

1 UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

2 *In re:*

3 TEXACO, INC.,

4 *Debtor.*

Case No. 87-20142 (*rdd*)
White Plains, New York
May 28, 2010
10:40 a.m.

5 CORRECTED TRANSCRIPT OF TELEPHONE HEARING RE
6 87-20 142-ASH TEXACO, INC.; CASE CLOSED ON 03/05/2007
7 CHAPTER: 11 RE: DOC. 3869 - MOTION OF TEXACO INC.
8 FOR ORDER (I) REOPENING TEXACOS CHAPTER 11 CASE,
9 (II) ENFORCING CONFIRMATION ORDER DATED MARCH 23, 1988,
10 (III) FINDING RESPONDENTS IN CIVIL CONTEMPT OF 11 U.S.C.
11 §524(A)(2) AND CONFIRMATION ORDER, AND (IV) DIRECTING
RESPONDENTS TO DISMISS THEIR DISCHARGED CLAIMS
AGAINST TEXACO INC. IN THE LOUISIANA ACTIONS FILED
BY MARTIN J. BIENENSTOCK ON BEHALF OF TEXACO, INC.
BEFORE THE HONORABLE ROBERT D. DRAIN
UNITED STATES BANKRUPTCY JUDGE

12 A P P E A R A N C E S :

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1 THE COURT: Do I have the parties on the phone on the
2 Texaco matter?

3 MS. KELLEHER: Your Honor, it's Leslie Kelleher of
4 Caplin & Drysdale for the respondents Kling Realty, et al.

5 MR. STEFFES: William Steffes, also on behalf -- Your
6 Honor, good morning -- on behalf of the Kling respondent.

7 MR. BIENENSTOCK: Good morning, Your Honor. Martin
8 Bienenstock, Phil Abelson and Henry Ricardo for Chevron.

9 THE COURT: Okay. I think that's -- those are the
10 relevant parties. I want to thank the parties for their
11 supplemental briefing, and, as I think my chambers informed you,
12 I am prepared to rule at this point on Texaco's request for
13 relief, which is to enforce the confirmation order and bar date
14 order in this case and ultimately the discharge under Section
15 524(a) against the defendants or respondents in this case, who I
16 will refer to as the "Kling parties," although there are also
17 the Walets involved, as well, and the other entities listed in
18 the caption.

19 The Court has core jurisdiction over this adversary
20 proceeding, which is a proceeding to enforce the Court's prior
21 orders, as well as the discharge in the case, all of which gives
22 rise to jurisdiction under both 28 U.S.C. 1334(a) and is --
23 makes this proceeding a core proceeding under section 157 -- 28
24 U.S.C. 157(b). See In Re: Petrie Retail, Inc. 304 F.3d. 223,
25 230 (2d. Cir 2002), and In Re: Brooks Fashion Stores, Inc. 124

1 B.R. 436 (Bankr. S.D.N.Y. 1991).

2 The parties have helpfully prepared a stipulation of
3 facts for a hearing dated January 21, 2010. I pressed the
4 parties at oral argument on this matter whether there were any
5 materially disputed facts, and I think it's a fair summary to
6 say that both Mr. Bienenstock and Mr. Lockwood stated that, to
7 their knowledge, there weren't, but if something came up they
8 would reserve their rights to assert if something is disputed.

9 Based on my review of the exhibits and the transcript
10 of oral argument, as well as the briefing on this matter, I
11 don't believe that for purposes of my decision today there are
12 any material disputed facts, and the key facts are set forth in
13 the stipulation as well as the underlying documents and,
14 primarily, the parties' lease, which is Exhibit 12 in this
15 matter.

16 By way of background, Texaco's motion arises out of
17 two state court lawsuits filed by the respondents herein, the
18 Kling parties, who had leased land pursuant to an oil and gas
19 lease to Texaco in 1946. That lease is attached, again, as
20 Exhibit 12 to one of the exhibits in the case. The parties have
21 through legal action -- through assignments or changes in name -
22 changed, but the parties here are the successors to those
23 parties.

24 One of the lawsuits, Kling-1, *Kling Realty Company,*
25 *Inc. and Walet Planting Company v. Chevron USA, Inc.* (Chevron

1 being the successor to Texaco), case number 08-30043 is no
2 longer an issue, given the final and non-appealable judgment
3 that that lawsuit is barred by prescription, or the statute of
4 limitations under Louisiana law.

5 In the second lawsuit, however, Kling Realty Company,
6 Inc. v. Chevron USA, case number 110623, the Kling parties
7 continue to seek relief on both contract and tort claims (or
8 delict claims, in Louisiana parlance), arising out of -- that
9 were connected to Texaco's oil and gas production under the 1946
10 lease. The respondents assert claims relating to alleged damage
11 to or for restoration of the portion of the acreage that was
12 subject to the 1946 lease referred to as Section 27; and that's
13 found at paragraph 6 of the stipulation of facts.

14 The lease provided that -- and this is in paragraph 2
15 of the lease -- "Subject to the other provisions herein
16 contained, this lease shall remain in force for up to five years
17 from this date and as long thereafter as either oil or gas is
18 produced from said land hereunder."

19 The parties acknowledge that the obligations under the
20 lease did not terminate until after the commencement of the
21 Chapter 11 case -- Texaco having filed for relief under Chapter
22 11 in this Court on April 12, 1987, and the final release under
23 the lease not having been executed and recorded until November
24 12, 1987. Much of the respondents' argument is based upon that
25 fact.

1 There are other relevant provisions of the lease,
2 however. First, the lease provides in paragraph 8 that the
3 lessee, just to quote, "may at any time and from time to time
4 during the lease, execute and deliver to lessor or place of
5 record a release covering all or any portion or portions of the
6 leased premises as to all or any specified mineral or minerals,
7 and thereupon shall be relieved of all obligations as to the
8 acreage surrendered or as to the acreage as to only the
9 particular mineral or minerals specified, as the case may be."

10 Finally, the 1946 lease also provides, at paragraph
11 10, that "the lessee shall without undue delay pay and reimburse
12 to the lessor any and all damages in full to lessor's lands,
13 crops, roads, and property caused by its operations either of
14 drilling wells or laying pipelines or in maintaining, operating
15 and also in constructing or using buildings, roads and other
16 works on the said land as permitted herein."

