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THE FEDERAL HIGH COURT
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT ABUJA

SUIT NO: FHC/ABJ/CS/14/2017

IN THE MATTER OF AN APPLICATION BY THE CHAIRMAN OF THE ECONOMIC AND FINANCIAL CRIMES COMMISSION FOR AN ORDER OF INTERIM ATTACHMENT OF OIL PROSPECTING LICENCE 245 PRESENTLY HELD BY SHELL NIGERIA EXPLORATION AND PRODUCTION COMPANY LIMITED (SNEPCO)

BETWEEN

NIGERIAN AGIP EXPLORATION LIMITED

- APPLICANT

AND

CHAIRMAN, ECONOMIC AND FINANCIAL CRIMES COMMISSION - RESPONDENT

MOTION ON NOTICE

Brought pursuant to Order 26 Rules 1, 2, 3, 4 & 11 of the Federal High Court (Civil Procedure) Rules 2009, Sections 6(6) and 36 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended), and under the Inherent Jurisdiction of this Honourable Court

TAKE NOTICE that this Honourable Court shall be moved on the ^{14th} day of *Feb* 2017 at the hour of 9 o'clock in the forenoon, or so soon thereafter as Counsel may be heard on behalf of Nigerian Agip Exploration Limited (the "Applicant") praying this Honourable Court for the following reliefs:

1. AN ORDER of this Honourable Court discharging and/ or setting aside the *ex parte* order of interim attachment of OPL 245, made by this Honourable Court on 26 January 2017, on the application of the Chairman of the Economic and Financial Crimes Commission.
2. AN ORDER of this Honourable Court discharging and/ or setting aside the *ex parte* order made by this Honourable Court on 26 January 2017, on the application of the

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ABUJA
CASHIER'S OFFICE
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Chairman of the Economic and Financial Crimes Commission, directing the Department of Petroleum Resources to manage OPL 245 on behalf of the Federal Government of Nigeria pending the conclusion of investigation and prosecution of the Applicant and other persons/ entities.

AND FOR SUCH FURTHER OR OTHER ORDERS as this Honourable Court may deem it fit to make in the circumstances.

AND TAKE FURTHER NOTICE that the grounds upon which this application is brought are as follows:

1. By the Ex-parte Order dated 26 January 2017, (the "Order") this Honourable Court granted the reliefs sought by the Chairman of the Economic and Financial Crimes Commission (EFCC) *vide* its Ex-parte Originating Summons dated 11 January 2017 (the "Ex-parte Application").
2. Oil Prospecting Licence (OPL) 245 is held jointly by the Applicant and Shell Nigeria Exploration and Production Company Limited (SNEPCO). As a result, the attachment of OPL 245 affects the interests of the Applicant, and it is in the interest of justice for the Applicant to be heard in relation to the question whether the Order should be sustained or discharged.
3. The Applicant contends that the Order ought to be discharged, for the following reasons:
 - a. Sections 28 and 29 of the Economic and Financial Crimes (Establishment, etc.) Act, Cap E1, Laws of the Federation of Nigeria, 2004 are inoperative, the Attorney-General of the Federation having not enacted any "prescribed rules" to bring the said provisions into effect. Consequently this Honourable Court lacks jurisdiction to make any orders under those provisions.
 - b. Section 29 of the Economic and Financial Crimes (Establishment, etc.) Act, Cap E1, Laws of the Federation of Nigeria, 2004, upon which the Ex-parte Application was predicated, conflicts with Section 36(5) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended), and has been declared to be (for that reason) null and void. Consequently, the Ex-parte Application, and by extension, the Order ought not to have been made and are incompetent; and having been made on the basis of a null provision, the Order is itself null and void;

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- c. To the extent that the Ex-parte Application purports to have been made pursuant to Section 28 of the EFCC Act, it ought to have been brought by way of a Motion on Notice. Section 28 does not authorise the application for interim attachment to be by way of an ex-parte application. In the absence of express statutory authorisation, an ex-parte application brought pursuant to Section 28 violates Section 36 of the Constitution and is therefore, null and void;
- d. In making the Ex-parte Application, the EFCC failed to disclose to this Honourable Court facts which, to its knowledge, defeat the averments contained in the Affidavit of Ibrahim Ahmed, and deposed to in support of the Ex-parte Application. This being the case, the Order ought to be discharged, and
- e. Without prejudice to (a) and (b) above, the Chairman of the EFCC has failed to satisfy the pre-conditions to the making of an application for interim attachment, as provided for by the EFCC Act. That is, showing (a) that the asset sought to be attached is one which had been seized by the EFCC prior to making the application, and (b) that the asset sought to be attached is one liable to forfeiture within the meaning of the EFCC Act. Having failed to meet these pre-conditions, the Ex-parte Application was irregular, and the Order granted on the basis of that Application ought to be discharged.

DATED THIS 31ST DAY OF JANUARY, 2017

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BABATUNDE FAGBOHUNLU, SAN
 CHUKWUKA IKWUAZOM
 OLUJOKE ALIU (signed)
 HAMID ABDULKAREEM
 OLADIMEJI OJO
 COUNSEL TO THE APPLICANT
 ALUKO & OYEBODE
 1, MURTALA MUHAMMED DRIVE,
 IKOYI, LAGOS

Email chukwuka.ikwuazom@aluko-oyebode.com

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FOR SERVICE ON:

CHAIRMAN, ECONOMIC AND FINANCIAL CRIMES COMMISSION

C/O

ALIYU M. YUSUF

JOHNSON OJOGBANE (JP)

H.M. MOHAMMED

LEGAL AND PROSECUTION DEPARTMENT

ECONOMIC AND FINANCIAL CRIMES COMMISSION

NO. 1, HOMBORI STREET, OFF FREETOWN STREET.

OFF ADETOKUNBO ADEMOLA CRESCENT

WUSE II, ABUJA

08162796041

DEPARTMENT OF PETROLEUM RESOURCES

7, KOFO ABAYOMI STREET

VICTORIA ISLAND

LAGOS

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- 2. Other than where expressly stated, the facts contained in this affidavit are facts which are within my personal knowledge in my capacity as one of the Counsel at the law firm of Messrs. Aluko & Oyebode advising and representing the Applicant in respect of the instant application, and derived from my review of relevant documents referred to in this Affidavit.
- 3. I verily believe the facts averred in this Affidavit to be true.

The Ex-parte Order

- 4. By the Motion to Discharge, the Applicant seeks to discharge the Ex-parte Order made by this Honourable Court on 26 January 2017 (the "Order").
- 5. The Order granted the reliefs claimed by an application made by the Chairman of the Economic and Financial Crimes Commission (EFCC), as follows:

"1. That the Applicant is granted interim Attachment of the Property known as Oil Prospecting License (OPL 245) pending the conclusion of investigation and prosecution of the Shell Nigeria Ultra Deep Ltd, Shell Nigeria Exploration and Production Company Ltd, Nigeria Agip Exploration Ltd, Malabu Oil and Gas Ltd and other individuals named in connection with acts of conspiracy, bribery and official corruption and money laundering mentioned in the schedule attached to this summons.

2. That the property known as Oil Prospecting License (OPL 245) shall be managed by the Department of Petroleum Resources on behalf of the Federal Government of Nigeria pending the conclusion of investigation and prosecution of the said Shell Nigeria Ultra Deep Ltd, Shell Nigeria Exploration and Production Company Ltd, Nigeria Agip Exploration Ltd, Malabu Oil and Gas Ltd. And other individuals named in connection with acts of conspiracy, bribery and official corruption and money laundering mentioned in the schedule attached to this summons."

The Ex-parte Application


- 6. As stated above, the Order was made on the basis of an Ex-parte Originating Summons dated 11 January 2017 (the "Ex-parte Application") filed by the Chairman of the EFCC,

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supported by an affidavit deposed to on 11 January 2017 by one Ibrahim Ahmed, described as an Operative of the EFCC (the "Supporting Affidavit").

- 7. I have read the said Ex-parte Application and the Supporting Affidavit, and I know that:
 - a. The Ex-parte Application was brought pursuant to the provisions of Sections 24(a), 26(1)(a) & (3), 28 and 29 (a) and (b) of the Economic and Financial Crimes Commission (Establishment, etc.) Act, Cap. E1, Laws of the Federation of Nigeria, 2004 (the "EFCC Act") and Section 44 (2)(k) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended)
 - b. At paragraphs 4 – 8 of the Supporting Affidavit, Mr. Ahmed avers that the EFCC's investigation was commenced on the basis of a petition received from shareholders of Malabu Oil and Gas Limited ("**Malabu**") who alleged a conspiracy to defraud and forgery relating to the shareholding of Malabu, and that the investigation had been conducted in collaboration with foreign investigative agencies in the United Kingdom, the United States of America, Switzerland, Italy and the Netherlands;
 - c. In paragraph 9 of the Supporting Affidavit, Mr. Ahmed alleges that:
 - i. Oil Prospecting Licence (OPL) 245 was awarded to Malabu in questionable circumstances in 1998 – at a time when General Sani Abacha (a sitting Head of State) and Dan Etete (serving Minister of Petroleum) were shareholders of the company and that they used their positions to confer an unfair advantage on Malabu;
 - ii. Following the allocation, Malabu contracted "Shell Petroleum and SNEPCO" in a joint venture to prospect and carry on petroleum operations in the block, and to the knowledge of Shell, the allocation of OPL 245 to Malabu was fraudulent;
 - iii. In 2001, the Federal Government of Nigeria (FGN) withdrew the allocation of OPL 245 to Malabu, and re-allocated the OPL to Shell Nigeria Ultra Deep Ltd. Malabu sued the FGN to challenge the revocation. This suit was settled out of Court and OPL 245 was allocated to Malabu;

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- iv. Shell and Agip (the Applicant) entered into a "fraudulent agreement" with Malabu whereby the companies paid monies - US\$1.2 Billion - intended for use to "bribe Dan Etete and his cronies";
 - v. The FGN was defrauded by under paying the sum of US\$210 Million as signature bonus on OPL 245
 - d. At paragraph 11 of the Supporting Affidavit, Mr. Ahmed avers that the FGN is in the process of preferring a charge bothering on "Conspiracy, Bribery, Official Corruption and Money Laundering" against a number of persons, including the Applicant, and
 - e. At paragraphs 16 – 17 of the Supporting Affidavit, Mr. Ahmed avers that the asset sought to be attached (OPL 245) is deemed to be the proceeds of crime and that it is necessary to obtain an interim order to "preserve the res".
8. I state that the Applicant denies each and every allegation of fact contained in the Supporting Affidavit, save to the extent expressly admitted below.

