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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

MOTION ON NOTICE

Brought pursuant to Order 26 Rules 1, 2, 3, 4 & 11 of the Federal High Court (Civil Procedure) Rules 2009 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 relief:

1. AN ORDER of this Honourable Court staying, suspending or otherwise restraining the Economic and Financial Crimes Commission, whether by itself, agents, servants, privies or any other body howsoever described, from executing, further executing, or taking any action or further action in pursuance of, the Ex-parte Order dated 26 January 2017 attaching Oil Prospecting Licence (OPL) 245, pending the determination of the Applicant's Motion on Notice dated 31 January 2017 seeking *inter alia*, to discharge the Ex-parte Order.

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FEDERAL HIGH COURT
ABUJA
CASHIER'S OFFICE

Signature *[Signature]*
Date *08/03/17*

2897-5314-1109

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2. **AN ORDER** of interlocutory injunction restraining the Economic and Financial Crimes Commission and the Department of Petroleum Resources, whether by themselves or through any agents, servants, privies or any other body howsoever described, from interfering with the conduct of petroleum operations by the Applicant pursuant to the rights conferred by OPL 245, on the basis of the Ex-parte Order dated 26 January 2017 or on any other basis, pending the determination of the Applicant's Motion on Notice dated 31 January 2017 seeking *inter alia*, to discharge the Ex-parte Order.

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. By a Motion on Notice dated 31 January 2017, the Applicant herein seeks the discharge of the Order.
3. 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 therefore entitled to bring its Motion on Notice dated 31 January 2017.
4. The Applicant's Motion on Notice contains good and arguable grounds for the discharge of the Order, including that:
 - 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.*

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- 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, is itself null and void;*
 - 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 authorize the application for interim attachment to be by way of a Motion Ex-parte. In the absence of the express statutory authorization, 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 preconditions to the making of such an application, as provided for by the EFCC Act. That is, showing (a) that the asset sought to be attached is one which had been seized in connection with an arrest, 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.*
5. It is just and convenient, and there exist exceptional circumstances on the basis of which this Honourable Court ought to stay the execution of the Order, including that:
- a. The Applicant is challenging the grant of the Ex Parte Order on jurisdictional grounds.

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- b. 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. 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;
- c. There is no risk whatsoever that the Applicant may dissipate OPL 245 during the course of the investigation or prosecution which the Economic and Financial Crimes Commission purports that it intends to conduct. No transfer of rights in OPL 245 can occur without the knowledge and approval of relevant government agencies and functionaries, including the Department of Petroleum Resources and the Minister of Petroleum Resources.

DATED THIS 31ST DAY OF JANUARY 2017



[Handwritten Signature]

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 tunde.fagbohunlu@aluko-oyebode.com

FOR SERVICE ON:

CHAIRMAN, ECONOMIC AND FINANCIAL CRIMES COMMISSION
 C/O
 ALIYU M. YUSUF
 JONSON OJOGANE (JP)
 H.M. MOHAMMED

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

COMMISSIONER FOR OATHS
FEDERAL HIGH COURT
ABUJA

SUIT NO: FHC/ABJCS/174/2017

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

AFFIDAVIT IN SUPPORT OF THE APPLICANT'S
MOTION ON NOTICE FOR STAY DATED 31 JANUARY 2017

I, Zainab Ndanusa, Nigerian and Legal Practitioner, of Afri Investment House, Plot 2669, Aguiyi Ironsi Street, Cadastral Zone A 6, Maitama, Abuja, do hereby make oath and state as follows:

Introductory Depositions

1. I am a Legal Practitioner in the employment of Messrs. Aluko & Oyebode, the law firm acting in these proceedings for Nigerian Agip Exploration Limited, (the "Applicant"), whose lawful corporate organs have directed and authorised me to depose to this affidavit in support of the Motion on Notice dated 30 January 2017 (the "Motion for Stay and Injunction"). I also have the consent of Messrs. Aluko & Oyebode to depose to this affidavit.