17 Consistent with paragraph 8 of the lease, which I
18 previously quoted in relevant part, Texaco, over the course of
19 its tenancy, used the right to release a portion of the leased
20 property or leased acreage a number of times. It executed a
21 release as to Section 21 of the leased property in 1974; in June
22 -- on June 6, 1986, as recorded on June 13, 1986, it also
23 released a portion of the acreage on Section 27. It also did so
24 in 1984. See stipulation at paragraphs 7 and 10.

25 In each case, Texaco consistent, again, with paragraph

1 8, reserved and retained certain rights of way, easements,
2 servitudes and privileges for the operation of pipelines and
3 other facilities located over, upon and across Section 27, which
4 were necessary and convenient to lessee's continued operations
5 on the land retained under the 1946 lease.

6 With respect to the June 1986 release, this pertained
7 to an operating well in Section 26, Well Number 14. The
8 operation of or production, excuse me, on Section 27 is agreed
9 to have terminated pre-bankruptcy, and the parties have agreed
10 that the last well on Section 27 was plugged and abandoned on
11 November 3, 1986 -- again, before Texaco commenced this Chapter
12 11 case.

13 The alleged harm or damage to the respondents'
14 property is agreed to have been to property on -- located on
15 Section 27, and it appears to me that all of that damage
16 occurred, or that the contamination or other causation of such
17 damage occurred, before the commencement of Texaco's Chapter 11
18 case.

19 However, the parties have also stipulated that after
20 the petition date Texaco continued to "access and perform work,
21 including pit closures, upon certain property once subject to
22 the 1946 lease, including Section 27," and that this activity
23 continued beyond the date that Texaco's plan was confirmed,
24 March 23, 1988. Stipulation at paragraph 31.

25 The dispute in this case hinges upon whether, first,

1 the Kling parties, or the respondents, are bound by the bar date
2 order entered by this Court during the course of Texaco's
3 Chapter 11 case, establishing a March 15, 1988 bar date, and,
4 then, whether the failure of the respondents to file a claim
5 means that their claims in the Kling-2 action are now barred and
6 discharged by the bar date order and the confirmation order,
7 which was entered on March 23, 1988.

8 To answer that question, the Court has to navigate its
9 way through a number of issues which, given the expertise and
10 creativity of the parties, somewhat resemble a law school exam;
11 but, ultimately, the determination is relatively clear cut on
12 each of the issues.

13 Before turning to those issues, the Court should note
14 one other relevant date, which is October 9, 1991 -- which is
15 when the bankruptcy case, the Texaco bankruptcy case, was
16 closed, as well as note that although there was some uncertainty
17 about this in my mind going into the oral argument, it has now
18 been conceded at oral argument that each of the respondents, or
19 the Kling parties, received actual notice of the bar date, and,
20 of course, that they did not file a claim that asserted any
21 claim, let alone the claims set forth in Kling-2.

22 The first set of issues raised by the respondents is
23 whether, in fact, the respondents received appropriate notice of
24 the bar date and also whether, even if they did so receive --
25 did receive such notice, they should be relieved of the bar date

1 order under various equitable theories. The respondents have
2 also requested that if the answer to those questions is that
3 they are bound by the bar date order, they be permitted to file
4 a late proof of claim under Bankruptcy Rule 9006. I will
5 address that latter point at the end of this ruling.

6 As far as the former point, the Court has previously
7 upheld the bar date order, as applied to creditors in a similar
8 position to the respondents here, in this case. And I believe
9 that those rulings are equally applicable here, notwithstanding
10 the argument made by the respondents, as would have been
11 applicable in the other Texaco rulings that were decided, that
12 this was a solvent debtor and that the bar date order and the
13 bar date itself, therefore, didn't play all of the traditional
14 roles that a bar date order would play in most Chapter 11 cases,
15 that involve insolvent debtors, and that the bar date itself was
16 established as a date only relatively shortly before
17 confirmation of Texaco's Chapter 11 plan.

18 None of those facts, I believe, negates the fact of
19 the bar date order, which was granted and entered by the Court
20 to set a deadline for the filing of general unsecured claims in
21 the case, and which I believe served an important purpose in the
22 case enabling parties in interest to evaluate the claims against
23 the estate prior to the confirmation hearing and entry of the
24 confirmation order. That is, it was not an empty procedural
25 gambit. See, for example, *In re Calpine, Inc.* 2007 U.S. Dist.

1 Lexis 86514, pages 14 through 15 (S.D.N.Y., Nov. 21, 2007), and
2 *First Fidelity Bank, N.A. v. Hooker Investments, Inc.* 937 F.2d.
3 823, 840 (2d. Cir. 1991).

4 The respondents further argue that in light of
5 Texaco's stated policy that it intended to treat its lessors and
6 leases as if the bankruptcy hadn't happened, they should be
7 excused from having to be bound by the order, notwithstanding
8 the order's terms, or, as a wrinkle on the foregoing, that the
9 notice of the bar date approved by the Court needed to identify
10 their particular claims and their obligation to file a claim
11 more explicitly than it did.

12 I believe, having reviewed the bar date notice and bar
13 date order, that the order sufficiently set forth notice of the
14 requirement to file a proof of claim for the types of claims
15 that are asserted in the Kling-2 action, and that additional
16 notice was not required.

17 I say that notwithstanding Texaco's communications to
18 lessors, because I believe that those communications should not
19 be read as obviating the need to file a claim, particularly in
20 respect of obligations that, under paragraphs 8 and 10 of the
21 1946 lease, would have been triggered pre-bankruptcy by either
22 the release of specific acreage or, under paragraph 10, a duty
23 to cure damages without undue delay.

24 The respondents rely heavily upon *In Re Texaco, Inc.*
25 254 536 -- I'm sorry, 254 B.R. 536 (Bankr. S.D.N.Y. 2000), also

1 referred to as the LaFourche case, L-a F-o-u-r-c-h-e. However,
2 I believe that that case in fact supports Texaco's position
3 here, in that that case, in contrast to the other Texaco
4 decisions enforcing the bar date that I am about to cite, is
5 addressed to a different circumstance, which is the so-called
6 ride-through of unexpired leases, where there was no express
7 termination either by a clear rejection notice or under section
8 365 of the Bankruptcy Code or a termination of the lease or
9 expiration of the lease by its own terms.