The Applicant's Interest

- 9. Nigerian Agip Exploration Limited, the Applicant, is a company established under the Laws of the Federal Republic of Nigeria and having its head office at No. 40/42 Aguiyi Ironsi Street, Maitama, Federal Capital Territory, Abuja, Nigeria.
- 10. I am aware that, by a Letter of Award dated 11 May 2011, the right to explore and prospect for petroleum within the area covered by Block 245 was allocated to the Applicant and Shell Nigeria Exploration and Production Company Limited (SNEPCO), jointly.

Attached and marked as Exhibit A1 is a copy of the Letter of Award dated 11 May 2011.

- 11. I verily believe that the interests of the Applicant are affected by the grant of the Order by this Honourable Court.
- 12. I am aware that, in summary, the Ex-parte Application and the Supporting Affidavit state that: (a) the allocation of OPL 245 to Malabu was fraudulent/improper, and that (b) the

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Applicant and SNEPCO defrauded the FGN by paying to Malabu US\$1.2 Billion, and paying to the FGN, US\$210 Million for the acquisition of OPL 245;

13. I was informed by Mrs Chinwe Njoku, Deputy Division Manager, Corporate Legal Services of the Applicant on 28 January 2017, at about 11am, during a telephone call convened for the purpose of discussing this matter, and I verily believe it to be true, that the following matters were not disclosed or were misrepresented by the EFCC:

- a. In the first place, the FGN had previously revoked the award of OPL 245 to Malabu and subsequently withdrew OPL 245 from Malabu. OPL 245 was then awarded to Shell Nigeria Ultra Deep Limited (**SNUD**) under a Production Sharing Contract following a competitive bid in 2002.
- b. This withdrawal and re-allocation of OPL 245 gave rise to a number of proceedings which are not disclosed in the Supporting Affidavit. For instance, Malabu commenced proceedings against the FGN seeking to recover the rights to OPL 245. These proceedings were settled by an agreement reached on 30 November 2006 in which the FGN (of which neither General Abacha or Chief Dan Etete were a part) agreed to re-allocate OPL 245 to Malabu. This settlement agreement was entered as a judgment of the Court of Appeal in Appeal No. CA/A/99/M/06 and subsists to date. It is on the basis of this judgment that the re-allocation of OPL 245 to Malabu in 2006 was again confirmed on 2 July 2010 by the FGN. Thereafter, OPL 245 was also subject to a series of litigations and arbitrations between SNUD, FGN and Malabu up to the time that OPL 245 was allocated to SNEPCO and the Applicant.
- c. Contrary to the averments contained in the Supporting Affidavit, the terms upon which OPL 245 was then allocated to SNEPCO and the Applicant are contained in the Block 245 Resolution Agreement dated 29 April 2011.

Attached and marked as **Exhibit A2** is a copy of the Block 245 Resolution Agreement
- d. The monies paid by the Applicant pursuant to the Block 245 Resolution Agreement were **paid transparently to the FGN pursuant to that Agreement.**

14. I verily believe that:


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- a. The propriety of the allocation of OPL 245 to Malabu in 1998 was affirmed by the consent judgment of the Court of Appeal in Appeal No. CA/A/99/M/06 and again the executive arm of the FGN – vide the settlement agreement between Malabu and the FGN in 2006, and the confirmation of the eventual re-allocation of OPL 245 to Malabu in 2010;
- b. In any case, OPL 245 was re-allocated to Malabu by successive administrations of the FGN (2006 and 2010);
- c. The Block Resolution Agreement was an effort to ensure the continued exploration of OPL 245, and monies paid thereunder were paid **transparently** and on the understandings recorded in that Agreement.

OPL 245

- 15. I am aware that by its nature as an oil prospecting licence, OPL 245 incorporates a bundle of rights which permits the Applicant together with SNEPCO to prospect for, petroleum within the area covered by Block 245.
- 16. I am informed by Mrs Chinwe Njoku, in the same circumstances as mentioned above, and I verily believe it to be true, that:
 - a. OPL 245 is an oil block located (deep) offshore Nigeria, with water depths of 1700 to 2,000 metres;
 - b. the Applicant, as Operator, is still receiving tenders for contracts to provide equipment necessary for development of the Block, and as such no oil is being produced from OPL 245 to date,
 - c. The Applicant cannot transfer its rights in OPL 245 without the consent of the Minister for Petroleum;
 - d. The Applicant's conduct of petroleum operations on OPL 245 is at a sensitive stage, working on a strict timetable, and any disruption of the said petroleum operations is liable to cause the loss of millions of dollars of investment to the Applicant.

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- e. The Applicant currently has numerous employees whose work is devoted to the conduct of petroleum operations on OPL 245.
 - f. The order that the Department of Petroleum Resources take over the management of OPL 245 will cause severe disruption to petroleum operations on OPL 245.
17. I verily believe that there is no risk that OPL 245 will be destroyed or dissipated in any way whatsoever because, (a) it is an intangible asset, (b) production has not commenced, and so the reserves are not at risk of depletion, and (c) the rights of the Applicant cannot be transferred without the consent of the FGN.
 18. I verily believe that if the material facts stated at paragraphs 13 and 16 above had been disclosed, this Honourable Court could have determined that there was no basis for the grant of an ex parte order.
 19. I make this Affidavit in good faith verily believing the contents to be the true in accordance with the Oaths Act.

[Signature]

 DEPONENT

Sworn to at the Registry of the Federal High Court,
 Abuja, this ^{31st} day of January 2017

BEFORE ME

~~COMMISSIONER FOR OATHS
 FEDERAL HIGH COURT
 ABUJA~~

COMMISSIONER FOR OATHS

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Signature: *[Signature]*
 Date: *[Signature]*

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MINISTRY OF PETROLEUM RESOURCES
 OFFICE OF THE HONOURABLE MINISTER
 Block D, 11th Floor, NNPC Towers, Herbert Macaulay Way,
 Central Business District, P.M.B. 449 Abuja

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HMPR/07/01

May 11, 2011

EXH. A1

The Managing Director,
 Nigerian Agip Exploration Limited (NAE),
 Plot PC 23, Engineering Close,
 Victoria Island,
 Lagos

COMMISSIONER FOR OATHS
 FEDERAL HIGH COURT
 ABUJA

Pro-NAE.

3/1/11

RE: OPL 245 RESOLUTION AGREEMENT/LETTER OF AWARD

With reference to the Resolution Agreement dated 29th April 2011 between the Federal Government of Nigeria (FGN) and Shell Nigeria Ultra-Deep Limited (SNUD), and Nigerian National Petroleum Corporation (NNPC), and Nigerian Agip Exploration Limited (NAE) and Shell Nigeria Exploration and Production Company Limited (SNEPCO) in respect of OPL 245; and

Pursuant to the powers vested on the Honourable Minister of Petroleum Resources (HMPR) by the provisions of Section 2 (b) of the Petroleum Act No. 51 of 1969 (as amended), approval is hereby granted for the award of OPL 245 jointly to SNEPCO and NAE.

This award is with a proviso that the sum of USD 207,960,000.00 (Two Hundred and Seven Million, Nine Hundred and Sixty Thousand United State Dollars) being outstanding Signature Bonus on the block which was placed in an escrow account for the allocation of Block 245 be released by telegraphic wire transfer addressed to "CBN/Accountant General of the Federation FGN with JB Morgan Chase Bank, United States of America" within 5 days from the date of this award.

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The basis of this award includes but is not limited to the following:

- i.) the conduct of petroleum operations on the OPL shall be governed by a Production Sharing Agreement (PSA) between SNEPCO and NAE;
- ii.) the fiscal terms as provided in the **Deep Offshore and Inland Basin Production Sharing Contracts Act Cap D3, Laws of the Federation of Nigeria 2004** shall be applicable to the PSA between SNEPCO and NAE in respect to OPL 245.

In addition to the above conditions, Articles 6, 7, 9 and 11 of the Resolution Agreement in respect of OPL 245 referred to in the first paragraph of this Letter of Award shall apply to this award.



Diezani Alison-Madueke
Honourable Minister

cc: The GMD
NNPC

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EXH. A 2⁸⁰

COMMISSIONER FOR OATHS
FEDERAL HIGH COURT
ABUJA
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BLOCK 245 RESOLUTION AGREEMENT

THIS AGREEMENT ("FGN Resolution Agreement") is made this 21st day of April 2011

Between

THE FEDERAL GOVERNMENT OF NIGERIA (hereinafter referred to as the FGN) represented by Honourable Attorney General of the Federation and Minister of Justice, the Minister of Petroleum Resources and the Minister of Finance; and

SHELL NIGERIA ULTRA-DEEP LIMITED, a company incorporated under the laws of the Federal Republic of Nigeria having its registered office at Freeman house, 21/22 Marina, Lagos (hereinafter referred to as SNUD, which expression where the context so admits shall include its successors-in-title and assigns); and

NIGERIAN NATIONAL PETROLEUM CORPORATION, a statutory corporation established under the laws of the Federal Republic of Nigeria whose Head Office is at NNPC Towers, Central Area, Herbert Macaulay Way, P.M.B 190, Garki, Abuja, Nigeria (hereinafter referred to as "NNPC" which expression where the context so admits shall include its successors-in-title and assigns), and

NIGERIAN AGIP EXPLORATION LIMITED a company established under the laws of the Federal Republic of Nigeria whose registered office is at Churchgate Building, Plot 473 AO Constitution Avenue, Central Business Area, Abuja, (hereinafter referred to as "NAE", which expression where the context so admits shall include its successors-in-title and assigns), and

SHELL NIGERIA EXPLORATION AND PRODUCTION COMPANY LIMITED, a company incorporated under the laws of the Federal Republic of Nigeria having its registered office at Freeman house, 21/22 Marina, Lagos (hereinafter referred to as SNEPCO, which expression where the context so admits shall include its successors-in-title and assigns);

FGN, SNUD, NNPC, SNEPCO and NAE may also be referred to herein individually as a "Party" or, collectively, as the "Parties".