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[Signature]

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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 & Oyeboade 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 Motion for Stay and Injunction

4. By the Motion for Stay and Injunction, the Applicant seeks:
 1. *AN ORDER of this Honourable Court staying, suspending or otherwise restraining the Economic and Financial Crimes Commission, whether by itself, agents, servants, privies or any other body howsoever described, from executing, further executing, or taking any action or further action in pursuance of, the Ex-parte Order dated 26 January 2017 attaching Oil Prospecting Licence (OPL) 245, pending the determination of the Applicant's Motion on Notice dated 30 January 2017 seeking inter alia, to discharge the Ex-parte Order.*
 2. *AN ORDER of interlocutory injunction restraining the Economic and Financial Crimes Commission and the Department of Petroleum Resources, whether by themselves or through any agents, servants, privies or any other body howsoever described, from interfering with the conduct of petroleum operations by the Applicant pursuant to the rights conferred by OPL 245, on the basis of the Ex-parte Order dated 26 January 2017 or on any other basis, pending the determination of the Applicant's Motion on Notice dated 30 January 2017 seeking inter alia, to discharge the Ex-parte Order.*

The Ex-parte Order

5. The Ex-parte Order made by this Honourable Court on 26 January 2017 (the "Ex Parte 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

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

The Applicant

- 7. Nigerian Agip Exploration, the Applicant, is a company established under the Laws of the Federal Republic of Nigeria and having its registered office at No. 40/42 Aguiyi Ironsi Street, Maitama, Federal Capital Territory, Abuja, Nigeria.
- 8. 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.

- 9. I verily believe therefore, that the interests of the Applicant are affected by the grant of the Order by this Honourable Court.

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The Motion to Discharge

10. I am aware that the Applicant has caused to be filed a Motion on Notice dated 31 January 2017 by which the Applicant seeks (a) the discharge of the Order (the "Motion to Discharge"), and (b) the discharge or 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, as follows:

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 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.*

11. I have read the Applicant's Motion to Discharge, and I know that part of the grounds relied upon by the Applicant include that:

3. *Furthermore, as the Order was made without notice to the Applicant, it is important that, in furtherance of the Applicant's right to fair hearing, the Applicant be accorded the opportunity to adduce facts and arguments (which were not before the court at the time of the grant of the Order) as to whether there is good basis for the grant of the Order.*

4. *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,*

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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, is itself null and void;
- 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 authorize the application for interim attachment to be by way of a Motion Ex-parte. In the absence of the express statutory authorization, 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 preconditions to the making of such an application, as provided for by the EFCC Act. That is, showing (a) that the asset sought to be attached is one which had been seized in connection with an arrest, 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.

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12. I believe that the Applicant's Motion to Discharge contains good and arguable grounds for the discharge of the Order.

13. I am informed by Mrs. Chinwe Njoku, Deputy Division Manager, Corporate Legal Services of the Applicant, in the course of a telephone conversation on 28 January 2017, at about 11am, and I verily believe it to be true that:
 - a. OPL 245 is located in ultra deep waters offshore Nigeria.
 - b. Following the award of OPL 245 to NAE and SNEPCO in 2011, the Applicant and SNEPCO have incurred huge capital and operating expenditure on OPL 245.
 - c. The Applicant currently has numerous employees whose work is devoted to the conduct of petroleum operations on OPL 245.
 - d. The Department of Petroleum Resources has no statutory power to take over the operations and/ or management of an oil prospecting licence.
 - e. Due to the immediately preceding averment, the management of OPL 245, which requires millions of dollars to keep it doing, will be disrupted.
 - f. 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.
 - g. No transfer of rights in OPL 245 can occur without the knowledge and approval of relevant government agencies and functionaries, including the Department of Petroleum Resources and the Minister of Petroleum Resources.
 - h. Finally, the production of petroleum resources from OPL 245 has not begun. Accordingly, there are no proceeds from the sale of petroleum resources which could be dissipated by the Applicant. Even if any petroleum resources were produced from OPL 245 in the near future, those resources cannot be taken out of Nigeria without the knowledge, approval and participation of the Department of Petroleum, Nigerian Customs Service, Nigerian National Petroleum Corporation, and other agencies/ agents of the Federal Government of Nigeria..