10 In addition to that distinguishing factor which Judge
11 Hardin I believe makes clear in the LaFourche decision, the
12 applicability of the bar date to claims arising prepetition in
13 this case has been enforced a number of times, including in In
14 Re Texaco, Inc. 218 B.R. 1 (Bankr. S.D.N.Y. 1998), and In Re
15 Texaco, Inc. 182 B.R. 937 (Bankr. S.D.N.Y. 1995), which cases I
16 believe sufficiently dealt with the arguments made by the
17 respondents here with regard to the confusion they say they had
18 as to whether their claim was, in fact, a pre-bankruptcy claim
19 covered by the bar date order or a post-bankruptcy claim which
20 would ride through the bankruptcy case instead. See also, in
21 respect of the notice issues, Jones v. Chemtron Corp. 212 F.3d
22 199 (3d. Cir. 2000).

23 The Kling parties also argue that Texaco should be
24 estopped from relying on the bar date under the doctrine of
25 laches, given that the Kling-2 case, which was filed on May 15,

1 2009 -- I am sorry, given that Texaco appears to have first
2 raised the bar date issue and the discharge issue in Kling-2 on
3 May 15, 2009, approximately 20 months after the commencement of
4 Kling-2, and that in the intervening period the parties -- the
5 Kling parties -- incurred thousands of dollars of fees and costs
6 in the preliminary litigation of Kling-2.

7 They also note that when the answer was due in Kling-
8 2, Louisiana law required that a discharge in bankruptcy be
9 raised as an affirmative defense. See Louisiana Rules of Civil
10 Procedure Annot. Article 1005 (2005). Notwithstanding that
11 fact, however, I believe that neither waiver nor laches apply
12 here, given, primarily, the fact that under the Bankruptcy Code
13 the discharge, which in a Chapter 11 case benefits not only the
14 debtor but the debtor's creditors (and, in a solvent case the
15 debtor's shareholders) cannot be waived by conduct or even an
16 agreement, without proper approval under section 524 of the
17 Bankruptcy Code. See *In re Gurrola*, 328 B.R. 158 (9th Cir. BAP
18 2005). I believe the same analysis would apply to laches, as
19 has been so held at 323 B.R. 802 (10th Cir. BAP 2005), in *In Re*
20 *Pritner*.

21 In any event, laches is an equitable doctrine which
22 applies when a party unreasonably delays in asserting a right
23 which, taken together with a lapse of time and other
24 circumstances causes prejudice to an adverse party and operates
25 as a bar in a court of equity. *In Re DeArakie*, D-e A-r-a-k-i-e,

1 199 B.R. 821, 827 (Bankr. S.D.N.Y. 1996). Here, notwithstanding
2 the costs that the Kling parties have incurred between the date
3 that they commenced Kling-2 and the date that Texaco sought to
4 enforce this Court's orders and the discharge, two facts cut
5 against the application of laches, even if it is permitted to
6 apply notwithstanding section 524.

7 First, in their complaint, the Kling parties asserted
8 they were not seeking relief in violation of the discharge.
9 Second, as is evident by the development, even during oral
10 argument, of the matter before the Court, the nature of and
11 theory behind the Kling parties' claims has developed over time.
12 Therefore, I believe that it is not inequitable to permit Texaco
13 to have asserted the discharge and the bar date when it did,
14 after it became clear that the type of claim -- at least one of
15 the types of claims -- asserted by the respondents would clearly
16 be within the ambit of the bar date order and the discharge.

17 I also do not believe that the doctrine of judicial
18 estoppel would apply here since the plaintiff here, Texaco, has
19 not both asserted and prevailed on a contrary position in
20 another matter than the position it is asserting here with
21 respect to the applicability of the bar date order and the
22 discharge. See *In Re Perry H. Koplik & Sons, Inc.* 357 B.R. 231
23 (Bankr. S.D.N.Y. 2006), and *In Re I. Appel Corp.* 300 B.R. 564
24 (Bankr. S.D.N.Y. 2003), as well as *New Hampshire v. Maine*, 532
25 U.S. 742, 749 (2001).

1 Ultimately, the doctrine of judicial estoppel is
2 intended to prevent a party from "playing fast and loose with
3 the courts." *In Re Galerie Des Monnaies of Geneva, Ltd.*, 62
4 B.R. 224, 226 (S.D.N.Y. 1986), and *In Re Perry H. Koplik & Sons,*
5 *Inc.* 357 B.R. 231, 245 (Bankr. S.D.N.Y. 2006). I do not believe
6 that that is the case here with regard to the applicability of
7 the bar date order and the discharge.

8 Therefore, I turn to the respondents' argument that
9 the claims they are asserting are not covered by the bar date
10 order and, therefore, would not be barred or discharged at this
11 time.

12 The claims that are being asserted by the respondents
13 here fall, according to the respondents, into two categories:
14 prepetition claims and postpetition claims. By its terms, the
15 plan would pay all administrative claims, that is postpetition
16 claims, in full in the ordinary course.

17 And they will be: to the extent that it is asserted by
18 the respondents that they have administrative claims, those
19 claims will be paid as dealt with in a moment. However, it is
20 clear to me that to the extent that the claims in Kling-2 arise
21 prepetition, those claims would, in fact, be barred by the bar
22 date order and discharged.

23 Based upon the facts in this case, it is clear to me
24 that claims arising under either paragraph 8 or paragraph 10 of
25 the 1946 lease would be, in fact, prepetition claims.

1 First, the lease itself is obviously a prepetition
2 agreement. Secondly, the conduct giving rise to the conditions
3 that require cleanup occurred prepetition. And, thirdly, the
4 obligation itself (although this is not required for making a
5 claim a prepetition claim) appears to have become actual
6 prepetition with the release of the production property
7 prepetition and the closing and cease -- cessation of the
8 production prepetition in Section 27, which as I understand it
9 is the basis for the claim in Kling-2.

10 As I just noted, that latter fact, i.e., the fact that
11 the claim ceased to be contingent prepetition, is not a
12 requirement for a claim to be a prepetition claim given the
13 broad definition of "claim" in section 101(5) of the Bankruptcy
14 Code. As noted by the Second Circuit, "A claim arises for
15 purposes of bankruptcy when 'the relationship between the debtor
16 and creditor contained all of the elements necessary to give
17 rise to a legal obligation under the relevant non-bankruptcy
18 law.'" In re Duplan Corporation, 212 F.3d 144, 151 (2d. Cir.
19 2000), quoting In Re Chateaugay Corp., 53 F.3d 478, 497 (2d.
20 Cir.), cert. denied 516 U.S. 913 (2000) -- I'm sorry, (1995).
21 See also In Re: Manville Forest Products Corp. 209 F.3d 125 (2d.
22 Cir. 2000), and In Re: Texaco, Inc. 218 B.R. 1 (Bankr. S.D.N.Y.
23 1990).