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[Signatures]

WHEREAS:

- A. On the 29th of April 1998, FGN granted an Oil Prospecting License (OPL 245) over oil block 245 ("Block 245") to Malabu Oil & Gas Limited company incorporated under the laws of the Federal Republic of Nigeria ("MALABU").
- B. On 30th March, 2001, MALABU and SNUD entered into a Farm-in Agreement, and a Deed of Assignment under which MALABU assigned forty (40) percent equity interest in OPL 245 to SNUD.
- C. On the 2nd July 2001, FGN revoked OPL 245.
- D. By a letter dated the 23rd May 2002, the then Honourable Minister of Petroleum Resources, on behalf of FGN awarded Block 245 to SNUD on the basis of a Production Sharing Contract ("PSC"), following a competitive bid with another international oil company, on the invitation of the FGN.
- E. On 22nd December 2003, NNPC executed a PSC with SNUD, (hereinafter referred to as the "2003 PSC"), granting SNUD the right to exclusively operate Block 245 as contractor for a term of thirty (30) years.
- F. Subsequent to the revocation referred to in paragraph C above and the execution of the 2003 PSC, various law suits involving the FGN, NNPC, MALABU and SNUD, were instituted to determine disputes arising from the revocation of OPL 245 by the FGN, the termination of the agreements between MALABU and SNUD referred to in paragraph B above, and the execution of the 2003 PSC in respect thereof, with SNUD.
- G. On 30th November, 2006, the FGN executed a settlement agreement with MALABU wherein the FGN, without admission of liability for any alleged wrongful, unlawful, unjust or any like conduct, agreed to re-allocate Block 245 to MALABU in consideration of MALABU discharging and releasing the FGN from all claims and suits filed by MALABU against the FGN in connection with the revocation of MALABU's interest on 2nd July 2001.
- H. As a result of the execution of the settlement agreement referred to in paragraph G above, a number of dispute resolution proceedings were initiated by SNUD against the FGN including the Bilateral Investment Treaty (BIT) arbitration No. ARB/07/18 pending at the International Centre for the Settlement of Investment Disputes ("ICSID Arbitration"), to enforce SNUD's rights to exclusively operate Block 245 as Contactor on the basis of the 2003 PSC between NNPC and SNUD.
- I. The extant cases of those referred to in paragraphs F and H above, are:

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- i. CA/A/25M/2003 - SNUD vs. The House of Representatives and MALABU.
 - ii. ICC No. 12136 MS (C12137/MS) SNUD vs. MALABU. (Arbitration with resulting award in favor of SNUD delivered on 20th December 2004, and costs of US\$2.735 million awarded against MALABU.)
 - iii. FHC/NRJ/01/2009 - SNUD vs. MALABU, by which the ICC Award was registered on 29 March, 2010, making it enforceable in Nigeria.)
 - iv. ICSID Case No. ARB/07/18- Bilateral Investment Treaty arbitration between SNUD and the FGN. (Ruling pending.)
- J. On 2nd July 2010, FGN again issued a letter to MALABU, re-allocating Block 245 to MALABU.
- K. FGN is willing to settle all claims to any interest in OPL 245 by SNUD against FGN and/or MALABU in the terms of this Agreement.
- L. Pursuant to paragraph K above, FGN has entered into agreements of even date, respectively with MALABU and SNUD (The 'Resolution Agreements'), in respect of the resolution referred to in paragraph K above, by which, MALABU has relinquished all claims to OPL 245 and agrees to all future actions which FGN may take under this FGN Resolution Agreement with respect to OPL 245.
- M. SNUD agrees to the reallocation of its interest in Block 245 to SNEPCO, an Affiliate of SNUD, and SNEPCO agrees to reimburse the past costs and the signature bonus paid by SNUD in respect of Block 245 as well as to agree terms with NAE to jointly undertake the future development of the Block 245.
- N. FGN and SNUD now wish to resolve their differences amicably with respect to Block 245 and to set out the agreed interests of the Parties with respect to Block 245 in accordance with the terms of this FGN Resolution Agreement.

NOW THEREFORE, pursuant to FGN's confirmation of the full and final resolution with MALABU and SNUD, of all MALABU's and SNUD's respective claims and issues in dispute over Block 245 and a mutual reciprocal release from all claims, under the Resolution Agreements, FGN, SNUD, NNPC, SNEPCO and NAE HAVE AGREED in the manner hereinafter stated:

- 1.1 SNEPCO shall reimburse SNUD in respect of: (i) costs incurred by SNUD under Clause 2(i); and (ii) costs of three hundred thirty five million and six hundred thousand US Dollars (\$335,600,000) incurred by SNUD related to the execution of the work-programme pursuant to

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the terms of the 2003 PSC and in consideration of this payment SNUD hereby consents to the reallocation of the interests in Block 245 by the FGN as agreed in Clause 1.2 herein.

- 1.2 The FGN hereby causes the allocation of Block 245 and will cause the grant of the relevant Oil Prospecting license by the Minister of Petroleum Resources in favour of SNEPCO and NAE as joint licence holders under the Petroleum Act Cap P10, Laws of the Federation of Nigeria, 2004 on the terms of this FGN Resolution Agreement.
 - 1.3 Following the execution of this FGN Resolution Agreement, (i) SNUD shall, on behalf of SNEPCO and NAE pay to the FGN the Signature Bonus in accordance with Clause 2 below, and FGN hereby agrees that not later than seven (7) days thereafter FGN shall grant the Oil Prospecting license in respect of Block 245 to SNEPCO and NAE and (ii) NAE shall, on behalf of NAE and SNEPCO and FGN, appoint an escrow agent for the purpose of paying to FGN a sum equal to one billion ninety two million and forty thousand Dollars (US\$1,092,040,000) for the purposes of FGN settling all and any existing claims and/or issues over Block 245, in accordance with Clause 3 below.
 - 1.4 Upon the grant of the Oil Prospecting License to SNEPCO and NAE pursuant to Clause 1.2 hereof, NNPC and SNUD agree that the 2003 PSC is terminated as of the date of grant of the Oil Prospecting License to SNEPCO and NAE. Consequent upon the termination of the 2003 PSC, NNPC and SNUD release and discharge each other fully and effectively from all and any existing and continuing obligations that would otherwise survive the termination of the 2003 PSC except that this release shall not be deemed to extend to any claim or obligations related thereto and arising from this FGN Resolution Agreement.
 - 1.5 The FGN confirms that the Oil Prospecting License to be granted to SNEPCO and NAE shall be for an aggregate period of ten (10) years commencing from the date it is issued, and any OMLs which may derive therefrom shall have a duration of twenty (20) years plus additional renewals as allowed by law.
- 2 Upon the execution of this FGN Resolution Agreement by all the Parties herein:
- i) FGN and SNUD as parties to an escrow agreement dated 22nd December 2003 ("the Escrow Agreement") shall issue to the Escrow Agent, (JP Morgan Chase Bank) a notice (in the form attached to this FGN Resolution Agreement as Schedule 1) as required under Clause 10.1 of the Escrow Agreement, terminating the Escrow Agreement with an instruction to pay the sum of two hundred and seven million nine hundred sixty thousand US Dollars (\$207,960,000.00) representing the Signature Bonus, into the FGN Receiving Account. The balance of the Escrow Fund shall be paid into the Shell Receiving Account free of any taxes. The Parties acknowledge and agree that the payment of the Signature Bonus made pursuant to this Clause 2(i), represents the full payment of the Signature Bonus for the acquisition by SNEPCO and NAE of all rights over Block 245 and that no other payments are or will be due by any of SNUD, SNEPCO and NAE to FGN in this respect other than as provided for in Clause 3.
 - ii) FGN and NAE shall enter into an escrow agreement ("Escrow Agreement no. 2"), substantially in the form attached to this FGN Resolution Agreement as Schedule 2, with a bank of international standing acceptable to such Parties within five (5) Business Days from the Execution Date.

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For the purposes of Clause 2(i) above, "Escrow Agent", "Escrow Fund", "FGN Receiving Account" and "Shell Receiving Account" shall have the meaning ascribed to them in the Escrow Agreement.

- 3 Within five (5) Business Days of the grant and delivery to SNEPCO and NAE by FGN of the Oil Prospecting license for Block 245 duly issued jointly in the name of SNEPCO and NAE pursuant to Clause 1.2 above NAE shall, on behalf of both NAE and SNEPCO, wire transfer to the account opened in accordance with the Escrow Agreement no. 2 the amount of one billion ninety two million and forty thousand Dollars (US\$1,092,040,000) to the benefit of FGN pursuant to Clause 1.3.

Subject to receipt by NAE and SNEPCO of a letter from FGN confirming that it has achieved the full and final resolution of all claims and issues in dispute over Block 245 and obtained a release from all claims on Block 245 from the relevant parties, NAE and SNEPCO as parties to the Escrow Agreement No.2 shall issue to the escrow agent, a notice (in the form attached to the Escrow Agreement No.2) terminating the Escrow Agreement No. 2 with an instruction to pay the sum indicated in this Clause 3 into the FGN Escrow Account as defined in the Escrow Agreement No.2.

- 4 The rights and obligations of NAE and SNEPCO as between themselves in the operations of Block 245 shall be governed by a Production Sharing Agreement (PSA) to be executed between themselves or between themselves and/or their nominees.

- 5 The PSA shall be treated as and deemed a "Production Sharing Contract" as defined in section 17 of the Deep Offshore and Inland Basin Production Sharing Contracts Act, Cap D3, Laws of the Federation of Nigeria 2004.

- 6 The FGN confirms to NAE and SNEPCO that the fiscal terms as provided in the Deep Offshore and Inland Basin Production Sharing Contracts Act Cap D3, Laws of the Federation of Nigeria, 2004, shall be applicable to the PSA between NAE and SNEPCO with respect to Block 245.

In the event of any enactment of or change in the laws or regulations of Nigeria or any rules, procedures, guidelines, instructions directives or policies, applying to this FGN Resolution Agreement and/or the Oil Prospecting License for Block 245 and/or subsequent Oil Mining Lease (OML) derived therefrom, including the above fiscal terms, introduced by any Government department or Government parastatals or agencies occurs subsequent to the Execution Date, which materially and adversely affects the rights and obligations or the economic benefits of NAE and SNEPCO, the relevant Parties shall agree to such modifications to this FGN Resolution Agreement and/or any agreements between the relevant Parties in furtherance hereof as will redress and remove the adverse effect of such changes with retroactive effect from the date of such adverse change.

- 7. Tax Oil under the PSA shall be allocated, in the proportion of their interests in Block 245, to NAE and SNEPCO, as Holder as defined in the Deep Offshore and Inland Basin Production Sharing Contracts Act. Each of NAE and SNEPCO shall have the right to lift its share of the allocated Tax Oil and remit the proceeds thereof to the appropriate agencies of the FGN for the discharge of their proportionate share of the PPT obligations attributable to the Contract Area.

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8. The Parties hereby expressly agree that nothing in this FGN Resolution Agreement shall be taken as an admission by FGN, or any of its agents and authorities, including NNPC, of the possibility that either SNEPCO or NAE acting in their respective capacities as Contractor' (as such term is defined), under existing production sharing contracts with NNPC are engaged in Petroleum Operations, nor can it be cited in any ongoing arbitral proceedings between NAE, SNEPCO and any of the agencies of FGN in respect of such existing production sharing contracts between NAE, SNEPCO and NNPC.