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- 14. I verily believe therefore that neither the ongoing investigation nor the office of the Chairman of the EFCC will be prejudiced by the grant of this application.
- 15. I make this Affidavit in good faith verily believing the contents to be true in accordance with the Oaths Act.

[Signature]

 DEPONENT

Sworn to at the Registry of the Federal High Court,
 Abuja, this *21st* day of January 2017

BEFORE ME

 COMMISSIONER FOR OATHS
 FEDERAL HIGH COURT
 ABUJA

 COMMISSIONER FOR OATHS

FEDERAL HIGH COURT
 ABUJA
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Signature: *[Signature]*
 Date: *[Signature]*

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[Signature]



FEDERAL 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.

HMPR/07/01

May 11, 2011

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

COMMISSIONER FOR OATHS
 FEDERAL HIGH COURT
 ABUJA

Mo-NAE.

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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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
APPLICANT'S MOTION ON NOTICE 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 for Stay and Injunction") seeking; (a) stay and suspension of the execution of the Ex-parte Order of Interim Attachment made by this Honourable Court on 26 January 2017, and (b) an interlocutory injunction restraining the Economic and Financial Crimes Commission and the Department of Petroleum Resources from interfering with the conduct of petroleum operations by the Applicant pursuant to the rights conferred by OPL 245.
2. The Motion for Stay and Injunction is supported by a 15-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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Signature: *[Handwritten Signature]*
Date: *[Handwritten Date]*

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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 for Stay and Injunction are as follows:
- a) This Honourable Court granted an Ex-parte Order dated 26 January 2017, (the "**Ex Parte 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 Applicant has filed a Motion on Notice dated 31 January 2017 (the "**Motion to Discharge**"), seeking the discharge of the Ex Parte Order, on the grounds (among others) that: (a) having been made via a procedure previously declared to be unconstitutional by the Court of Appeal, the Order amounts to a nullity; (b) The Ex-parte Application by which the Ex Parte Order was sought failed to disclose crucial facts which would have showed that there was no prima facie case that OPL 245, as far as the Applicant is concerned, is the proceeds of a crime, and (c) in any event, there was no risk that OPL 245 would be dissipated, and therefore no basis for an application seeking to "*preserve the res*".
 - d) The Applicant has now applied for the stay of execution of the Ex Parte Order, pending the determination of the Motion to Discharge.

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ISSUES FOR DETERMINATION

5. We respectfully submit that the issues which arise for determination on the Motion for Stay and Injunction are:
 - a. *Whether the Applicant has demonstrated that there are good grounds for the grant of the stay of execution of the Ex Parte Order.*
 - b. *Whether the Applicant has demonstrated that there are good grounds for the issuance of an order of interlocutory injunction restraining the Economic and Financial Crimes Commission and the Department of Petroleum Resources from giving effect to the Order, pending the determination of the Motion to Discharge.*

ARGUMENTS

ISSUE 1

Whether the Applicant has demonstrated that there are good grounds for the grant of the stay of execution of the Ex Parte Order.

6. The jurisdiction of this Honourable Court to stay the execution of its orders or judgments is undoubted. In this respect, **Order 32 Rule 2 of the Federal High Court (Civil Procedure) Rules, 2009** provides as follows.

'The Court shall have the power to make or refuse an order for stay of execution or proceedings subject to such conditions as shall appear just including the deposit in Court of any money adjudged due to any party in the judgment appealed to or from'. (Emphasis ours)

7. It is also undoubted that the Ex Parte Order is of an executory character, and is thus capable of being subject to an order of stay of execution; *Okoya v. Santili* (1990) 2 NWLR [Pt. 131] 172 at 196^G, *Yaro v. Arewa Construction Limited* (1998) 7 NWLR [Pt. 558] 368 at 380^{A-B}.
8. Having established the foregoing, we respectfully submit that the only question which remains to be determined on this issue is whether in view of the principles established

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by judicial practice, this Honourable Court can exercise its discretion in favour of the Applicant, by staying the execution of the Ex Parte Order.