24 I believe that the respondents pretty much
25 acknowledged this hurdle, at least at oral argument, when the

1 focus of their opposition to Texaco's request for relief here
2 turned to asserting, or emphasized the assertion, that the claim
3 or claims as asserted in the Kling-2 case are in fact
4 administrative claims under section 503(b)(1) of the Bankruptcy
5 Code and, therefore, wouldn't be covered by the bar date order
6 in any event but, rather, would be governed by Texaco's Chapter
7 11 plan, which required that such claims be paid in the ordinary
8 course in full.

9 Section 503(b)(1) of the Bankruptcy Code provides a
10 priority for the "actual necessary costs and expenses of
11 preserving the estate, including wages, salaries or commission
12 for services rendered after the commencement of the case."
13 Under section 507(a)(1), Those expenses are accorded a first
14 priority. That priority is based on the premise that the
15 operation of the business by the debtor in possession benefits
16 prepetition creditors. Therefore, any claims that result from
17 the operation are entitled to payment prior to payment to
18 creditors for whose benefit the continued operation of the
19 business was allowed. *In re Enron Corp.* 300 B.R. 201, 207
20 (Bankr. S.D.N.Y. 2003). As noted by the *Enron* court, the focus
21 of this section is to prevent unjust enrichment of the estate,
22 not to compensate the creditor for its loss. *Id.* at -- again at
23 207.

24 It is clear that in evaluating whether a creditor has
25 carried its burden to show that it has an administrative claim,

1 the court should narrowly construe the right to such a claim.
2 That is because every dollar paid in full to an administrative
3 creditor reduces the amount of so-called tiny bankruptcy dollars
4 paid to general unsecured creditors. See Howard Delivery
5 Service, Inc. v. Zurich American Insurance Co., 126 S. Ct. 2105
6 (2006), and In Re: Bethlehem Steel Corp., 479 F.3d 167 172 (2d.
7 Cir. 2007).

8 In light of the forgoing, the Second Circuit has
9 adopted a definition that is difficult to meet. An expense is
10 administrative under section 503(b)(1) only if it arises out of
11 a transaction between the creditor and the trustee or debtor in
12 possession, and only to the extent that the consideration
13 supporting the claimant's right to payment was both supplied to
14 and beneficial to the debtor in possession in the operation of
15 the business. In Re: Bethlehem Steel, 479 F.3d at 172, quoting
16 Trustees of Amalgamated Insurance Fund v. McFarlin's Inc., 789
17 F.2d 98, 101 (2d. Cir. 1986). That is the case with respect to
18 all matters other than postpetition tort matters. Before
19 turning to those types of administrative claims, it should be
20 noted, therefore, that a debt is not entitled to an
21 administrative priority simply because the right to payment
22 arises after the debtor in possession begins managing the estate
23 but, rather, depends upon the date of the consideration
24 supporting the claimant's right to receive it. McFarlin's, 789
25 F.2d at 101.

1 In addition, the benefit will set the measure of the
2 claim, since it's clear from the prior quote that the claim will
3 be allowed only to the extent that the consideration supporting
4 the claimant's right to payment was both supplied and beneficial
5 to the debtor in possession. Also, the benefit must not be
6 speculative but, instead, must have a present value at the time
7 it was conferred, even if, thereafter, according to the Second
8 Circuit, it had turned to dust, in light of the ultimate failure
9 to rehabilitate or sell the business. See Nostas Associates v.
10 Costich (In re Klein Sleep Products, Inc.), 78 F.3d 18, 26 (2d.
11 Cir. 1996), and In Re: Refco, Inc. 2008 WL 140956 at *7-8
12 (S.D.N.Y. January 14, 2008), aff'd, 321 Fed. Appx. 12 (2d. Cir.
13 2009).

14 Given the forgoing, it appears to me that the
15 respondents' contract claims in Kling-2 would not constitute
16 administrative claims: not only are they premised on a
17 prepetition contract, but they are also premised upon activity
18 giving rise to a cleanup obligation that occurred prepetition.

19 The respondents counter by saying that the debtor
20 maintained an interest in Section 27 during the postpetition
21 period with respect to rights of way, pipelines and easements
22 that related to Section 26 and the well for which some income
23 was produced thereon, and that that section -- that is Section
24 26 -- was not released until the postpetition period. However,
25 they have not asserted any cleanup obligation that was caused by

1 conduct of the debtor on Section 27 relating to the postpetition
2 period.

3 Moreover, it appears clear to me that the debtor's
4 obligation under the parties' contract to the extent that the
5 contract continued during the postpetition period arose
6 prepetition. Again I return to Section -- paragraph 8, excuse
7 me, and paragraph 10 of the lease. Paragraph 8 of the lease
8 provides that the lessee shall be relieved of all obligations as
9 to the acreage surrendered or as to the acreage -- as to all of
10 the particular minerals specified, as the case may be. The
11 acreage surrendered prepetition as I understand it, is the
12 acreage upon which the cleanup obligation is asserted.

13 More importantly, the lease provides an obligation to
14 clean up that modifies paragraph 8, which is found in paragraph
15 10; but again I believe that obligation was triggered by its
16 plain terms when the property was surrendered. That section
17 provides "the lessee shall without undue delay pay and reimburse
18 the lessor any and all damages in full to the lessor's lands,
19 crops, roads and property caused by its operations."

20 The term "undue delay" does not appear to me to be a
21 term of art. And again without there being an assertion that
22 the lessee was somehow prohibited from paying and reimbursing to
23 the lessor any and all damages upon its release of the land in
24 Section 27, it appears to me that the parties agreed by
25 paragraph 10 of the lease that that is when Texaco's obligation

1 to pay the respondents their damages caused by its operations
2 would have arisen, at the latest.

3 It is asserted by the respondents that there is a
4 separate obligation under Louisiana law that arises only upon
5 the termination of the lease, i.e., the full lease as opposed to
6 release of the property under a lease, to restore the property.
7 And I believe that is the case when the lease itself has not
8 dealt with, by the agreement of the parties, the parties' rights
9 in respect of damages caused by one to the other.

