6 what the statute says.

7 MR. OSTRAGER: - - - 205 applies.

8 JUDGE SMITH: I understand why you call it
9 a grace period. My question is, what, in principle,
10 makes it different from a toll?

11 MR. OSTRAGER: Well, I believe that it's a
12 remedial statute, which a hundred years of
13 jurisprudence, going back to Just - - - Justice Card
14 - - - Judge Cardozo's opinion in the Gaines case, is
15 designed to allow a plaintiff to get an adjudication
16 on the merits. And - - -

17 JUDGE GRAFFEO: Counsel, have you - - -

18 JUDGE READ: So there's no difference
19 between the gra - - - there's no difference between a
20 grace period and a toll, in your view?

21 MR. OSTRAGER: In - - -

22 JUDGE READ: I mean, effectively, they have
23 the same effect?

24 MR. OSTRAGER: They can. Most tolls
25 operate to extend the time - - -

1 JUDGE READ: Right.

2 MR. OSTRAGER: - - - within which a
3 plaintiff can bring an action. 205 isn't intended to
4 extend the time when you can bring an action. But
5 the focus of 205 is whether or not the action was
6 timely filed under the provisions of 202. So what
7 this court's jurisprudence teaches is that you try to
8 harmonize the statutes to accomplish the purposes of
9 both statutes.

10 Now, there's clearly no forum shopping
11 involved in this case, because when Norex filed its
12 case initially, in federal court, it was literally
13 within a month of the actions which gave rise to the
14 claim. So Norex didn't come to New York to forum
15 shop; Norex came - - -

16 CHIEF JUDGE LIPPMAN: So the purposes - - -
17 you're saying the purposes of 202 have been fulfilled
18 in your case, and then 205 prevails once that
19 happens, if you find that?

20 MR. OSTRAGER: Precisely. And that's the
21 analysis that this court used in the Global Financial
22 case. In the Global Financial case, Justice Kaye,
23 writing for the court, looked to see whether an
24 action that may have accrued, either in Pennsylvania
25 or Delaware or Florida, could be maintained. And

1 Justice Kaye wrote, you look at the date of the
2 commencement of the federal court action, and then
3 you see, if that was timely filed, whether under the
4 applicable statute of limitations - - -

5 JUDGE GRAFFEO: In your vi - - -

6 JUDGE ABDUS-SALAAM: If we don't decide in
7 your favor, that would mean that you would have had
8 to brought your case, both in the foreign
9 jurisdiction as well as federal court, right?

10 MR. OSTRAGER: Well, in this - - - - -

11 JUDGE ABDUS-SALAAM: In order to - - - if
12 we don't decide the way that you would like us.

13 MR. OSTRAGER: Well, in this case there - -
14 - there was no possibility of getting jurisdiction
15 anyplace other than - - -

16 JUDGE ABDUS-SALAAM: Other than the federal
17 court.

18 MR. OSTRAGER: - - - because this is where
19 the defendants resided. And so that's why we're - -
20 -

21 JUDGE SMITH: You're saying you could never
22 have sued them in Alberta - - -

23 MR. OSTRAGER: That's correct.

24 JUDGE SMITH: - - - even in a timely
25 fashion.

1 MR. OSTRAGER: That's correct.

2 JUDGE PIGOTT: When you look at it - - - I
3 think the way you're arguing it is - - - I'll put it
4 a little more objectively - - - is once it's in our
5 house, once it's in our courts, what we decide to do
6 with it is our call, not Canada's. So if - - - if we
7 say you made a mistake, the mistake is not on the
8 merits, we're going to give you an opportunity in our
9 court to do what we think is fair and just, we should
10 be able to do that and not say what we think is fair
11 and just is one thing, but apparently because you're
12 from Alberta, we can't do what is fair and just in
13 our own courts.

14 MR. OSTRAGER: I completely agree with
15 that, Judge Pigott. I should also note, as the court
16 is aware, there are amicus briefs that have been
17 filed by - - - on behalf of five fairly distinguished
18 academics, which trace both the history of 205 and
19 202 and how they should be harmonized. And I haven't
20 yet addressed - - -