9. FGN confirms that all sums reimbursed to SNUD by SNEPCO under Clause 1.1(ii) above is expenditures on mineral assets, being the acquisition of petroleum deposits or rights in or over such deposits and information relating to the extent of such deposits, and is incurred wholly, exclusively, necessarily and reasonably for the purposes of petroleum operations in Block 245 and shall be treated accordingly for the purposes of the laws listed in the First Schedule to the Federal Inland Revenue (Establishment) Act 2007, and as such each of NAE and SNEPCO shall be entitled to treat the sums referred to in Clause 1.1(ii) above in accordance with their participating interest in the Block 245 when calculating PPT and pursuant to the PSC Act.


10. FGN hereby grants full and unconditional exemption from any obligations and liabilities in respect of capital gains tax, taxes on income, withholding taxes and Value Added Tax in respect of the transactions and payments mentioned in Clause 1 arising from or relating to this FGN Resolution Agreement. Notwithstanding the foregoing and without prejudice to the position of FGN and NNPC, NAE and SNEPCO shall not be precluded from presenting a claim for any allowances applicable by law on the amount of Signature Bonus to FIRS in the normal course.

11. The Parties enter into this Agreement on the understanding that NAE and SNEPCO and/or their permitted assigns shall be sole and exclusive owners of Block 245 for the duration of the Oil Prospecting Licence and any OML derived therefrom, including any renewals allowed by law. Notwithstanding the foregoing, if at any time FGN and/or its relevant agencies and institutions decides by law to participate or acquire any interest in the Oil Prospecting license or any OML for Block 245 issued pursuant to this FGN Resolution Agreement, the FGN undertakes to NAE and SNEPCO that:
 - (i) the participation of the FGN and/or its relevant agencies and institutions shall be exercised by way of acquiring not more than fifty (50%) percent interest under the Oil Prospecting licence or relevant oil mining lease subject to the payment by FGN to NAE and SNEPCO of the cost of the latter's acquisition of Block 245 which shall be an amount equal to the proportionate share relative to the interest acquired by the FGN and/or its relevant agencies and institutions of the sums paid by NAE and SNEPCO under Clauses 2 and 3 of this FGN Resolution Agreement net of any taxes, levies or other duties whatsoever; plus accrued interest as agreed by the relevant parties; and
 - (ii) the FGN and/or its relevant agencies and institutions shall enter into a production sharing contract with NAE and SNEPCO as Contractors for the exclusive conduct of petroleum Operations in respect of the FGN's acquired interest in the Block 245 ("FGN PSC"); The

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- (iii) terms of the FGN PSC shall be no less favourable than the terms previously agreed between NNPC and SNUD in the agreement referenced in Preamble E; and the FGN's and/or its relevant agencies and institutions' proportionate share relative to its acquired interest, of all costs incurred by NAE and SNEPCO in Block 245 from the date of the grant of the Oil Prospecting Licence, pursuant to Clause 1.3, up to the date of the acquisition of interest by FGN and/or its relevant agencies and institutions pursuant to this Clause 11, shall be recoverable by NAE and SNEPCO under the FGN PSC.
- 12. FGN confirms that the terms of this FGN Resolution Agreement have been agreed by all the appropriate agencies of the FGN including the Ministry of Finance, and the Federal Inland Revenue Service.
- 13. FGN acknowledges that, in entering into this FGN Resolution Agreement, the other Parties have relied on its express or implied representation and other assurances made by its agents and representatives before the signature of this FGN Resolution Agreement regarding the efficacy of the terms thereof.
- 14. This FGN Resolution Agreement and any agreements executed by the Parties on the date of this FGN Resolution Agreement or in pursuance thereof, supersede all and any agreement or arrangement between the Parties or any of them entered into prior to the date of this FGN Resolution Agreement, either by letter directive, or howsoever relating to Block 245.
- 15. No amendments, changes or modifications to this FGN Resolution Agreement shall be valid except if the same are in writing and signed by a duly authorised representative of each of the Parties hereto.
- 16. Each of the Parties shall do all such acts and execute and deliver all such documents as shall be reasonably required in order to fully perform and carry out the terms of this FGN Resolution Agreement.
- 17. FGN shall indemnify, save and hold harmless, and defend SNUD, SNEPCO and NAE from and against all suits, proceedings, claims, demands, losses and liability of any nature or kind, including, but not limited to, all litigation costs, attorneys' fees, settlement payments, damages, and all other related costs and expenses, based on, arising out of, related to, or in connection with: (i) this FGN Resolution Agreement, (ii) the Resolution Agreements and/or (iii) the issuance of the Oil

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Prospecting licence in respect of Block 245 jointly in the name of SNEPCO and NAE, and arising out of any asserted prior interest in Block 245.

18. Each Party agrees that they and their employees, agents, agencies, subsidiaries, and attorneys will keep confidential at all times, this Agreement, the terms thereof, and the discussions or negotiations that led to the Agreement, except to the extent required by law or any competent regulatory body.

19. Definitions:

19.1 "Affiliate" means: a company which, directly or indirectly through one or more intermediaries, controls or is controlled by, or is under common control with a Party. For this purpose control means the direct or indirect ownership of in aggregate fifty percent (50%) or more of the voting capital.

19.2 "Business Day" shall mean a day other than Saturday, Sundays and public holidays, on which banks are open for business in Nigeria

19.3 "Clause" means a clause of this Resolution Agreement.

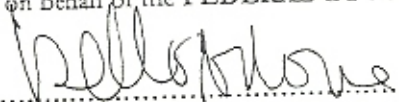
19.4 "Execution Date" means the date first written in this Resolution Agreement; being the date on which all Parties to this Resolution Agreement execute this Resolution Agreement.

19.5 "PSA" means the production sharing agreement to be entered into between NAE and SNEPCO for the conduct of Petroleum Operations in respect of OPL 245 pursuant to this Agreement.


19.5 "Signature Bonus" means the sum referred to in Clause 2(i) of this Resolution Agreement.

SIGNED AND AGREED the day and year first above written.

For and on Behalf of the FEDERAL GOVERNMENT OF NIGERIA:


.....
THE HON. ATTORNEY GENERAL OF THE FEDERATION
AND MINISTER OF JUSTICE.


.....
THE HON. MINISTER OF PETROLEUM RESOURCES

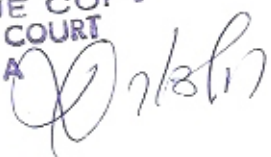

.....
THE HON. MINISTER OF FINANCE

The COMMON SEAL of NIGERIAN AGIP EXPLORATION LIMITED was affixed to this Resolution Agreement and was duly delivered in the presence of:

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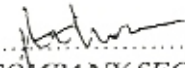


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.....
VICE CHAIRMAN AND MANAGING DIRECTOR


.....
COMPANY SECRETARY

The COMMON SEAL of SHELL NIGERIA ULTRA-DEEP LIMITED was affixed to this FGN Resolution Agreement and was duly delivered in the presence of:


.....
DIRECTOR


.....
SECRETARY/DIRECTOR


The COMMON SEAL of SHELL NIGERIA EXPLORATION AND PRODUCTION COMPANY LIMITED was affixed to this FGN Resolution Agreement and was duly delivered in the presence of:



.....
DIRECTOR


.....
SECRETARY/DIRECTOR

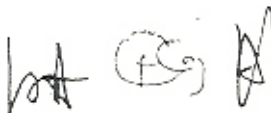
The COMMON SEAL of NIGERIAN NATIONAL PETROLEUM CORPORATION was affixed to this FGN Resolution Agreement and was duly delivered in the presence of:


.....
GROUP MANAGING DIRECTOR


.....
COMPANY SECRETARY/LEGAL ADVISER

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IN THE FEDERAL HIGH COURT
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT ABUJA

SUIT NO: FHC/ABJ/CS/14/2017

IN THE MATTER OF AN APPLICATION BY THE CHAIRMAN OF THE ECONOMIC AND FINANCIAL CRIMES COMMISSION FOR AN ORDER OF INTERIM ATTACHMENT OF OIL PROSPECTING LICENCE 245 PRESENTLY HELD BY SHELL NIGERIA EXPLORATION AND PRODUCTION COMPANY LIMITED (SNEPCO)

BETWEEN

NIGERIAN AGIP EXPLORATION LIMITED

- APPLICANT

AND

CHAIRMAN, ECONOMIC AND FINANCIAL CRIMES COMMISSION - RESPONDENT

WRITTEN ADDRESS IN SUPPORT OF THE APPLICANT'S MOTION DATED 31
JANUARY 2017

INTRODUCTION

1. This Written Address is submitted in support of Nigerian Agip Exploration Limited's (the "Applicant's") Motion on Notice dated 31 January 2017 (the "Motion to Discharge") seeking (a) an order discharging the *ex parte* Order of Interim Attachment made by this Honourable Court on 26 January 2017, and (b) an order discharging the *ex parte order* directing the Department of Petroleum Resources to manage OPL 245 on behalf of the Federal Government of Nigeria pending the conclusion of investigation and prosecution of the Applicant and other persons/ entities (the "Order").
2. The Motion to Discharge is supported by a 22 paragraph affidavit deposed to by Zainab Ndanusa, a legal practitioner in the firm of Messrs Aluko & Oyebode, Counsel to the Applicant (the "Supporting Affidavit").

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3. We will rely herein on all the averments in the Supporting Affidavit.

SUMMARY OF RELEVANT FACTS

4. In summary, the facts which are relevant to the determination of the Motion to Discharge are as follows:

a) This Honourable Court granted an Ex-parte Order dated 26 January 2017, (the "Order") attaching deep offshore Oil Prospecting Licence (OPL) 245 pending the completion of an ongoing investigation and prosecution by the Economic and Financial Crimes Commission (EFCC), sought vide its Ex-parte Originating Summons dated 11 January 2017 (the "Ex-parte Application").

b) OPL 245 is held jointly by the Applicant and Shell Nigeria Exploration and Production Company Limited (SNEPCO). As a result, the Order affects the interests of the Applicant.

c) The Ex-parte Application by which the Order was sought fails to disclose facts which show that (a) OPL 245 is the proceeds of a crime, and (b) there was no risk that OPL 245 would be dissipated, and therefore no basis for an application seeking to "preserve the res".

d) The omitted facts are stated at paragraphs 13 and 16 of the Supporting Affidavit.

ISSUES FOR DETERMINATION

5. We respectfully submit that the issues which arise for determination on the Motion for Joinder & Discharge are:

a. Whether this Honourable Court has the jurisdiction to make any orders pursuant to Sections 28 and 29 of the Economic and Financial Crimes (Establishment, etc.) Act, Cap E1, Laws of the Federation of Nigeria, 2004, those sections being inoperative since the Attorney-General of the Federation has not enacted any "prescribed rules" to bring the said provisions into effect.