- 9. The principles relevant to the grant of a stay of execution were distilled by the Supreme Court in *Okafor & Ors v. Nnaife* (1987) 2 NSCC 1194 at 1197 – 1198 as follows:

'These principles have been reiterated in many decisions of this Court. Perhaps it may be well here to re-emphasise some of them:

- 1. *The Courts have an unimpeded discretion to grant or refuse a stay. In this, like in other instances of discretion, the Court is bound to exercise that discretion both judicially as well as judiciously and not erratically.*
- 2. *A discretion to grant or refuse a stay must take into account the competing rights of the parties to justice. A discretion that is biased in favour of an applicant for stay but does not adequately take into account the respondent's equal right to justice is discretion that has not been judicially exercised.*
- 3. ...
- 4. *An unsuccessful litigant applying for a stay must show 'special circumstances' or 'exceptional circumstances' eloquently pleading that the balance of justice is weighted in favour of a stay.*
- 5. *What will constitute these 'special' or 'exceptional' circumstances will no doubt vary from case to case...*
- 6. ..." (Emphasis ours)

- 10. In this case, the Ex Parte Order seeks to wrest from the Applicant the control and direction of petroleum operations in the acreage covered by OPL 245, pending the conclusion of its investigation and potential prosecution of the Applicant and other entities for the commission of alleged crimes. We respectfully submit, with reference to the averments at paragraph 11, 12 and 13 of the Supporting Affidavit, that there are special and exceptional circumstances on the basis of which the execution of the Ex Parte Order should be stayed, pending the determination of the Motion to Discharge.

- 11. First, as indicated at paragraph 11 of the Supporting Affidavit, the Applicant is challenging jurisdiction of this Honourable Court to have issued the Ex Parte Order on the basis of a provision and procedure (Section 29 of the EFCC Act) which is, and has been declared to be, unconstitutional. It is settled (in the context of stay of execution pending appeal) that where an order/ judgment is challenged on jurisdictional grounds,

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this constitutes a "special circumstance". We respectfully submit that the same principle is applicable in this situation. In **Martins v Nicannar Food Co. Ltd (1988) Vol. 19, 1 NSCC 613 at 622**, the Supreme Court, per the Hon. Justice Nnaemeka-Agu JSC, held as follows:

"Applying the above principles to the instant appeal, I am clearly of the view that where an appellant has exercised his constitutional right of appeal against a judgment of a lower court, and the appeal genuinely raises a substantial issue as to the jurisdiction of the court below, there exists a special circumstance for which the court below or the appellate court could, and ought to, grant a stay of execution." (Emphasis ours)

- 12. Second, there is absolutely no risk that OPL 245 could be destroyed or dissipated during the conduct of the EFCC's investigation and/ or prosecution. 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)

- 13. Third, as averred by at paragraph 13 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.
- 14. Finally, as averred at paragraph 13 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.

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15. 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. Accordingly, having not been charged or found guilty of the commission of any offence, there is no basis for the imposition of any unnecessarily punitive measures on the Applicant.
16. On the premises, we respectfully submit that the circumstances of this case warrant the grant of an order staying the execution of the Ex Parte Order, pending the hearing and determination of the Motion to Discharge. We humbly urge this Honourable Court to so hold.

ISSUE 2

Whether the Applicant has demonstrated that there are good grounds for the issuance of an order of interlocutory injunction restraining the Economic and Financial Crimes Commission and the Department of Petroleum Resources from giving effect to the Order, pending the determination of the Motion to Discharge.