21 JUDGE GRAFFEO: Counsel, in - - - counsel,
22 in - - -

23 MR. OSTRAGER: - - - the 1367 claim.

24 JUDGE GRAFFEO: - - - in your view, will
25 205 always trump 202?

1 MR. OSTRAGER: They - - - it's not a
2 question of trumping, Judge Graffeo.

3 JUDGE GRAFFEO: Or that they - - -

4 MR. OSTRAGER: It's a question of - - -

5 JUDGE GRAFFEO: Do you feel they work
6 sequentially?

7 MR. OSTRAGER: - - - reconciling the - - -

8 JUDGE GRAFFEO: Is that - - -

9 MR. OSTRAGER: They - - - it's a seamless,
10 harmonious relationship that they have. If an action
11 - - -

12 JUDGE GRAFFEO: Is timely - - -

13 MR. OSTRAGER: - - - isn't timely filed - -
14 -

15 JUDGE GRAFFEO: If the action is timely - -
16 -

17 MR. OSTRAGER: - - - under 202 - - -

18 JUDGE GRAFFEO: - - - under 202 - - -

19 MR. OSTRAGER: - - - then you'd never get
20 to 205.

21 JUDGE GRAFFEO: Then 205 - - -

22 MR. OSTRAGER: 205 - - -

23 JUDGE GRAFFEO: - - - will always be
24 available. That's - - -

25 MR. OSTRAGER: 205 never - - -

1 JUDGE GRAFFEO: That's the rule - - -

2 MR. OSTRAGER: - - - trumps 202.

3 JUDGE GRAFFEO: - - - you want us to
4 articulate?

5 MR. OSTRAGER: You have to have - - - it
6 has to be timely filed under 202 in order to have any
7 205 analysis. And that's how these statutes work in
8 harmony. And it's completely perverse to interpret
9 the statutes in a way that one trumps the other and
10 one is inconsistent with the other.

11 JUDGE ABDUS-SALAAM: Counsel, even if
12 205(a) did not apply, but you had 1367 of the federal
13 statute - - -

14 MR. OSTRAGER: Yes.

15 JUDGE ABDUS-SALAAM: - - - would you still
16 be able to bring - - -

17 MR. OSTRAGER: Absolutely.

18 JUDGE ABDUS-SALAAM: As long as you brought
19 your suit in state court within thirty days - - -

20 MR. OSTRAGER: That's correct.

21 JUDGE ABDUS-SALAAM: - - - you would still
22 be good?

23 MR. OSTRAGER: That's correct. 136 - - -

24 JUDGE READ: But we don't get there, do we,
25 Mr. Ostrager? If we agree with you on the way you

1 put together 202 and 205(a) do we - - - we don't get
2 to 367 (sic) - - -

3 MR. OSTRAGER: I don't think - - -

4 JUDGE READ: - - - 1367.

5 MR. OSTRAGER: - - - you have to get to
6 1367 if you harmonize 202 and 205.

7 CHIEF JUDGE LIPPMAN: What do - - -

8 JUDGE READ: But in any event, you started
9 - - -

10 CHIEF JUDGE LIPPMAN: Yeah.

11 JUDGE READ: - - - to tell us how you - - -

12 MR. OSTRAGER: But with respect to 1367,
13 it's very clear that - - - that 1367, on its face,
14 provides that a - - - a plaintiff - - -

15 CHIEF JUDGE LIPPMAN: Is the law settled in
16 relation to 1367?

17 MR. OSTRAGER: The law is settled with
18 respect to 1367 - - -

19 CHIEF JUDGE LIPPMAN: Go ahead.

20 MR. OSTRAGER: - - - and as the amicus
21 brief makes clear, the period of limita - - - under
22 the express terms of 1367, the period of limitations
23 for any claim asserted under Section 1367(a), and
24 this is once - - -

25 JUDGE SMITH: But what claims - - -

1 MR. OSTRAGER: - - - this - - -

2 JUDGE SMITH: - - - what claims did you
3 assert in federal court under 1367(a)?

4 MR. OSTRAGER: The supplemental claims.
5 1367(a) makes provision for the assertion - - -

6 JUDGE SMITH: I know what it says.

7 MR. OSTRAGER: - - - of supplemental
8 claims.

9 JUDGE SMITH: What claims did you assert in
10 federal court?

11 MR. OSTRAGER: Russian law claims that were
12 asserted as supplemental claims under 1367(a).

13 JUDGE SMITH: My question is what claims
14 did Norex assert in federal court?

15 MR. OSTRAGER: They were unjust enrichment
16 claims - - -

17 JUDGE SMITH: There are two - - - I see two
18 Russian law claims, but they look to me like they
19 might have been time barred before you asserted them.

20 MR. OSTRAGER: They - - - they were - - -
21 they were - - - they were asserted within a month,
22 Judge Smith, of - - - of when the actions took place,
23 and they - - - they were not time barred at all.
24 There was a RICO claim to which there were
25 supplemental claims.