10 Louisiana, not surprisingly, recognizes freedom of
11 contract. Their agreement is the law as between the parties,
12 Corbello v. Iowa Production 857 So.2d. 686, 693 (La. 2003). And
13 not surprisingly also, the purpose of contract interpretation is
14 to determine the common intent of the parties, and the meaning
15 and intent of the parties to a written instrument should be
16 determined within the four corners of the document and its terms
17 should not be explained or contradicted by extrinsic evidence.
18 Id.

19 When a contract is subject to interpretation of the
20 four corners of the instrument without the necessity of
21 extrinsic evidence that interpretation is a matter of law, and
22 when the words of the contract are clear and explicit and lead
23 to no uncertain consequences, no further interpretation need be
24 made into the party's intent. Thus, again, the parties are free
25 to contract for any object that is lawful, possible and

1 determined or determinable.

2 Here, I believe, that's just what the parties did.
3 The cases cited by the respondents for the proposition that a
4 remediation obligation -- or a restoration obligation, excuse
5 me, arises only upon termination of the contract, deal with
6 situations where the parties did not specify a separate
7 obligation and therefore were dealing with, simply, issues under
8 Louisiana mineral statute and civil statute law.

9 I believe this is clearly or most clearly set forth in
10 the back and forth between the dissenters and the court in *In*
11 *Re: Terrebonne Parish School Board v. Castex Energy Inc.* 893
12 So.2d. 789 (La. 2005), where the language that appears in the
13 lease did not appear but the Court was, instead, dealing with
14 implied obligations under Louisiana law. That was also the fact
15 pattern in *Corbello v. Iowa Production*, 857 So. 686 (La. 2003).

16 So, even under the broadest approach, which is the
17 approach that the respondents take, to finding an administrative
18 claim, wherever there is some postpetition benefit because of a
19 continued relationship between the parties, I don't believe that
20 the amount of the claim, or, more importantly, the underlying
21 basis for the claim, which is prepetition activity, under the
22 parties' agreement would support the allowance of an
23 administrative claim here.

24 Moreover, I believe there is also considerable merit
25 to the view that, with the release of the property where the

1 cleanup needs to be done, there was no ongoing postpetition
2 cleanup obligation simply because other property was retained.
3 I believe this is made clear in a series of cases that deal with
4 tenants' cleanup obligations after the rejection or termination
5 of a lease, where the courts have uniformly held that such
6 cleanup obligations do not give rise to an administrative claim
7 even where, in certain instances, the debtor chose not to reject
8 the lease and, therefore, end the relationship until a
9 considerable time postpetition. See *In Re: Ames Department*
10 *Stores, Inc.*, 306 B.R. 43 (Bankr. SDNY 2004), which relied upon
11 *In Re: Unidigital, Inc.*, 262 B.R. 283 (Bankr. D Del. 2001), and
12 *In Re: National Refractories and Minerals Corp.*, 297 B.R. 614
13 (Bankr. N.D. Cal. 2003).

14 In response to those types of cases, as well as
15 *Bethlehem Steel* and *McFarlin's*, the respondents essentially rely
16 upon a trilogy of Third Circuit -- I'm sorry, of Second Circuit
17 cases that provided administrative claim status for severance
18 claims for employees with severance agreements who were
19 terminated postpetition, including and most importantly, *In Re:*
20 *Straus Duparquet*, 386 F.2d 649 (2d Cir. 1967). The respondents
21 are correct that the Second Circuit has not overturned those
22 precedents. However, it has severely narrowed them in the
23 *Bethlehem Steel* case that I previously cited, in which the Court
24 said "A payment may be entitled a priority under *Straus*
25 *Duparquet* even if it operates differently from the payment at

1 issue there, if it provides a new benefit at termination that
2 employees would not otherwise receive. The key inquiry is
3 whether the payment is a new benefit earned at termination or
4 instead an acceleration of benefits to which the employee was
5 previously entitled. The former is an administrative expense of
6 the debtor-in-possession, while the latter is not."

7 As I previously noted, the right here asserted by the
8 respondents arose pre-bankruptcy, under the lease and in
9 particular at paragraphs 8 and 10, under these facts. Those
10 paragraphs modified the common law -- or not common law, the
11 code law provisions as interpreted by the Louisiana courts --
12 that, in the absence of an applicable contractual provision,
13 give the lessor a restoration right upon only the termination in
14 full of the lease.

15 Obviously, in the normal case such a common law or
16 code law provision would operate to the detriment of lessors
17 since a lessee could drag out its obligation under a long term
18 lease until all sections would be terminated. Here, where the
19 parties anticipated the termination of individual sections or
20 acreage within individual sections well before the termination
21 of the lease, it's entirely logical that they would contract to
22 accelerate the obligation of the lessee to pay for damages
23 caused by its operations. And therefore, again, consistent with
24 all of the administrative claim case law that I've cited, that
25 obligation being accelerated by the parties arose postpetition -

1 - I'm sorry, prepetition, and, therefore, would be merely a
2 general unsecured claim.

3 I have reviewed the one other case cited by the
4 respondents on this point, which is In Re: Penn Traffic Company,
5 524 F.3d. 373 (2d. Cir. 2008), and, frankly, I simply don't see
6 its relevance given that the termination in that case was by the
7 non-debtor party and the case did not really deal with
8 administrative claims but, rather, with what was an executory
9 contract and what isn't an executory contract.

10 That leaves two remaining issues. As I noted, the
11 requirements for the allowability of an administrative claim
12 under Bethlehem Steel would bar a claim where the parties'
13 relationship is contractual. There's a slightly different
14 approach where the parties' relationship is based on a tort
15 claim, following Reading Co. v. Brown, 391 US 471 (1968). It's
16 well established that "damages resulting from the negligence of
17 a receiver" [you could substitute in here a debtor-in-
18 possession] "during the postpetition period give rise to
19 administrative expense claims." Id. at 485. In doing so, the
20 Court held, "an involuntary creditor of the estate suffers grave
21 financial injury as a result of the negligence of the bankrupt's
22 estate and therefore it is natural and just to afford such
23 claims priority and distribution even though such claims do not
24 arise from transactions that were necessary to preserve or
25 rehabilitate the estate." Id. at pages 477 and 482.