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- b. *Whether Section 29 of the Economic and Financial Crimes (Establishment, etc.) Act, Cap E1, Laws of the Federation of Nigeria, 2004, upon which the Ex-parte Application was predicated, conflicts with Section 36 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended), and whether, for that reason, this Honourable Court had the jurisdiction to make the Order;*
- c. *Whether, having failed to disclose to this Honourable Court facts within its knowledge which are relevant to the grant of the Order, the Order ought to be discharged, and*
- d. *Without prejudice to (a) and (b) above, whether the Chairman of the EFCC failed to satisfy the pre-conditions to the making of the Ex-parte Application, and whether, having failed to meet these pre-conditions, the Ex-parte Application was irregular, and the Order granted on the basis of that Application ought to be discharged.*
- e. *Whether or not the Ex-parte Application was an abuse of process.*

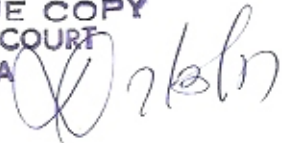
ARGUMENTS

ISSUE 1

Whether this Honourable Court has the jurisdiction to make any orders pursuant to Sections 28 and 29 of the Economic and Financial Crimes (Establishment, etc.) Act, Cap E1, Laws of the Federation of Nigeria, 2004, those sections being inoperative since the Attorney-General of the Federation has not enacted any "prescribed rules" to bring the said provisions into effect.

- 6. We respectfully submit that the provisions of Sections 28 and 29 of the EFCC Act which permit the seizure and interim attachment of property pending the completion of an investigation are inchoate, and cannot properly give rise to the exercise of jurisdiction by this Honourable Court to make an order pursuant thereto. Consequently, this Honourable lacked the jurisdiction to make the Order and it is, for that reason, null and void.
- 7. On the face of it, the Ex-parte Application is stated to be brought pursuant to the provisions of Sections 24(a), 26(1)(a) & (b), 28 and 29 (a) and (b) of the Economic and Financial Crimes Commission (Establishment, etc.) Act, Cap. E1, Laws of the Federation

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of Nigeria, 2004 (the "EFCC Act") and Section 44 (2)(k) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended).

8. In summary, the provisions relied on by the Chairman of the EFCC provide as follows:

- a. Section 24 (a) describes property subject to forfeiture as including "any property – whether real or personal, which represents the gross receipts a person obtains directly as a result of the violation of this Act or which is traceable to such gross receipts";
- b. Section 26 (1)(a) and (3) provides that property which is subject to forfeiture may be seized if the seizure is incidental to an arrest or search, and any property taken under this section is deemed to be in the custody of the EFCC subject to an order of Court;
- c. Sections 28 and 29 provide as follows:

“28. Where a person is arrested for an offence under this Act, the Commission shall immediately trace and attach all the assets and properties of the person acquired as a result of such economic or financial crime and shall thereafter cause to be obtained an interim attachment order from the Court.

29. Where –

(a) the assets or properties of any person arrested for an offence under this Act has been seized; or

(b) any assets or property has been seized by the Commission under this Act,

The Commission shall cause an ex parte application to be made to the Court for an interim order forfeiting the property concerned to the Federal Government and the Court shall, if satisfied that there is *prima facie* evidence that the property concerned is liable to forfeiture, make an interim order forfeiting the property to the Federal Government.”

- d. Section 44(2)(k) of the Constitution provides that the "temporary taking of possession of property for the purpose of any examination, investigation or enquiry", where provided for by law, is not to be affected by the provisions of Section 44(1)

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which precludes the compulsory acquisition of private property without compensation.

9. Not cited by the Chairman of the EFCC, and perhaps intentionally so, is **Section 26(1)(b)** which creates a condition precedent to the exercise of the rights created by **Sections 28 and 29**. **Section 26 (1)** in its entirety provides as follows:

"(1) Any property subject to forfeiture under this Act may be seized by the Commission in the following circumstances –

(a) The seizure is incidental to an arrest or search; or

(b) In the case of property liable to forfeiture upon process issued by the Court following an application made by the Commission **in accordance with the prescribed rules.**"

10. Under Sections 28 and 29, both of which are cited by the Chairman of the EFCC in support of the Ex-parte Application, the EFCC is entitled to (a) make an arrest, (b) seize assets and properties relating to the crime for which the arrest was made, and thereafter, (c) apply to Court for an order attaching the properties seized. The questions as to whether OPL 245 was in fact seized and whether it is property liable to forfeiture are discussed in detail at paragraphs 53 to 62 below.
11. Here, by reason of Section 26 (1)(b), the making of an application to the Court – whether for an "interim attachment order" or for an "interim order forfeiting the property concerned" as contemplated by Sections 28 and 29 respectively is required to be conducted in accordance with the prescribed rules. Therefore, the existence of, and compliance with prescribed rules are a pre-condition to the bringing of applications to Court under Sections 28 and 29.
12. In **Nigericare Dev. Co. Ltd v Adamawa State Water Board and Ors** (2008) 9 NWLR (pt. 1093) 498, the Supreme Court states in respect to condition precedents, as follows at pages 520 and 521 at paragraphs E and C respectively:

"A condition precedent is defined as one which delays the vesting of a right until the happening of an event.

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Where there is non-compliance of the statute that is shown to be mandatory, the suit and/or proceedings is/are a nullity, however well conducted."

- 13. As to whether there is a necessity for the Chairman of the EFCC to bring an application in line with prescribed rules as required by Section 26 (1) (b), we respectfully refer this Honourable Court to the counsel of the Supreme Court in **Osafire v. Odi** (1990) 3 NWLR [Pt. 137] 130 at 161, to the effect that: "*[i]t is always necessary to exercise powers conferred by an enabling statute within the four corners of the statute*". Similarly, in **Olaniyan v. UNILAG** (1985) 2 NWLR [Pt. 9] 599 at 623, the Supreme Court held that:

"A corporation or company which is created by statute or under a statute cannot do anything at all, unless authorised expressly or impliedly by the statute or instrument defining its powers. It simply has got no vires or powers or the authority to act outside the statute". (Emphasis ours)

- 14. It is also worthwhile to note that because the EFCC Act is a penal statute (and the interim attachment process is instituted in furtherance of a penal process), the provisions of the Act must be construed strictly. In **Ogboni v. Ojah** (1989) 1 NWLR [Pt. 100] 725 at 735, the Court of Appeal held as follows:

*"Rule 13, being a procedure which may result in an imposition of a penalty, must be strictly construed. In the case of **R v. Bullock** (1964) 1 Q.B. 481, it was held that statutes dealing with procedure or jurisdiction will be strictly construed if they relate to the imposition of any penalty and that if there is any ambiguity or doubt as to the procedural provisions it will be resolved in favour of the person liable to be penalised. This is so even though it may enable such person to escape punishment on a technicality (...) As was said in **Martin v. Mackonochie** (1878) L.R.3 Q.B. 730 at 774 by Cockburn C.J.,*

'In a criminal proceeding the question is not alone whether substantial justice has been done, but whether justice has been done according to law. All proceedings in poenam are, it needs scarcely be observed, strictissimi juris; nor should it be forgotten that the formalities of law, though here and there they may lead to the escape of an offender, are intended on the whole to insure the safe administration of justice and the protection of innocence, and must be observed. A party accused has the right to insist on them as matter of right, of which he cannot be

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deprived against his will; and the judge must see that they are followed." (Emphasis ours)

- 15. **Section 43 of the EFCC Act** provides that "*the Attorney-General of the Federation may make rules and regulations with respect to the exercise of any of the duties, functions or powers of the Commission under this Act.*". To date, no rules or regulations have been made which set out the process by which the powers created under Sections 28 and 29 are to be exercised.
- 16. As a result, Sections 28 and 29 are inchoate, and the powers they create cannot, as of yet, properly vest jurisdiction in this Honourable Court to grant the orders contemplated by those provisions. For this reason, this Honourable Court lacked the jurisdiction to grant the Order and it is, having been made without jurisdiction, null and void. We urge your Lordship to so hold.
- 17. Outside of the clear legal principles as outlined above, the lacunae caused by the absence of prescribed rules is apparent in the difficulties in exercising those powers. Perhaps the clearest indication of those difficulties is the nature of the process by which an application under Section 28 for the interim attachment of property ought to be brought. Here, the Chairman of the EFCC filed an '*Ex-parte Originating Summons*', a process not recognized either by the Federal High Court (Civil Procedure) Rules, 2009 or the EFCC Act itself.
- 18. These difficulties arise in the context of the reliefs which are claimed as well. We consider that prescribed rules ought to, and usually would provide guidance for example as to: (a) whether the EFCC or any other entity is required to manage an attached asset such as OPL 245 as a going concern, (b) whether the EFCC or any other entity will be liable for mismanagement of any seized asset, or (c) who is required to bear the costs of maintaining an asset such as OPL 245.
- 19. Here, the Chairman of the EFCC sought, and this Honourable Court issued an Order directing the Department of Petroleum Resources to manage OPL 245 during the period of the attachment, on behalf of the Federal Government – this is tantamount to a forfeiture of the asset. It is unclear on what basis this relief was sought, as Section 28 which contemplates an order for the interim attachment of property does not anticipate the forfeiture of the said assets or properties until a conviction is obtained – see Section 30 of the EFCC Act.

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- 20. It is these difficulties that have also given rise to questions as to the constitutionality of Sections 28 and 29 in and of themselves and the processes by which they are sought to be applied. These questions of constitutionality are discussed in detail, beginning from paragraph 22 below.
- 21. While there are no prescribed rules, as required by the EFCC Act, guiding the implementation of Sections 28 and 29, those provisions are inchoate and cannot properly be the basis for the exercise of jurisdiction by this Honourable Court. Being made without jurisdiction, the Order ought to be discharged. We urge your Lordship to so hold.