1 JUDGE SMITH: You didn't - - -

2 MR. OSTRAGER: That support - - -

3 JUDGE SMITH: You didn't assert any - - -
4 any state law, that is, United States state law
5 claims, did you - - -

6 MR. OSTRAGER: That - - -

7 JUDGE SMITH: - - - in federal court?

8 MR. OSTRAGER: That is correct, Judge
9 Smith. But - - -

10 JUDGE SMITH: So 1367(d) could not apply to
11 those claims.

12 MR. OSTRAGER: Well, 1367(d) absolutely
13 applies to all claims. If you look at the statute,
14 it specifically says the period of limitations for
15 any - - - any claim asserted under thir - - - under
16 subsec - - -

17 JUDGE SMITH: Asserted under subsection
18 (a).

19 JUDGE READ: Does this get to the whole
20 relation-back? Is that the - - -

21 MR. OSTRAGER: Yes. Once we were able to
22 timely, under both 205(a) and 1367(d), properly file
23 in New York court, then we were able to then, under
24 203 - - -

25 CHIEF JUDGE LIPPMAN: Okay, counsel.

1 You'll have your rebuttal time.

2 MR. OSTRAGER: Thank you, Your Honor.

3 CHIEF JUDGE LIPPMAN: Let's hear from your
4 adversary.

5 MR. OSTRAGER: Thank you.

6 MR. PELL: May it please the court.

7 CHIEF JUDGE LIPPMAN: Counselor.

8 MR. PELL: Owen Pell for TNK-BP, and the
9 rest of the defendants.

10 CHIEF JUDGE LIPPMAN: Let's start with 202
11 and 205. Are they seamless, as your adversary - - -

12 MR. PELL: They are, in fact, seamless.
13 And the case that best shows why they're seamless is
14 the Besser case.

15 CHIEF JUDGE LIPPMAN: Yeah.

16 MR. PELL: Because in Besser, 205 - - -
17 there was - - - we did not allow a DES statute,
18 passed by the New York legislature, to help a
19 nonresident with a non-New York accruing claim. So
20 there we had something, a revival statute like a
21 tolling statute. There are no cases where 205(a) is
22 brought in after we decide to use 202 to go
23 elsewhere.

24 This court has been clear, and in fact, its
25 decisions are echoed by the U.S. Supreme Court in the

1 Tomanio case, we look to all of foreign law.

2 JUDGE PIGOTT: I look at - - -

3 MR. PELL: That is the legislative balance.

4 JUDGE PIGOTT: If you look at the DES case
5 and things like that, I kind of understand those, as
6 you could tell from when I asked Mr. Ostrager; at
7 some point when it's in our court, we're not bound by
8 - - - by some procedural rule that - - - that
9 Alberta, Canada has with respect to whether or not we
10 have a statute which, in equity, permits somebody to
11 bring a - - - to revive a case that's been dismissed
12 not on the merits.

13 MR. PELL: Actually, Your Honor, New York
14 has made very clear we don't care whether it's
15 procedural or substantive; we look to all of foreign
16 law. It's always in your court. The point is the
17 New York legislature has made a policy decision.

18 JUDGE PIGOTT: Let's assume for a minute
19 that - - - that our standard of summary judgment's
20 different. Do we say, well, you know, we - - - we
21 would have granted summary judgment in this, but
22 because in Alberta they wouldn't, we're not going to
23 grant it?

24 MR. PELL: That's a choice-of-law decision,
25 not a statute-of-limitations decision.

1 shopping, right?

2 MR. PELL: Also to create clarity - - - to
3 create - - - it's - - - it's like your rules - - -

4 CHIEF JUDGE LIPPMAN: Are you argu - - -
5 you're not arguing that they were forum shopping in
6 this case?

7 MR. PELL: Oh, no, they absolutely are
8 forum shopping, because - - -

9 CHIEF JUDGE LIPPMAN: I see.

10 MR. PELL: - - - they litigated the merits
11 of their claims to rulings in Russia. The Russian
12 law claims are an attempt to - - -

13 JUDGE SMITH: But they - - -

14 CHIEF JUDGE LIPPMAN: So you say what - - -

15 JUDGE SMITH: But they're not coming to New
16 York because they like it better than Alberta;
17 they're coming to New York - - - as between New York
18 and Alberta, Alberta's not an option, is what he's
19 saying.

20 MR. PELL: Alberta may not be an option but
21 they - - - they decided to litigate first in Russia,
22 they chose Russia and they lost. Then they came to
23 New York; they decided to go to federal court instead
24 of state court. Prior law firms, before Mr. Ostrager
25 was representing them, decided never, in federal

1 court, to assert a single New York law claim. They
2 never - - - New York law was never on their radar.
3 They never thought they would come to New York state
4 court until they lost in federal court. So this is
5 clearly a forum shopping case.

6 They made litigation decisions - - - they
7 made litigation decisions to ignore Section - - - to
8 ignore CPLR 202 and ignore its effect, which would
9 have pointed them toward Alberta. They would have
10 seen - - -

11 JUDGE RIVERA: No, but he's arguing that
12 he's got federal claims and he's got nonfederal
13 claims. And under our federal rules, he can go and
14 assert both of those sets of claims in federal court.
15 My understanding of your interpretation of 202 and
16 205 is it would have forced him to either bring all
17 the claims, if he could, to New York, or to have two
18 cases running at the same time.