1 I believe, however, that the mere label of a tort
2 claim, as placed on the alternative claim asserted in the Kling-
3 2 action, does not by itself give rise to an administrative
4 claim here under Reading Co. v. Brown and the case law that has
5 followed it. The tort claim that is asserted here is a "delict"
6 claim, under the Louisiana parlance, that is premised upon the
7 fault incurred by Texaco in breaching its contract. See
8 Louisiana Code -- I'm sorry, Civil Code Annotated, Article
9 2315(a), and Cooper v. Louisiana Department of Public Works, 870
10 So.2d. 315, 332 (La. A.D. 3d Cir. 2004).

11 Here, in that sense, and contrary to the logic of
12 Reading Co. v. Brown, the respondents are not involuntary
13 creditors. Their tort rights are premised upon their
14 contractual relationship and the breach of that relationship or
15 the asserted breach of that relationship by Texaco. Since that
16 breach occurred, as I have already found -- if it occurred --
17 prepetition, I do not believe that the holding of Reading Co. v.
18 Brown would be applicable here.

19 I also note that the respondents have been careful to
20 state, as they did at oral argument, that they're not asserting
21 a right based upon a breach of applicable regulations or statute
22 that would require Texaco to act at the direction of the
23 Louisiana environmental regulatory authorities, and they're not
24 asserting that Texaco placed or caused environmental
25 contamination on the leased property postpetition. Rather, the

1 administrative claim is premised upon the continuing
2 lessor/lessee relationship with respect to property that
3 apparently was not contaminated and does not give rise to a
4 cleanup obligation or a damage claim, but that occurred after
5 the commencement of Texaco's Chapter 11 case. That
6 relationship, as I have said, however, would not give rise to a
7 postpetition administrative expense claim.

8 Finally, the claimants -- I'm sorry, the respondents,
9 contend that Texaco had an obligation with regard to all of
10 Section 27 under section 365(d)(3) of the Bankruptcy Code
11 because that -- the lease in respect of that section did not
12 completely get released in the prepetition releases. If that
13 were so, then Texaco would have an administrative claim against
14 it under that section, which provides that "The trustee shall
15 timely perform all obligations of the debtor [with irrelevant
16 exceptions] arising from and after the order for relief under
17 any expired lease of non-residential real property until such
18 lease is assumed or rejected."

19 Texaco contends that this provision does not apply to
20 a Louisiana oil and gas lease based upon case law, including a
21 case involving Texaco, but primarily upon In Re: Hamm Consulting
22 Company/William Lagnion MJV, 143 B.R. 71 (Bankr. W.D. La. 1992),
23 which construed, among other things, a decision by the District
24 Court for the Middle District of Louisiana in Texaco, Inc. v.
25 Louisiana Land and Exploration Co., 136 B.R. 658 (M.D. La.

1 1992). I believe that those decisions are persuasive and that
2 this type of real property relationship would not constitute a
3 non-residential real property lease for purposes of section
4 362(d)(3).

5 However, I believe there's another reason also that
6 this section does not apply, which is that, first, the
7 obligations under the lease are those that I have already
8 specified, all of which arose prepetition, so that even to the
9 extent that the release of the specific land where the
10 obligation appears prepetition would not render that portion of
11 the lease "unexpired", to use the term in section 365(d)(3), the
12 obligations that would remain are those set forth in paragraphs
13 8 and 10, and those are prepetition obligations as far as the
14 assertion that any claims derive from them. See generally the
15 discussion of 365(d)(3) in In Re: Ames Department Stores, Inc.,
16 306 B.R. 43 (Bankr. S.D.N.Y. 2004).

17 For those reasons, I conclude that the respondents
18 here have only asserted in the Kling-2 case prepetition general
19 unsecured claims and, therefore, that those claims are subject
20 to the bar date order and the discharge and, accordingly, may
21 not be pursued at this time.

22 That leaves the respondents' request that they be
23 relieved of the bar date and be allowed to file, late, a proof
24 of claim for such claims. If I were to grant that motion, the
25 claims would be -- to the extent that they are determined by the

1 Louisiana court or another trier of fact to be valid -- those
2 claims would be paid in full.

3 I have reviewed that request under Bankruptcy Rule
4 9006(b)(1), which permits a claimant to file a late proof of
5 claim if the failure to submit a timely proof of claim was due
6 to "excusable neglect." The burden of proving excusable neglect
7 is on the respondents here. *In Re: R.H. Macy and Co.*, 161 B.R.
8 355, 360 (Bankr. S.D.N.Y. 1993).

9 The Supreme Court has developed a two-step test for
10 determining whether a late filing was due to excusable neglect,
11 in *Pioneer Investment Services, Co. v. Brunswick Associates,*
12 *Limited Partnership*, 507 U.S. 380 (1993). First, the movant
13 must show that its failure to file a timely claim constituted
14 "neglect", as opposed to a knowing decision, neglect generally
15 being attributed to a movant's inadvertence, mistake or
16 carelessness. *Id.* at 387-88. After establishing neglect, as
17 opposed to willfulness or knowledge of the bar date, and the
18 failure to show why any unknowing basis for neglecting - and, I
19 am sorry, and the failure to show any unknowing basis for
20 neglecting it, the movant must show by a preponderance of the
21 evidence that the neglect was "excusable." That analysis is to
22 be undertaken on a case-by-case basis that is based on the
23 particular facts of the case, although the court is to be guided
24 by, and make the determination balancing, the following factors:
25 (a) the danger of prejudice to the debtor, (b) the length of the

1 delay and whether or not it would impact the case, (c) the
2 reason for the delay, in particular whether the delay was within
3 the control of the movant, and (d) whether the movant acted in
4 good faith. Id. at 395. However, "Inadvertence, ignorance of
5 the rules or mistake construing the rules do not usually
6 constitute excusable neglect." Midland Cogeneration Venture LP
7 v. Enron Corp. (In Re: Enron Corp.), 419 F.3d 115, 126 (2d. Cir.
8 2005), citing Pioneer, 507 U.S. at 392.

9 In the Midland case, the Second Circuit has stated "We
10 have taken a hard line in applying the Pioneer test. In a
11 typical case, three of the Pioneer factors, the length of the
12 delay, the danger of prejudice and the movant's good faith,
13 usually weigh in favor of the party seeking the extension. We
14 have noted, though, that we and other circuits have focused on
15 the third factor, the reason for the delay, including whether it
16 was within the reasonable control of the movant. And we
17 cautioned that the equities will rarely, if ever, favor a party
18 who fails to follow the clear dictates of a court rule, and that
19 where the rule is entirely clear, we continue to expect that a
20 party claiming excusable neglect will in the ordinary course
21 lose under the Pioneer test." Id. at 122-23.