ISSUE 2

Whether Section 29 of the Economic and Financial Crimes (Establishment, etc.) Act, Cap E1, Laws of the Federation of Nigeria, 2004, upon which the Ex-parte Application was predicated, conflicts with Section 36 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended), and whether, for that reason, this Honourable Court had the jurisdiction to make the Order

- 22. The Applicant respectfully submits that, to the extent that it permits the forfeiture of property, even on an interim basis, without notice to the Applicant, **Section 29 of the EFCC Act** conflicts with the right to fair hearing protected by **Section 36** of the Constitution, is unconstitutional, and therefore null and void.
- 23. It is trite that where a statute conflicts with the provisions of the Constitution, that statute, to the extent of its inconsistency, will be null, void and of no effect. **Section 1 (3) of the Constitution** notwithstanding states that "*if any other law is inconsistent with the provisions of this Constitution, the Constitution shall prevail, and that other law shall be to the extent of the inconsistency, void*".
- 24. Where a statute conflicts with the provisions of the Constitution, the statute has no validity from commencement, and any actions taken on the basis thereof are null and void, and of no effect. In *Kotoye v CBN* (1989) 1 NSCC 238 at 250, at 255 as follows, per Nnaemeka-Agu JSC, the apex Court stated that:

"It follows therefore, that by the very letter of the Constitution, which is not only the supreme law of the land but also, in appropriate metaphor, the touchstone

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and yard-stick of measurement of the validity of all other laws, it is intended that such decisions should be appealable.”

25. **Section 315(3)** of the Constitution expressly preserves the right of every Court, including this Honourable Court to declare invalid any provision of an existing law on the ground of an inconsistency with any other law, including a provision of the Constitution.

26. In **Nongu v Local Government Service Commission & Anor** (2011) LPELR-4851(CA), the Court of Appeal held that:

“... once an act is declared unconstitutional, it loses its validity since it is contrary to the Grundnorm, the constitution, from where it derives its validity and legitimacy. Consequently, the act is to be declared null and void and of no effect.

27. The result is that, as recorded in the famous words of Lord Denning in **Macfoy v. United Africa Co. Limited** (1961) 3 WLR 1405 PC at 1409, and cited with approval by our Courts:

“If an act is void, then it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse”

28. Further, it is submitted that the Order made by this Honourable Court is void because (a) Section 29 of the EFCC Act, upon which the Ex-parte Application was based, has been declared to be unconstitutional, and (b) the grant of the reliefs sought by the Ex-parte Application without notice to the Applicant constitutes a breach of the right to fair hearing under Section 36 of the Constitution, it is therefore unconstitutional and for that reason, null and void.

Section 29 of the EFCC Act is null and void

29. At the time that the Ex-parte Application was filed, **Section 29** had been declared by the Court of Appeal pursuant to **Section 1(3)** as above, to be unconstitutional and, consequently, null and void. The basis for this declaration was that Section 29

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contravenes the provisions of **Section 36 (5)** of the Constitution which guarantees that "every person who is charged with a criminal offence shall be presumed to be innocent until he is proven guilty"

- 30. This express declaration, and the resultant effect on any orders made pursuant to Section 29, was put beyond doubt by the Court of Appeal in **Nwaigwe v Federal Republic of Nigeria** (2009) 16 NWLR (pt. 1166) 169 at 201 paragraphs B – C. The Court held as follows:

"Section 29 of the EFCC Act clearly imposes punishment on the appellants by way of forfeiture of property on the basis of mere suspicion. It constitutes an infraction on the rights of the appellant under Section 36(5) of the Constitution and is in wild riot or conflict with that constitutional provision.

I have no hesitation in finding the provision of section 29 of the EFCC Act as unconstitutional. I therefore invoke the provision of section 1(3) of the Constitution to declare the provision of Section 29 of the EFCC Act as null and void. That dictatorship like provision was an unfortunate misplacement in our laws under democratic governance.

The fourth issue is resolved in favour of the Claimants.

The next issue questions the life span of the interim order of forfeiture. I think my finding on and resolution of the immediate proceeding [sic] issue has over taken this very issue. Having found that section 29 of the EFCC Act is unconstitutional and void, the forfeiture order made under that void provision is equally a nullity and is therefore as good as never made. It was a complete non-starter in law. The question as to its life span therefore does not arise, since it is, ab initio lifeless."

- 31. The undeniable result, with the greatest respect to this Honourable Court, is that the Order made by this Honourable Court on 26 January 2017 is a nullity. We urge your Lordship to so hold.

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The Ex-parte Application and the Order are unconstitutional

- 32. Outside the express declaration made in respect of **Section 29** by the Court of Appeal in **Nwaigwe v FRN** (supra), we respectfully submit that for the reason that they were brought and made, respectively, without notice to the Applicant, they violate the right to fair hearing under Section 36 of the Constitution.
- 33. It is helpful to note, at the outset, that other than the express provision of **Section 29**, no other provision cited by the Chairman of the EFCC on the face of the Ex-parte Application permits a Motion to be brought for the attachment of property on an ex-parte basis.
- 34. The failure to put the Applicants on notice offends the principles of natural justice which are captured by **Section 36** of the Constitution. The Supreme Court has, in **Adigun v A.G Oyo State** (1987) 1 NWLR (pt. 53) 678, helpfully captured the way in which such an application offends the Applicant's right to fair hearing. **Adigun's Case** further shows that the nature of the proceedings does not relieve the burden imposed under **Section 36 of the Constitution**, and that the proper course of action, where there is a violation of **Section 36 of the Constitution**, is to nullify the proceeding. In this regard, the Supreme Court specially held as follows:

At page 721 paragraph D

"Natural justice demands that a party must be heard before the case against him is determined. Even, God gave Adam an oral hearing despite the evidence supplied by his act of covering his nakedness before the case against his continued stay in the Garden of Eden was determined against him."

At page 721, paragraphs F – G

"Once an appellant shows that there is an infringement of the principles of natural justice against him, it is my view that he needs to show nothing more. The finding that there is an infringement of the principle is sufficient to grant him a remedy."

At page 744, paragraph B

"The Court of Appeal appears to hold the view that observance of the rules of fair hearing was not necessary since the matter was not a lis inter partes. This is a

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clear misunderstanding of the protection of the right to fair hearing in S. 33 (2) of the Constitution 1979."

At page 744, paragraph D – E

"Section 33(2) power to determine questions arising in the administration of law speaks of conferring "on any government or authority law that affects or may affect the civil rights and obligations of any person ..." The subsection does not speak of lis inter-partes, and in fact concerns powers conferred on "government" or "authority" and not necessarily a court"

At page 744 – 745, paragraphs G – A

"I think it is important to emphasise that the crucial element in the application of the fundamental rights provisions, is that the invalidity of the proceedings complained of does not lie in the injury or prejudice to the persons affected, but by virtue of the breach of the provision itself. See Anamuthodo v Oilfields Workers Trade Union (1961) AC 945. Accordingly, prejudice to the person whose right to fair hearing has been infringed is not a necessary requirement of the invalidity of the act consequent upon the breach. It is unnecessary to consider whether the result would have been the same had the complaint been heard – See Ridge v Baldwin (1964) AC 40 at p. 128. The injury, if any is sought for, is the deprivation of the right itself. It is not quantifiable and so incalculable injury. Hence, the only remedy is to nullify the resulting proceedings."

(Emphasis Ours)

35. From the above decision of the Supreme Court, it is clear that:
- a. The determination of a matter which affects the rights and obligations of a person without that person being given the opportunity to be heard is contrary to the principles of fair hearing and offends the constitutional provisions which protect the right to fair hearing;
 - b. It would not matter, as in this case, that the application was not brought in the context of an *inter partes* proceedings, the Applicant ought to have been put on Notice;

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c. A violation of the right to fair hearing in this manner results in the nullity of the proceedings, and affects the jurisdiction of the Court.

36. We note, in particular, the provisions of **Section 44 (2) (k)** of the Constitution which permits, by law, the temporary taking of possession of property for the purpose of any examination, investigation or enquiry. This provision does not permit the making of such an application on an *ex-parte* basis, and given the provisions of **Section 36**, it is our respectful submission that any statutes which permit the interim attachment of property must do so subject to the right of the adverse party to a fair hearing. We urge your Lordship to so hold.

37. Given the nullity of **Section 29**, no other provision of the EFCC Act, including **Section 28** upon which the Ex-parte Application was predicated permits the making of an ex-parte application for the interim attachment of property. Therefore, the making of an application under that section without notice to the Applicant and the granting of an order on that basis offend **Section 36** of the Constitution. To the extent that an application which affected its rights and interests in such a fundamental way was to be determined, the Applicant was entitled to be put on notice.

38. In **Kotoye v CBN** (supra) at 254, the Supreme Court stated as follows:

"But I am of the clear view that, once it is conceded that what is involved is an order for interlocutory injunction and not a mere interim injunction to keep matters in status quo pending the hearing of the application for interlocutory injunction on notice to both sides or until a near named date, then the procedure runs counter to the letters and spirit of Section 33 of the Constitution of 1979 and ought not be entertained."

39. The Order granted by this Honourable Court is stated to last until the completion of proceedings which the EFCC is, by its own averments, yet to commence. This is a clear violation of the Applicant's Section 36 right to fair hearing, and is unconstitutional.

40. For completeness, we note that although empowered by **Section 43** of the EFCC Act to do so, the Attorney General of the Federation has made no rules of procedure relating to the exercise of the powers of seizure and an application for interim attachment contained in **Section 28** of the EFCC Act. We therefore submit that (a) that provision is inchoate and cannot form the basis of a valid application, and (b) assuming without

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conceding that the provisions may give rise to a valid application, then that application must comply with extant laws and in particular the provisions of Section 36 on fair hearing – that is to say, any such application must be made on notice.

- 41. At risk of repetition, the necessity of notice and its effect of proceedings is repeated by the Supreme Court in **Leedo Presidential Motel v Bank of the North Limited** (1998) 10 NWLR (pt. 570) 353 at 380 – 381 as follows:

"I should myself think that an ex parte motion is inappropriate where the interests of the other party will be adversely affected except in a case of extreme urgency and for a limited period only. Justice demands that both sides are heard or given an opportunity to be heard before an order affecting the rights and obligations of one of them is made. This is in accord with the provisions of the Constitution. Natural justice also demands it.

Where a party is entitled to notice of a proceeding and there is failure to serve him, the failure is a fundamental defect which goes to the root of the competence (or jurisdiction) of the court to deal with the matter..."
(Emphasis ours)

- 42. It is trite that every Court has the jurisdiction to set aside its own order made without jurisdiction. This Honourable Court therefore is able to (and we respectfully submit, ought to) set aside and discharge the Order made on 26 January 2017 following the EFCC's wrongful Ex-parte Application.
- 43. By reason of the Ex-parte Application which is not permitted by law, and which violates the provisions of the Constitution and the principles of natural justice, the proceedings before this Honourable Court and the Order made on 26 January 2017 are a nullity. We urge your Lordship to so hold.