19 MR. PELL: What he - - - what he could have
20 done - - -

21 JUDGE RIVERA: Yes.

22 MR. PELL: - - - the choices they could
23 have made, for example.

24 JUDGE RIVERA: Yes.

25 MR. PELL: If they want to go to federal

1 court first, first of all, they could have actually
2 asserted their New York state claims, which they only
3 said for the first time in 2012 - - -

4 JUDGE RIVERA: All right. But that's not
5 this issue. Go ahead.

6 MR. PELL: Okay. As to the Russian law
7 claims - - -

8 JUDGE RIVERA: Um-hum.

9 MR. PELL: - - - when those were dismissed,
10 when the federal court said we don't have
11 supplemental jurisdiction over those - - -

12 JUDGE RIVERA: Um-hum.

13 MR. PELL: - - - they never, within thirty
14 days, refiled, even though even Professor Siegel says
15 within thirty days of a district court dismissal, you
16 refile because you must be conservative and you must
17 be careful and the statute says refile. They didn't
18 do that.

19 JUDGE RIVERA: Um-hum.

20 MR. PELL: They also didn't - - -

21 JUDGE SMITH: Well - - -

22 JUDGE RIVERA: Well, but they took - - -

23 but that's still not my question. They took their

24 appeal; that's a different issue on this. I'm

25 talking about your interpretation of 202 and 205(a),

1 which, as I say, strikes me as requiring them to file
2 two cases.

3 MR. PELL: On their - - - on the 202 and
4 205(a) - - -

5 JUDGE RIVERA: Yes.

6 MR. PELL: - - - if they wanted to come to
7 New York, they could only come to New York knowing
8 that all of Alberta law would apply. They don't get
9 the benefit of 205(a) because of 202, because we look
10 to all of Alberta law. This is - - -

11 JUDGE PIGOTT: Well, you say that. That
12 begs the question, though.

13 MR. PELL: Why so, sir?

14 JUDGE PIGOTT: Didn't I say it before? In
15 other words, if - - - if - - - if they come here,
16 they don't say, oh, and the standard on a motion for
17 summary judgment I'm adopting Alberta.

18 MR. PELL: But this isn't sum - - -

19 JUDGE PIGOTT: And I'm - - -

20 MR. PELL: But this isn't summary judgment.

21 JUDGE PIGOTT: Hold on, wait a minute; I'm
22 almost done. And so it's the same thing here.
23 You're saying, well, they should have known that even
24 though New York has - - - has a very forgiving
25 statute, which is not a toll - - - as Mr. Ostrager's

1 saying, it's - - - it's an ability to refile your
2 case because it has not been heard on the merits.
3 And we tend to think that if - - - if you were
4 dismissed not on the merits, that you ought - - - you
5 ought to have a chance, limited, admittedly, to - - -
6 to bring it again, but bring it again. And you're
7 saying Alberta's telling us that we can't do that.

8 MR. PELL: No, the New York legislature is
9 telling you to look to Alberta.

10 JUDGE PIGOTT: Well, that's fencing with
11 me. I'm just taking your point.

12 MR. PELL: Actually not, though. Actually
13 not, for this reason. The - - - the point is, Judge,
14 first of all, there was a decision on the merits.
15 For 205 purposes, there was a decision on the merits
16 in the Second Circuit.

17 JUDGE PIGOTT: It's a different issue.

18 MR. PELL: We have a dismissal under
19 federal law on the merits.

20 JUDGE PIGOTT: That's a different issue.

21 MR. PELL: Okay. So the point is if you
22 look at where 205 sits in the CPLR, it sits among
23 other tolling provisions. It is just like any other
24 tolling provision, and this court has never
25 distinguished it from any other - - -

1 JUDGE SMITH: So - - -

2 MR. PELL: - - - toll - - -

3 JUDGE SMITH: - - - is the basic point that
4 you read 202 to do exactly what Judge Pigott says it
5 doesn't do, which is to - - -

6 MR. PELL: Correct.

7 JUDGE SMITH: - - - to bind - - - to
8 prohibit us from using our generous statute when
9 Alberta doesn't have an equally generous one?

10 MR. PELL: Because we have a nonresident
11 with non-New York accruing claims, exactly, Your
12 Honor.

13 JUDGE RIVERA: But you're saying that what
14 they need to do is look at the Alberta law, look at
15 the New York law, and then they have to anticipate
16 that their federal action is going to get dismissed.
17 Well, why - - - why would we encourage that kind of
18 lawyering and that kind of advocacy? As I understand
19 it, you are promoting that they file two cases to run
20 simultaneously.