22 See also In Re: Musicland Holding Corp. 2006 Bankr.
23 LEXIS 3315 at pages 10-11 (Bankr. S.D.N.Y. 2006), in which Chief
24 Bankruptcy Judge Bernstein, citing Midland, stated that the
25 Second Circuit focuses on the reason for the delay in

1 determining excusable neglect under Pioneer and that "the other
2 factors are relevant only in close cases."

3 Here, I have considered the facts and conclude that
4 there is not a basis for permitting the late filing of a proof
5 of claim. First, it appears to me that the late filing of the
6 claim was within the reasonable control of the respondents.
7 They have argued that that they were confused by the fact that
8 Texaco's plan paid creditors, including unsecured creditors, in
9 full, and, further, that they felt that they might have had an
10 administrative claim, instead of a prepetition general unsecured
11 claim, as I have just determined.

12 Third, they've stated that they were confused by an
13 earlier communication from Texaco that indicated that Texaco
14 intended to treat its lessors essentially as if the bankruptcy
15 had not happened.

16 However, I have reviewed the bar date notice, the
17 plan, and that communication; and I conclude that a reasonable
18 claimant would in making a similar review conclude that although
19 unsecured claims, like administrative claims, would be paid in
20 full, if there was any reasonable doubt as to whether the claim
21 was administrative or unsecured it would have to file a proof of
22 claim on a timely basis in order to have that claim be allowed
23 as a general unsecured claim.

24 Moreover, I do not believe that the communication by
25 Texaco would have reasonably led the respondents to think that

1 they would not have to comply with the subsequently received bar
2 date notice. Rather, in order to be treated and paid in full, I
3 believe it's clear from the notice that they would have to file
4 the timely proof of claim. There's nothing in the wording of
5 the notice, the bar date order, or the plan (which, frankly,
6 follow the general form which is essentially boilerplate for
7 these types of notices) that would have indicated otherwise.

8 Moreover, the respondents have a long history of
9 noting claims and seeking to enforce claims for damages to the
10 property caused by Texaco, including sending notices through
11 representatives and lawyers prepetition. Therefore, it's safe
12 to assume not only from that history as well as the fact that
13 they were dealing with an oil and gas lease (where obviously
14 there's a potential for at least contingent prepetition claims
15 caused by the lessee's use of the property for its intended
16 purposes) that they would have been aware that they would have
17 had a unsecured prepetition claim, and, therefore, the failure
18 to have filed such a claim was within their control.

19 Moreover, I don't believe the other factors suggest
20 that this is a particularly close case, even in the -- if one
21 were to weigh the other factors. The delay here is obviously
22 substantial, over 22 years. Moreover, the delay follows the
23 effective date of Texaco's plan and the closing of the case
24 which occurred in 1991.

25 The respondents make the point that Texaco had, and

1 Chevron has, enough money to pay unsecured creditors in full and
2 therefore there's no prejudice to the creditors. However, in a
3 solvent Chapter 11 case, the fulcrum claim moves down to the
4 equity holders. Here, Texaco emerged as a publicly held company
5 from Chapter 11. The existence of this claim, which is a very
6 large claim as asserted, if it existed, would have affected
7 those holders. Moreover, Chevron purchased Texaco in reasonable
8 reliance upon the bar date and the discharge, and the existence
9 of this claim would, after that purchase and obviously well
10 after the issuance of the discharge, prejudice it, as well.

11 So, while I believe that the respondents have acted in
12 good faith here, I don't believe that they've established their
13 burden, which is a heavy one given that I believe that the late
14 filing was well within their control, to have the claim be
15 permitted to be filed late. So, for those reasons, I will deny
16 that request by the respondents.

17 The relief sought at this point seeks merely to
18 enforce the discharge injunction and the bar date order, and I
19 believe that's fully appropriate here for the reasons that I
20 have stated. There's no issue here before me on any damages
21 suffered by Texaco or Chevron -- the plaintiff here being quite
22 candid that its goal is simply to stop the Kling-2 lawsuit from
23 proceeding in violation of the Court's orders and the discharge.

24 So I will grant that relief and I request that, Mr.
25 Bienenstock, you submit an order consistent with my ruling. You

1 do not have to settle that order on the respondents, but you
2 should email it to them before you send it to me so that they
3 would have a chance to review it to determine whether it's
4 inconsistent with my ruling.

5 This has been a lengthy ruling. As I noted, the
6 issues raised by the parties probably could serve as a law
7 school exam. It was an oral ruling, and with oral rulings of
8 this nature, I generally reserve the right to go over the
9 transcript and edit it, not only for typos and mis-citations or
10 misspellings of citations but also if I feel that I should have
11 said something more elegantly or that I should have added
12 something, I will do that. If I do that, I will file the
13 corrected bench ruling and it will be a separate document in the
14 case. It won't be the transcript anymore of my ruling. It will
15 be the ruling. And I may do that here, given the length of this
16 bench ruling; but the holding won't change. So, again, Mr.
17 Bienenstock, you should submit an order consistent with the
18 ruling.

19 MR. BIENENSTOCK: Thank you, Your Honor.

20 THE COURT: Okay. Thank you.

21 MR. STEFFES: Thank you, Your Honor.

22 THE COURT: Okay.

23 MS. KELLEHER: Your Honor?

24 THE COURT: Yes.

25 MS. KELLEHER: This is Leslie Kelleher for respondents

1 Kling, et al.

2 THE COURT: Yes.

3 MS. KELLEHER: We appreciate the thoughtfulness of
4 your ruling but I would ask that we be allowed to submit
5 supplemental briefs on the late filed issue as our understanding
6 was that the opinion would deal primarily with the issue of
7 administrative claims and Louisiana law and that the scope of
8 the ruling would be with respect to what was discharged or not.

9 THE COURT: Well, the supplemental briefing covered
10 that issue but as I -- I went back and read the transcript last
11 night, as I took it, the parties put before me the 9006 issue.
12 You can move under Rule 59, Bankruptcy Rule 9023, if you think
13 there's something that should have been in the record on this
14 that wasn't, but I think the whole thing was in front of me.