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ISSUE 3

Whether, having failed to disclosed to this Honourable Court facts within its knowledge which are relevant to the grant of the Order, the Order ought to be discharged

- 44. Without prejudice to our arguments in respect of **ISSUES 1 and 2** above to the effect that the Order made on 26 January 2017 is null and void, we respectfully submit that the grant of the Ex-parte Order was made upon the suppression of material facts and ought to be discharged.
- 45. The Supreme Court in **Universal Trust Bank Ltd & Ors v Dolmetsch Pharmacy Nigeria Limited** (2007) All FWLR (pt. 385) 434 at 450 – 451 stated as follows:

"It is settled law that the court that makes an ex parte order of interim injunction has the inherent power or jurisdiction in an appropriate case to vary, or discharge same. The grounds on which the court will set aside, vary or discharge an order of interim injunction made ex parte include the following:

- (i) if the plaintiff has not used his administrative powers that might have resolved the difficulty;*
- (ii) if default has been made in giving security for costs;*
- (iii) if the affidavit has not been filed when the injunction was moved for;*
- (iv) if it was granted on a suppression or misrepresentation of material facts;*
- (v) if it was irregularly granted;*
- (vi) if the plaintiff failed to attend to be cross examined;*
- (vii) if there had been delay in complying with an undertaking to amend the writ by adding a party as plaintiff;*
- (viii) if there is non-disclosure of material facts.*

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It is no excuse for the plaintiff or a party to say that he was not aware of the importance of the facts which have been suppressed or not brought to the attention of the Court. The law is that the court will deal strictly with a party applying ex parte and who had misrepresented or suppressed material facts. (Emphasis ours)

46. The provisions of **Section 28** and **29** (to the extent that they are constitutional, which is not admitted) empower the Chairman of the EFCC to seize and to apply to attach assets and properties "acquired as a result of such economic and financial crime" or which is "liable to forfeiture". Suffice it to state that, by definition in **Section 24(a)**, property is liable to forfeiture where it is the proceeds of a violation of the EFCC Act.

47. As stated in paragraph 7 of the Applicant's Supporting Affidavit, the EFCC attempts to discharge this obligation as follows:

7. I have read the said Ex-parte Application and the Supporting Affidavit, and I know that:

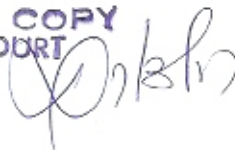
- a. The Ex-parte Application was brought pursuant to the provisions of Sections 24(a), 26(1)(a) & (3), 28 and 29 (a) and (b) of the Economic and Financial Crimes Commission (Establishment, etc.) Act, Cap. E1, Laws of the Federation of Nigeria, 2004 (the "EFCC Act") and Section 44 (2)(k) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended)
- b. At paragraphs 4 – 8 of the Supporting Affidavit, Mr. Ahmed avers that the EFCC's investigation was commenced on the basis of a petition received from shareholders of Malabu Oil and Gas Limited ("Malabu") who alleged a conspiracy to defraud and forgery relating to the shareholding of Malabu, and that the investigation had been conducted in collaboration with foreign investigative agencies in the United Kingdom, the United States of America, Switzerland, Italy and the Netherlands;
- c. In paragraph 9 of the Supporting Affidavit, Mr. Ahmed avers that:
 - i. Oil Prospecting Licence (OPL) 245 was awarded to Malabu in questionable circumstances in 1998 – at a time when General Sani Abacha (a sitting Head of State) and Dan Etete (serving Minister of Petroleum) were shareholders of

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the company and that they used their positions to confer an unfair advantage on Malabu;

- ii. Following the allocation, Malabu contracted "Shell Petroleum and SNEPCO" in a joint venture to prospect and carry on petroleum operations in the block, and to the knowledge of Shell, the allocation of OPL 245 to Malabu was fraudulent;
 - iii. In 2001, the Federal Government of Nigeria (FGN) withdrew the allocation of OPL 245 to Malabu, and re-allocated the OPL to Shell Nigeria Ultra Deep Ltd. Malabu sued the FGN to challenge the revocation. This suit was settled out of Court and OPL 245 was allocated to Malabu;
 - iv. Shell and Agip (the Applicant) entered into a "fraudulent agreement" with Malabu whereby the companies paid monies - US\$1.2 Billion - intended for use to "bribe Dan Etete and his cronies";
 - v. The FGN was defrauded by under paying the sum of US\$210 Million as signature bonus on OPL 245
- d. At paragraph 11 of the Supporting Affidavit, Mr. Ahmed avers that the FGN is in the process of preferring a charge bothering on "Conspiracy, Bribery, Official Corruption and Money Laundering" against a number of persons, including the Applicant, and
 - e. At paragraphs 16 – 17 of the Supporting Affidavit, Mr. Ahmed avers that the asset sought to be attached (OPL 245) is deemed to be the proceeds of crime and that it is necessary to obtain an interim order to "preserve the res".
48. These averments were made in an affidavit deposed to on 11 January 2017 by one Ibrahim Ahmed, described as an Operative of the EFCC (the "EFCC's Supporting Affidavit").
49. As averred at paragraph 13 of the Applicant's Supporting Affidavit, the EFCC has either suppressed, failed to disclose and/or misrepresented material facts which have a bearing on the allegation that OPL 245 is the proceeds of a crime, as follows:

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- a. *In the first place, the FGN had previously challenged Malabu's entitlement to OPL 245 on the basis that the allocation was improperly made, and withdrew OPL 245 from Malabu. OPL 245 was then allocated to Shell Nigeria Ultra Deep Limited (SNUD) following a competitive bid in 2002.*
 - b. *This withdrawal and re-allocation of OPL 245 gave rise to a number of proceedings which are **not disclosed** in the Supporting Affidavit. For instance, Malabu commenced proceedings against the FGN seeking to recover the rights to OPL 245. These proceedings were settled by an agreement reached on 30 November 2006 in which the FGN (of which neither General Abacha or Chief Dan Etete were a part) agreed to re-allocate OPL 245 to Malabu. This settlement agreement was entered as a judgment of the Court of Appeal in Appeal No. CA/A/99/M/06 and subsists to date. It is on the basis of this judgment that the re-allocation of OPL 245 to Malabu in 2006 was again confirmed on 2 July 2010 by the FGN. Thereafter, OPL 245 was also subject to a series of litigations and arbitrations between SNUD, FGN and Malabu up to the time that OPL 245 was allocated to SNEPCO and the Applicant.*
 - c. *Contrary to the averments contained in the Supporting Affidavit, the terms upon which OPL 245 was then allocated to SNEPCO and the Applicant are contained in the Block 245 Resolution Agreement dated 29 April 2011.*

*Attached and marked as **Exhibit A2** is a copy of the Block 245 Resolution Agreement.*
 - d. *The monies paid by the Applicant pursuant to the Block 245 Resolution Agreement were **paid transparently to the FGN pursuant to that Agreement.***
50. Likewise, the EFCC's Supporting Affidavit fails to disclose facts material to its allegation that the interim order of attachment was necessary to preserve the res. At paragraph 16 of the Applicant's Supporting Affidavit, these relevant facts are stated as follows:
- a. *OPL 245 is an oil block located (deep) offshore Nigeria, with water depths of 1700 to 2000 metres;*

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- b. *the Applicant, as Operator, is still receiving tenders for contracts to provide equipment necessary for the development of the block, and as such no oil is being produced from OPL 245 to date, and*
- c. *The Applicant cannot transfer its rights in OPL 245 without the consent of the Minister for Petroleum.*

...

- 51. If these facts which the Chairman of the EFCC suppressed, misrepresented or failed to disclose had been disclosed to this Honourable Court at the time that the Order was made, they would have shown that contrary to the allegations contained in the EFCC's Supporting Affidavit, OPL 245 is not the proceeds of a crime, and there was no risk that the res would be destroyed or dissipated.
- 52. By reason of the fact that the Order was made without the benefit of the facts highlighted at paragraphs 13 and 16 of the Applicant's Supporting Affidavit, it ought to be discharged. We urge your Lordship to so hold.

ISSUE 4

Without prejudice to (a) and (b) above, whether the Chairman of the EFCC failed to satisfy the pre-conditions to the making of the Ex-parte Application, and whether, having failed to meet these pre-conditions, the Ex-parte Application was irregular, and the Order granted on the basis of that Application ought to be discharged.

- 53. Without prejudice to the above, we respectfully submit that, assuming without conceding that the Ex-parte Application was properly made, the Chairman of the EFCC failed to satisfy the pre-conditions for the grant of the application, in particular (a) that the application must be made in respect of property seized by the EFCC, and (b) that the said property must be shown, on a prima facie basis, to be the proceeds of a crime.
- 54. Without question, where a statute prescribes a pre-condition for the exercise of a right or the taking of an action, the failure to meet the said conditions affects the jurisdiction of the Court. Please see the decision in **Nigercare Dev. Co. Ltd v Adamawa State Water Board and Ors** (supra) and quoted at paragraph 12 above.

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- 55. Sections 28 and 29 of the EFCC Act (reproduced at paragraph 8 above), individually and jointly prescribe two conditions necessary for an application to attach/forfeit property. These conditions are (a) that the property must have been seized, and (b) that the property is the proceeds of a crime.

Seizure

- 56. In **Nwaigwe v Federal Republic of Nigeria** (supra), the Court of Appeal held, at page 191, paragraphs B – D that:

"It follows, therefore, that at the time the application for interim forfeiture of the property and assets in question was made at the court below was made, there was no valid seizure of the property as provided by section 28 of the EFCC Act. The Court below could not have granted an interim order for forfeiture of any property that has not been validly seized by the EFCC. The seizure of property by the EFCC is a necessary pre-condition to a competent ex-parte motion for an interim order of forfeiture of property to the Federal Government." (Emphasis ours)

- 57. It is a matter of fact that OPL 245 was not, at any point prior to the filing of the Ex-parte Application seized by the EFCC. As a result, this Honourable Court could not properly have exercised jurisdiction in respect of the Ex-parte Application. Indeed, EFCC makes no attempt at all, to establish that there was a seizure of the asset, as there was none. Consequently, we submit that a condition precedent to the exercise of jurisdiction to make the Order was absent and the Order was thus made without jurisdiction and is therefore null and void. We urge your Lordship to so hold.