21 MR. PELL: No - - - no, Judge, I'm not,
22 actually.

23 JUDGE RIVERA: Okay.

24 MR. PELL: If they wanted - - - because you
25 told me before not to pay attention to the New York

1 claims which are not here. If they wanted to assert
2 New York claims, as a plaintiff - - -

3 JUDGE RIVERA: Or nonfederal claims - - -

4 MR. PELL: Non - - - well, they have two -
5 - -

6 JUDGE RIVERA: - - - that New York might
7 have jurisdiction over.

8 MR. PELL: They have two kinds of
9 nonfederal claims here; they have Russian law claims
10 - - -

11 JUDGE RIVERA: Yes.

12 MR. PELL: - - - and they have - - - now
13 they purport to have New York claims - - -

14 JUDGE RIVERA: Yes.

15 MR. PELL: - - - which they thought of only
16 when they came here.

17 JUDGE RIVERA: Um-hum.

18 MR. PELL: If they wanted to do that, they
19 could have brought them all in federal court and then
20 upon their dismissal, they could have immediately,
21 within thirty days - - - right, end of case plus
22 thirty days - - - gone to New York State Supreme and
23 filed their action.

24 JUDGE RIVERA: Um-hum.

25 MR. PELL: And then they could have

1 preserved them, doing it sequentially. They didn't
2 do that. They now want you to help them out of the
3 box they put themselves in.

4 JUDGE PIGOTT: But you're saying they can
5 do that.

6 MR. PELL: I'm saying they - - -

7 JUDGE PIGOTT: They could have.

8 MR. PELL: - - - they could have.

9 JUDGE PIGOTT: So that particular federal
10 statute is not impacted by Alberta's law.

11 MR. PELL: It's not impacted by Alberta law
12 because even though Alberta law expired during the
13 pendency of the federal claim, if by the end of the
14 federal claim, by the time it was dismissed, by the
15 time jurisdiction was dismissed in federal court,
16 they had, within thirty days, refiled in New York
17 State court, then they'd be fine.

18 JUDGE PIGOTT: You're saying that
19 procedural issue of the extra thirty days that's
20 given under federal law is not impacted by Alberta
21 but ours is?

22 MR. PELL: Correct. No, yours is - - -
23 yours - - - you get - - - if the reason - - - 1367
24 only gives them end of case plus thirty days. New
25 York State, assuming no decision on the merits, might

1 give them six months. But the problem for New York
2 State is that the legislature has said, and this
3 court has said, when it's a nonresident with non-New
4 York accruing claims, we don't give them the benefit
5 of all our tolls.

6 JUDGE SMITH: On the Russian law claims,
7 I'm sorry, were the - - - were the Russian law claims
8 timely when they were added in the federal court?

9 MR. PELL: Yes.

10 JUDGE ABDUS-SALAAM: So why don't they get
11 to keep them under either 1367 or 205?

12 MR. PELL: They don't - - - well, they
13 don't get them under 205 because under Besser and
14 under this court's decisions on Section 202 - - - on
15 CPLR 202, they don't get the benefit of 205.

16 With regard to 1367, Your Honor, the
17 problem they have is multifold. There was a
18 dismissal in federal court of the jurisdiction over
19 these claims in 2007. They did not, within thirty
20 days, come to New York State court and file an action
21 to preserve their Russian law claims.

22 JUDGE ABDUS-SALAAM: Are you saying that
23 their - - - their appeal to the Second Circuit didn't
24 toll that?

25 MR. PELL: That's unclear. That's actually

1 unclear. But in any event, within thirty days of the
2 Second Circuit dismissal of their claims, they didn't
3 come to New York State court. They waited well
4 longer than thirty days. So either way, they lost
5 their 1367, because they waited well longer than
6 thirty days. There is - - -

7 JUDGE GRAFFEO: Counsel, what's the policy
8 reason to accept your interpretation of the interplay
9 of these two statutes over your adversaries?

10 MR. PELL: The policy reason is twofold.

11 JUDGE GRAFFEO: What's the benefit of us
12 accepting your interpretation?

13 MR. PELL: The benefit of accepting our
14 interpretation is twofold, Your Honor. First, these
15 claims have nothing to do with the State of New York;
16 they are completely extraterritorial. The Second
17 Circuit made that clear in its decision on the
18 merits. These are Russian claims involving people
19 having disputes in Russia over the ownership of
20 businesses in Russia.

21 JUDGE RIVERA: That's on the RICO claim,
22 though.

23 MR. PELL: No, it's actually even on the
24 substance. The underlying substance of the RICO
25 claim was what was extraterritorial, because the

1 Second Circuit said we looked at all of the claims
2 and we find that they're all extraterritorial in
3 terms of putting it into a RICO context. The fraud
4 claims - - - the meat of the fraud claims was all
5 extraterritorial.