15 MS. KELLEHER: Thank you.

16 THE COURT: If I am wrong about that, you can make
17 your motion, but at least you have the benefit of my thoughts on
18 it even if I did misconstrue the posture of this and what you
19 would have to show if you were going to prevail.

20 MS. KELLEHER: Thank you.

21 THE COURT: Okay. Thank you.

22 (This hearing concluded at 12:08:12.)

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CERTIFICATION

I, Linda Ferrara, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.

Dated: June 1, 2010

Signature of Approved Transcriber

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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| IN RE : | : | |
| | | Jointly Administered |
| TEXACO INC. | | Chapter 11 Case Nos. |
| TEXACO CAPITAL INC. | : | 87 B 20142 (RDD) |
| TEXACO CAPITAL, N.V., | : | 87 B 20143 (RDD) |
| | : | 87 B 20144 (RDD) |
| Reorganized Debtors. | x | |
| <hr/> | | |
| TEXACO INC., | : | |
| | : | |
| Movant, | : | |
| -against- | : | |
| | : | |
| Kling Realty Company, Inc.; Walet | : | |
| Planting Company; Kathleen Walet | : | |
| Heitkamp; Deanna Cecil Walet Gondron; | : | |
| Merlin P. Walet Jr.; Herman Charles | : | |
| Walet; Pliny Charles Walet II; Charlene | : | |
| Ann Walet; Carolyn Marie Walet; Arthur | : | |
| Stern; J. D. Mier; Sally A. Mier; Muriel | : | |
| O. Levinson; Thomas J. Levinson; | : | |
| Richard Levinson; Ann C. Martinez; | : | |
| Kathryn S. Ceja; Brenda S. Bush; David | : | |
| L. Stern; Michael L. Snur; Cary S. | : | |
| Solomon; Amy F. Tilley; William A. | : | |
| Snur; Drew M. Lerner; Douglas P. | : | |
| Lerner; Reid S. Lerner; and J. Lionel | : | |
| Kling Trust | : | |
| | : | |
| Respondents. | x | |
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**ORDER GRANTING MOTION OF TEXACO INC. FOR ORDER (i)
REOPENING TEXACO’S CHAPTER 11 CASE, (ii) ENFORCING
CONFIRMATION ORDER DATED MARCH 23, 1988, (iii) FINDING
RESPONDENTS IN CIVIL CONTEMPT OF 11 U.S.C. § 524(a)(2)
AND CONFIRMATION ORDER, AND (iv) DIRECTING
RESPONDENTS TO DISMISS THEIR DISCHARGED CLAIMS
AGAINST TEXACO INC. IN THE LOUISIANA ACTIONS**

Upon the motion, dated May 14, 2009 (the “Motion”), of Texaco Inc. (“Texaco”), as reorganized debtor, for an order (i) reopening its chapter 11 case, (ii) enforcing the confirmation order dated March 23, 1988 (the “Confirmation Order”), (iii) finding

respondents in civil contempt of 11 U.S.C. § 524(a)(2) and the Confirmation Order, and (iv) directing respondents to dismiss their discharged claims against Texaco in the Louisiana Actions,¹ all as more fully set forth in the Motion and accompanying Memorandum of Law; and the Court having subject matter jurisdiction to consider the Motion and the relief requested therein; and due and proper notice of the Motion having been provided; and the Court having reviewed and considered the Motion and all responsive or additional pleadings filed by the Respondents (as defined below) and Texaco (collectively, the “Pleadings”); and a hearing having been held before this Court on January 28, 2010; and the Court having admitted into evidence and considered (i) the stipulation, dated January 21, 2010, between Texaco and the Respondents setting forth certain undisputed facts (the “Stipulation”), (ii) the documents contained in the Joint Bench Book (as defined in the Stipulation), and (iii) the exhibits attached to the Pleadings; and for the reasons specified in this Court’s bench ruling of May 28, 2010, a corrected copy of which is attached as Exhibit A hereto; and the Court having considered the Respondents’ proposed form of order and request for entry thereof, set forth in the letter of William E. Steffes, Esq. to chambers dated July 7, 2010, and Texaco’s response thereto, set forth in the letter of Martin J. Bienenstock, Esq. to chambers dated July 12, 2010; and the Court having concluded that the additional relief requested by the Respondents in the July 7, 2010 letter would constitute advisory relief that is not appropriate to grant; therefore, it is hereby:

ORDERED that Texaco’s Motion is granted to the extent set forth below; and it

¹ The Motion initially sought relief as to the action captioned *Kling Realty Company, Inc., et al. v. Texaco Inc., et al.*, Case No. 6:06CV1492 (W.D. La.) (“Kling I”), as well as the Louisiana Action/Kling II (as defined below), but Kling I was dismissed by a final order of the United States Court of Appeals for the Fifth Circuit. Accordingly, the relief sought by the Motion as to Kling I was rendered moot.

is further

ORDERED that the above-captioned chapter 11 case is reopened for the limited purpose of enforcing the discharge injunction, the Confirmation Order and the other orders of this Court, including the bar date order; and it is further

ORDERED and FOUND that all the claims and/or causes of action asserted by the above-named respondents (the “Respondents”) in *Kling Realty Company, Inc., et al. v. Chevron U.S.A., Inc., et al.*, Docket No. 110623, Div “D” in the 16th Judicial District Court, Parish of Iberia, where it remains pending (the “Louisiana Action/Kling II”) were discharged in accordance with the Confirmation Order and barred by the bar date order; and it is further

ORDERED that, upon this Order becoming final and non-appealable, Respondents shall promptly dismiss all such claims and/or causes of action against Texaco and its alleged successors in the Louisiana Action/Kling II, with prejudice; and it is further

ORDERED that Respondents are forever enjoined from commencing or continuing any action or otherwise acting to assert any of such claims and/or causes of action asserted against Texaco and its alleged successors in the Louisiana Action/Kling II; and it is further

ORDERED that the “Alternative Counter-Motions for Relief” requested by the Respondents in their Response to Texaco’s Motion and Alternative Counter-Motions, dated August 10, 2009, are hereby denied in their entirety, with prejudice; and it is further

ORDERED that the Court shall retain jurisdiction to hear and determine all matters arising from or related to the implementation, interpretation, or enforcement of this Order.

Dated: August 3, 2010
White Plains, New York

/s/Robert D. Drain
HONORABLE ROBERT D. DRAIN
UNITED STATES BANKRUPTCY JUDGE