Proceeds of a crime

- 58. As stated at paragraph 44 above, **Sections 28 and 29** empower the Chairman of the EFCC to seize and to apply to attach assets and properties "*acquired as a result of such economic and financial crime*" or which is "*liable to forfeiture*". **Section 24(a)**, explains that property is liable to forfeiture where it is the proceeds of a violation of the EFCC Act.
- 59. The requirement to establish a prima facie case is adequately described in **Duru v Nwosu** (1989) LPELR-968(SC) as follows:

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"What then is the meaning of the expression "prima facie case"? The expression "prima facie" comes from two Latin words primus (which means first) and facies (which means face). "Prima facie", therefore literally means on the first appearance. Applied to the rule of onus of proof in the law of evidence, a "prima facie case" is a case supported by such a quantum of evidence on every material issue thereof that, if no evidence is called by the other side, or, if called, as often happens in civil cases, such contrary evidence is disregarded, the plaintiff (or the party on which the burden lies) will be entitled to the verdict of the court on the case or the particular issue, as the case may be. It is evidence which, viewed on the face of it alone, is sufficient to entitle the court to proceed with the proceedings. In a civil case at least, it is not a case which takes into account the evidence called by or on behalf of the opposite party"

- 60. Outside of the bare averments, the EFCC's Supporting Affidavit (summarised at paragraph 33 above), does not exhibit any document which shows, even on a prima facie basis, that OPL 245 is the proceeds of a crime committed by the Applicant. Of the documents exhibited to that Affidavit:
 - a. Exhibit EFCC 1 is a copy of a petition made against the shareholders of Malabu Oil and Gas Limited ("Malabu"). The Applicant is not a shareholder or otherwise, a beneficial owner of any shares in Malabu;
 - b. Exhibit EFCC 2 is an internal document of an agent of the Federal Government of Nigeria. The Applicant did not write, and was not the recipient of Exhibit EFCC 2.
 - c. Exhibit EFCC 3 is, like Exhibit EFCC 2 a document which is an internal document of the Federal Government of Nigeria. The Applicant is not privy to the internal debates of the Federal Government of Nigeria, and the document does not suggest in any way that the Applicant had committed a crime.
 - d. Exhibit EFCC 4 and EFCC 5 do not include charges against the Applicant in these proceedings.

- 61. The burden on the Chairman of the EFCC therefore is to put forward evidence sufficient to show on a prima facie basis, other than the bare averments contained in the Affidavit, that OPL 245 is the proceeds of a crime committed by the Applicant. The Chairman of

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the EFCC has failed to do so. We urge your Lordship to so hold. In addition, we humbly urge Your Lordship to consider the averments at paragraph 13 of the Applicant's Supporting Affidavit, which demonstrate that there can be no prima facie argument that the OPL 245 amounts to the proceeds of any crime committed by the Applicant. The Applicant only paid monies pursuant to a transparent agreement with the FGN (**Exhibit A2**), and received its allocation of an interest in OPL 245 only pursuant to that Agreement.

62. On the premises, we humbly urge Your Lordship to vacate the Ex Parte Order on the ground that the preconditions to the grant of the attachment order were not met.

ISSUE 5

Whether or not the Ex-parte Application was an abuse of process.

63. For all the reasons argued above, the Ex-parte Application was improper, and the Order is a nullity, and otherwise, ought to be discharged. In addition to all the above, the Ex-parte Application was an abuse of process and this Honourable Court ought to protect its process from such an abuse by setting aside the Order.
64. An abuse of process involves the use of court process in pursuit of a frivolous application or for a purpose which is vexatious or oppressive to the person against whom the process is applied. In **Dingyadi v INEC** (No.2) (2010) 18 NWLR (Pt.1224) 1 at 195 paragraph E – G, the Supreme Court states as follows:

*"The term abuse of process connotes simply the misuse of court's process and it includes acts which otherwise interfere with the course of justice. Clearly the acts include where without reasonable ground a party institutes **frivolous, vexatious and oppressive actions**, and also by instituting of multiplicity of actions or is on a frolic acts of forum shopping i.e. seeking for a favourable court to entertain a matter. It also includes depriving the court of jurisdiction. Arising from such acts, the court has the power to treat the acts as contemptuous of the court which can, apart from resorting to the use of its coercive powers of contempt, can also order the action to be stayed (as has been done here in Appeal No. CA/S/EP/GOV/10/2009) or dismiss it as the case may be."*

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65. The Ex-parte Application filed by the Chairman of the EFCC is frivolous, vexatious and is oppressive to the Applicant, and for that reason, it is an abuse of process.

66. It is not in doubt that the purpose of the power of interim attachment provided for in the EFCC Act is to prevent assets believed to be "proceeds of crime" from being dissipated during investigation/trial, so as not to render the final judgment of the court nugatory; see *Esai Dangabar v. Federal Republic of Nigeria (2012) LPELR-19732(CA)*:

"The order is in my view in the interest of both parties. This is because it will prevent dealing with the properties in such a way that could render the final Judgment of the Court nugatory. (...) The lower Court made the order in issue in order to preserve the properties suspected of being proceeds of crime in view of the fact that the Appellant may take steps to defeat the purpose of the relevant provisions of the EFCC Act which deals with forfeiture."

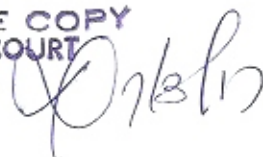
67. Paragraph 17 of the EFCC's Supporting Affidavit states that the Ex-parte Application was necessary to preserve the res. This is simply untrue.

68. There is absolutely no risk that OPL 245 could be destroyed or dissipated during the conduct of the EFCC's investigation and/ or prosecution. The Ex-parte application did not allege, let alone establish any risk of destruction or dissipation. Indeed there is none because, first, no transfer of the Applicant's interest in OPL 245 can be made without the knowledge and approval of relevant government agencies and agents. **Section 14 of the First Schedule to the Petroleum Act, Cap. P.13, LFN 2004** provides as follows:

"Without the prior consent of the Minister, the holder of an oil prospecting licence or an oil mining lease shall not assign his licence or lease, or any right, power or interest therein or thereunder." (Emphasis ours)

69. Third, as averred by at paragraph 18(b) of the Supporting Affidavit, the Applicant has not begun to produce petroleum resources from OPL 245. There are therefore no petroleum resources which can be dissipated by the Applicant, in order to warrant the need for an interim attachment order. In addition, even if petroleum resources were to be produced by the Applicant from OPL 245 during the pendency of any investigation or prosecution, such resources cannot be dissipated without the knowledge, approval and participation of DPR, Nigerian Customs Service, Nigerian National Petroleum Corporation, and other agencies/ agents of the Federal Government of Nigeria. See for example, the following:

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Section 1, Pre-Shipment Inspection of Exports Act, Cap. [...] LFN 2004


"As from the commencement of this Act, no goods to which this Act applies shall be exported from Nigeria unless an inspecting agent appointed pursuant to section 12 of this Act has issued in respect of the goods a Clean Certificate of Inspection to the over-seas buyers of the goods."

Section 6, Crude Oil (Transportation and Shipment Regulations), 1984

"No ship, tanker or vehicle in which crude oil is carried shall depart from Nigeria for any reason whatsoever without full documentation in the prescribed manner having been concluded by the appropriate authorities and without specific authorisation by designated officers of the Department of Customs and Excise and any other Government agency having authority in that regard."

- 70. Finally, as averred at paragraph 18(d-f) of the Supporting Affidavit, if the Ex Parte Order is sustained, petroleum operations on OPL 245 will be disrupted, and the Applicant will stand to make significant losses. We respectfully submit that it is disproportionate and unreasonable that the Applicant should be put at risk of making these significant losses, when the discharge of the Ex Parte Order would in no way prejudice either the investigation or the prosecution of the Applicant, or lead to the dissipation of OPL 245 or any petroleum resources derived therefrom.
- 71. In this context, it is also important to consider that pursuant to **Section 36(5) of the 1999 Constitution of the Federal Republic of Nigeria**, the Applicant enjoys a presumption of innocence. The interim attachment of property is in itself a derogation from the rights of another – where that other is entitled to the presumption of innocence guaranteed by **Section 36 (5)** of the Constitution. Accordingly, notwithstanding the EFCC's stated intention to investigate and prosecute the Applicant and other persons, there is no basis for the pre-emptive and unnecessary imposition of punitive measures on the Applicant, when the mischief that the power of interim attachment seeks to remedy (i.e. dissipation of assets) clearly does not exist.
- 72. In our respectful submission, the Order amounts to no more than an unnecessary disruption of the legitimate commercial activities of the Applicant, without the existence of any basis for the disruption (i.e. no risk of the dissipation of the asset). We respectfully

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submit that this is greatly at odds with the presumption of the Applicant's innocence, as enshrined in **Section 36(5) of the Constitution**, as well as the purpose and spirit of the interim attachment process contained in the EFCC Act. The Chairman of the EFCC is not entitled to exercise the statutory powers in the EFCC Act at his whim and to needlessly trigger the judicial process to the prejudice of the rights of another, where there is no risk that the property is likely to be dissipated.

73. On the premises, we respectfully submit that the Ex-parte Application is an abuse of process, and for that reason, this Honourable Court ought to discharge the Order. We urge your Lordship to so hold.

RESERVATION OF RIGHTS

74. The Applicant and its direct and indirect shareholders reserve all rights and remedies under Nigerian law and international law, including applicable investment protection treaties entered into by the Federal Republic of Nigeria, in relation to the adverse measures which have prompted the Motion to Discharge.

CONCLUSION

75. We humbly urge Your Lordship to grant the Motion to Discharge dated 31 January 2017.

DATED THIS 31ST DAY OF JANUARY, 2017



BABATUNDE FAGBOHUNLU, SAN
CHUKWUKA IKWUAZOM
OLUJOKE ALIU (signed)
HAMID ABDULKAREEM
OLADIMEJI OJO
COUNSEL TO THE APPLICANT
ALUKO & OYEBODE
1, MURTALA MUHAMMED DRIVE,
IKOYI, LAGOS
Email chukwuka.ikwuazom@aluko-oyebode.com

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FOR SERVICE ON:

CHAIRMAN, ECONOMIC AND FINANCIAL CRIMES COMMISSION

C/O

ALIYU M. YUSUF

JONSON OJOGBANE (JP)

H.M. MOHAMMED

LEGAL AND PROSECUTION DEPARTMENT

ECONOMIC AND FINANCIAL CRIMES COMMISSION

NO. 1, HOMBORI STREET, OFF FREETOWN STREET.

OFF ADETOKUNBO ADEMOLA CRESCENT

WUSE II, ABUJA

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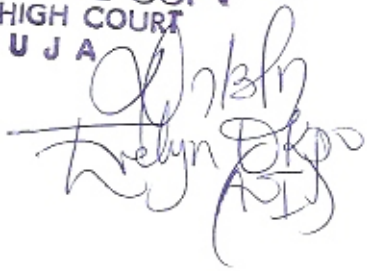
DEPARTMENT OF PETROLEUM RESOURCES

7, KOFO ABAYOMI STREET

VICTORIA ISLAND

LAGOS

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ABUJA



A handwritten signature in blue ink, appearing to read 'D. N. B. O. J. O. O.', is written over the stamp. Below the signature, the initials 'A. I. J.' are also written in blue ink.