6 So you have that problem. You have a non-
7 New York resident with totally non-New York claims.
8 And we - - - we don't give that the same - - - the
9 legislature doesn't give that the same protection.
10 Taking the learnings of this court, the legislature
11 doesn't give that the same protection as we do a New
12 York resident with New York accruing claims. So
13 that's the first problem, Judge.

14 The second problem is the issue of forum
15 shopping. They litigate fully on the merits in
16 Russia; they don't like that result. They come and
17 they litigate in federal court. They get a decision
18 on the merits; they don't like that result, and now
19 they come to New York State Supreme. So there is a
20 forum shopping issue here.

21 And third, the issue is clarity. We want -
22 - - as this court said in the Lehman case - - - the
23 Lehman Brothers case is - - - is very interesting
24 here, because the same policy issues are at stake.
25 We want bright-line rules so that parties who have

1 litigation decisions to make - - -

2 CHIEF JUDGE LIPPMAN: So what's the bright-
3 line rule here?

4 MR. PELL: Bright-line rule here is very
5 simple; the end of the federal action came when
6 federal jurisdiction no longer attached to those two
7 Russian law claims, for the purposes of preserving
8 their rights in New York, whether you look at the
9 district court case or you look at the Second Circuit
10 affirmance of dismissal - - -

11 JUDGE PIGOTT: What - - -

12 MR. PELL: - - - using the Lehman Brothers.

13 JUDGE PIGOTT: What statute of limitations
14 applied in federal court?

15 MR. PELL: The statute of limitations that
16 applied in federal court to the Russian law claims?

17 JUDGE PIGOTT: No, to the whole law suit.

18 MR. PELL: Well, the RICO action would have
19 had a RICO - - - would have had a federal statute of
20 limitations. And the Russian law claims, once they
21 were asserted, I think, we would have argued, had
22 either Alberta law or Russian law - - -

23 JUDGE PIGOTT: Okay.

24 MR. PELL: - - - two or three years.

25 JUDGE PIGOTT: I'm just trying to

1 coordinate the Alberta - - - if Alberta law applies,
2 any Alberta claims couldn't take advantage of the
3 thirty days either, right, under federal law?

4 MR. PELL: Well, the idea would be - - -
5 remember, it's - - - just like in 205(a), if the
6 expiration occurs while the lawsuit - - - while the
7 action is still live, you postpone that expiration
8 date to the end of the case, under 205(a) for six
9 months; under 1367(d) for thirty days.

10 JUDGE PIGOTT: So neither one of those
11 would apply?

12 MR. PELL: So if they had been timely,
13 neither one of them would apply. If they had been
14 timely, if they had taken advantage of their thirty
15 days, which they never did.

16 JUDGE PIGOTT: They still would have been
17 out?

18 MR. PELL: They still - - - well, no, if
19 they had come to this court - - - if they had come to
20 New York State Supreme - - -

21 JUDGE PIGOTT: Well, no, what I'm - - -
22 what I'm not understanding is you say Alberta decides
23 this stuff, and their statute of limitations does not
24 provide for an extra time to refile. But you're
25 telling me - - - I think you're saying but if it's a

1 - - - if it's in federal court, the extra time can
2 apply. It's just New York State that can't apply its
3 - - - its extension.

4 MR. PELL: Because of Section - - - because
5 of CPLR 202, based on the teachings of this court,
6 especially in cases like Besser - - -

7 JUDGE PIGOTT: But do you see a difference
8 between the 1367 extension and the - - - and the 205
9 extension?

10 MR. PELL: I see only one difference, Your
11 Honor.

12 JUDGE PIGOTT: Time?

13 MR. PELL: No.

14 JUDGE PIGOTT: Oh.

15 MR. PELL: I see a difference in
16 legislative choices. I don't see a federal
17 equivalent to CPLR 202. I don't see a federal
18 borrowing statute that says there may be
19 circumstances where you don't get this minimum
20 because the Congress is telling you to look to a
21 foreign law as to a nonresident with a non - - - in
22 the state - - -

23 JUDGE PIGOTT: Well, that's where I get
24 confused about the Alberta statute of limitations
25 which you said applies in federal court to the

1 Alberta claims.

2 MR. PELL: We didn't do a choice-of-law
3 analysis in federal court as to the statute of
4 limitations as to - - - that's why I - - - that's why
5 my answer was actually more, I think it's either
6 Russian law as to the Russian law claims. If they
7 had asserted New York claims, we would have asserted
8 the borrowing statute, no question. And that would
9 have looked to Alberta.

10 JUDGE RIVERA: Counsel - - -

11 MR. PELL: But the Russian law claims I
12 would have thought were Russian law.

13 JUDGE RIVERA: - - - if we disagree with
14 you on when the thirty days begins to run under
15 1367(d), that is to say, you're arguing that it runs
16 from the district court's dismissal; let's say we
17 disagree with you.

18 MR. PELL: I can live with the Second
19 Circuit dismissal.

20 JUDGE RIVERA: Why isn't it timely?

21 MR. PELL: I can live with the Second
22 Circuit's dismissal.

23 JUDGE RIVERA: Well, they say it's from the
24 mandate. Why isn't it - - - why shouldn't we apply
25 that rule, that it's from the mandate?

1 MR. PELL: It can't be - - - it shouldn't
2 be the mandate.

3 JUDGE RIVERA: Why not?

4 MR. PELL: Because not even the Supreme
5 Court's rules as to when you file a cert petition - -
6 - the - - - the mandate doesn't govern anything. The
7 rule - - - the rule in federal court, if you look at
8 the Supreme Court rules, is the same rule that this
9 court used in the Lehman Brothers case.

10 JUDGE RIVERA: Well, it's not final. I
11 mean, as an example, in this very case, the Second
12 Circuit, right, changed its mind.

13 MR. PELL: So they get from Decem - - -
14 they get thirty days from December 8th.

15 JUDGE SMITH: Well, why - - - if they'd
16 filed a cert petition, then they'd have a pretty good
17 argument that they - - - that they had thirty days
18 from denial of cert, wouldn't they?

19 MR. PELL: Not - - - no, they wouldn't,
20 actually, certainly not under this court's decision
21 in the Lehman Brothers case. The rea - - - the - - -
22 205 and 1367 serve very similar purposes, and there's
23 no reason to use - - - to apply them differently in
24 terms of legal standards. It's - - - they - - - I
25 see my time has expired.

1 CHIEF JUDGE LIPPMAN: It's okay; finish
2 your thought.

3 MR. PELL: The - - - thank you. The - - -
4 the point is that they had a bright-line rule that
5 they never met, and now what they want you to do is
6 give them relief from all the bright-line rules they
7 missed. Mandate is not something we use to count
8 from unless Congress has a specific statute - - -

9 JUDGE SMITH: You said a minute ago that
10 you can live with the Second Circuit.

11 MR. PELL: Yes.

12 JUDGE SMITH: But you can't live - - - but
13 if they filed a petition for certiorari, you can't
14 live with - - - you say the date for denial of cert
15 would be wrong?

16 MR. PELL: I don't see any federal case, or
17 even this court's decision in Lehman Brothers, that
18 gives that - - -

19 JUDGE SMITH: I'm having trouble
20 distinguishing the Second Circuit affirmance from the
21 denial of cert.

22 MR. PELL: There - - - the reason I would
23 distinguish is that's a dismissal of the case; that's
24 the end of the case. The mandate is a - - - is a
25 mechanical issue about when you ship the boxes back

1 to the district court and close the file.

2 CHIEF JUDGE LIPPMAN: Okay, counselor,
3 thanks.

4 MR. PELL: Thank you very much, Your Honor.

5 CHIEF JUDGE LIPPMAN: Counselor, rebuttal?

6 MR. OSTRAGER: Thank you, Your Honor.

7 Judge Rivera, I believe you've read
8 Professor Siegel's amicus brief and are fully
9 familiar with the application of 1367(d).

10 I want to correct one thing that Mr. Pell
11 said, which is just flat wrong and contradicted by
12 the record. This case was never litigated in Russia,
13 and the Second Circuit found that the Russian
14 proceedings had no impact on the pendency of the case
15 because - - -

16 JUDGE SMITH: Well, your - - -

17 MR. OSTRAGER: - - - because they weren't
18 served.

19 JUDGE SMITH: - - - you say, I think - - -

20 MR. OSTRAGER: Norex was never served.

21 JUDGE SMITH: - - - in your pleading, you
22 say that in Russia this case would be barred by a
23 previous decision, but we shouldn't - - - but the New
24 York courts should not respect it.

25 MR. OSTRAGER: No, no, the - - - the

1 Russian case was a default judgment from a corrupt
2 proceeding, and it's not relevant to anything that's
3 before this court.

4 Now, what is relevant to this court is what
5 this court said about 202 in the ABB Power Generation
6 case. It said, "In addition, although the deterrence
7 of forum shopping may be a primary purpose of CPLR
8 202, it is not the only purpose. As part of this
9 State's procedural code, 202 is designed to add
10 clarity to the law and provide the certainty of
11 uniform application". Now, that is precisely what we
12 have in - - - in harmonizing 202 and 205 as this - -
13 -

14 CHIEF JUDGE LIPPMAN: Well, he says it's
15 for clarity too, but he comes to the - - -

16 MR. OSTRAGER: In - - -

17 CHIEF JUDGE LIPPMAN: - - - opposite sense
18 of clarity.

19 MR. OSTRAGER: In Global Financial, this
20 court, you know, harmonized the statutes, just the
21 way Norex is advocating here. You look to see
22 whether the first action was timely filed under 202.
23 If it was timely filed under 202, then 205 applies,
24 and certainly 1367 applies.

25 CHIEF JUDGE LIPPMAN: If it's timely, end

1 of story, we go to 205.

2 MR. OSTRAGER: End of story.

3 Now, with respect to 1367, it's completely
4 well established that federal proceedings don't end
5 until the mandate of the Second Circuit issues. In
6 this case - - -

7 JUDGE SMITH: No - - -

8 MR. OSTRAGER: - - - there was a dismissal,
9 and there was no mandate, and then the Second Circuit
10 changed - - -

11 JUDGE SMITH: Do you have a - - -

12 MR. OSTRAGER: - - - its - - -

13 JUDGE SMITH: Do you have a preservation
14 problem on the 1367 issue? Wasn't that raised first
15 on reargument?

16 MR. OSTRAGER: Your Honor, in - - - in the
17 Goldstein case, the - - - it was only first raised in
18 the reply brief to the - - - to this court. And
19 Judge Lippman wrote an extensive opinion, in which he
20 said, even if 205(a) didn't apply, 1367(d) would
21 apply.

22 In this case, the - - - in the Greenblatt
23 case, the Appellate Division said that the end of a
24 federal court litigation is when the mandate issues.
25 There's Second Circuit law to that effect. There's

1 Ninth Circuit law to that effect. And that's common
2 sense, because until the mandate issues, the case
3 isn't final in the federal court, and the court can
4 change its mind, which is what it did in this case,
5 in this very case.

6 JUDGE ABDUS-SALAAM: Counselor, your
7 adversary says you blew two bright-line filings. Is
8 that accurate?

9 MR. OSTRAGER: I believe so. I believe
10 that in - - - in this case there's no question that
11 the case was initially timely filed. And because it
12 was initially timely filed, for all the reasons that
13 Judge Cardozo gave in the Gaines case, and all the
14 reasons that Judge Lippman gave in the Goldstein
15 case, New York's ameliorative remedial statute should
16 apply.

17 In the Carrick case - - - this court, in
18 the Carrick case, made very clear that the intent of
19 the New York courts is to always see that there's an
20 adjudication on the merits. And this isn't a game of
21 gotcha. You know, we had a perfect right to file in
22 federal court; it was dismissed for nonmerits
23 reasons. The merits of the case were never heard.
24 If - - - if the court goes to the record here, on
25 page - - -

1 JUDGE SMITH: Isn't - - -

2 MR. OSTRAGER: - - - 1304 of the rec - - -

3 JUDGE SMITH: Isn't the statute of
4 limitations always a game of gotcha? The merits are
5 never heard if it's barred by the statute of
6 limitations.

7 MR. OSTRAGER: Well, in - - - in this case,
8 the plaintiff specifically requested the Second
9 Circuit to stay its mandate so that this case could
10 be timely filed under 205(a). That's in the record
11 at page 1304.

12 The Second Circuit granted the request to
13 stay the mandate, and before the mandate even issued,
14 this case was refiled in - - - in New York court, in
15 accordance with 205(a), and certainly in accordance
16 with 1367(d).

17 JUDGE RIVERA: Could you address just
18 briefly, because your red light is on, why it's a
19 nonmerits dismissal?

20 MR. OSTRAGER: It's a nonmerits because
21 there was a jurisdictional defect that came about as
22 a result of the Supreme Court's finding that you
23 cannot bring a RICO case for extraterritorial
24 conduct. But the conduct in this case, while taking
25 place in Russia, was orchestrated by the defendants

1 in New York, which is why, you know, there's been no
2 challenge to personal jurisdiction or subject-matter
3 jurisdiction in the New York courts - - -

4 CHIEF JUDGE LIPPMAN: Okay, counsel.

5 JUDGE RIVERA: Merits - - - I'm sorry.

6 CHIEF JUDGE LIPPMAN: I'm sorry; go ahead,
7 Judge Rivera.

8 JUDGE RIVERA: I'm sorry; just one more
9 question. So I understand the merits argument on the
10 - - - on the RICO issue. Is it a merits - - - was
11 there any merits decision on the nonfederal claims?

12 MR. OSTRAGER: Never. The Second Circuit
13 declined to exercise supplemental jurisdiction when
14 the court, you know, dismissed the RICO case on - - -
15 on nonmerits grounds. And so that's precisely why,
16 under Carrick, there's never been a merits
17 adjudication of those claims.

18 CHIEF JUDGE LIPPMAN: Okay, counsel. Thank
19 you both. Appreciate it.

20 (Court is adjourned)

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C E R T I F I C A T I O N

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the Court of Appeals of Norex Petroleum Limited v. Blavatnik, No. 121, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Sharona Shapiro

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Date: May 14, 2014