17. As a matter of Nigerian law, it is settled that in order to be entitled to the grant of an order of interlocutory injunction, the Applicant must establish the presence of the following conditions:
 - a) That the Applicant has a legal right which is threatened and ought to be protected;
 - b) That there are serious issues to be tried in the substantive suit;
 - c) That the balance of convenience weighs in its favour, and
 - d) That damages would not be adequate compensation for any injury or harm that the Applicant would suffer if the injunction is not granted.
18. We respectfully refer this Honourable Court to the cases of *Akapo v. Hakeem Habeeb & Ors* (1992) 2 NSCC 313 at 327, *Akibu & Ors v. Oduntan* (1991) 1 NSCC 271 at 277, *Kotoye v. Central Bank of Nigeria* (1989) ALL NLR 76; *Obeya Memorial Hospital & Anor. v. A.G. Federation & Anor* (1987) 2 NSCC 961; *Ogbonnaya v. Adapalm (Nig.) Ltd* (1993) 5 NWLR [Pt. 292] 147 at 157^{E-F}, 159^{B-C}.

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19. As will be demonstrated below, the Applicant has satisfied all the preconditions for the grant of prayer 2 on the Motion for Stay and Injunction, i.e. interlocutory injunction restraining the restraining the EFCC and DPR from interfering with the conduct of petroleum operations on OPL 245 by the Applicant.

Existence of a legal right

20. In *Akapo v. Hakeem Habeeb* (supra at 327), the Supreme Court, per Karibi-Whyte JSC, held as follows:


"It is a fundamental principle for the grant of injunctions that the application will always be granted to support a legal right. ... Hence, the most important precondition of an applicant is to show that he has a legal right which is threatened and ought to be protected. ... It follows therefore that the Court has no power to grant an injunction where the applicant has not established a recognizable legal right." (Emphasis ours)

See also the Court of Appeal in *Leasing Co. (Nig.) Ltd. v. Tiger Ind. Ltd.* (2007) 14 N.W.L.R. [Pt. 1054] 350.

21. We respectfully submit that it is common ground that the Applicant is one of the holders of OPL 245. The EFCC itself alludes to this fact at paragraph 9(v) of the affidavit in support of its Ex Parte Application (although the Applicant rejects the allegation that it "secured OPL 245 through fraudulent scheme ..."). Being a holder of OPL 245, it is undoubted that the Ex Parte Order (attaching OPL 245 and directing that it be managed by DPR) directly affects the Applicant's legal rights.
22. We therefore respectfully submit that the Applicant has demonstrated that it has a legal right which is threatened by the Ex Parte Order.

Serious issues to be tried

23. We respectfully submit that the Motion to Discharge discloses serious and arguable issues (some of which are novel), on the basis of which the Applicant requests that the Ex Parte Order be discharged. The grounds stated on the Motion to Discharge are as follows:

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- 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, is itself null and void;

- 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 authorize the application for interim attachment to be by way of an ex parte application. In the absence of the express statutory authorization, 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 preconditions to the making of such an application, as provided for by the EFCC Act. That is, showing (a) that the asset sought to be attached is one which had been seized in connection with an arrest, 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.

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24. We therefore respectfully submit and urge Your Lordship to hold that there are serious issues to be tried on the Motion to Discharge.

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Balance of convenience

25. In *Ekwomchi v. Ukwu* [2002] 1 NWLR, [Pt. 749] 590 at 606, the court held that the determination of there the balance of convenience lies entails: "[w]eighing the Plaintiff's need for protection against the corresponding need of the Defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights."
26. As averred at paragraph 13(f) of the Supporting Affidavit, if the Ex Parte Order is sustained, the Applicant stands to make substantial losses. However, as demonstrated at paragraph 13(g)&(h) of the Supporting Affidavit, and as argued above, if the Ex Parte Order is discharged, there is no risk whatsoever that the OPL 245 or any proceeds therefrom can be dissipated or destroyed. In addition, the discharge of the Ex Parte Order will in no way interfere with the EFCC's purported investigation or prosecution of the Applicant or any other person. The current situation is therefore one in which the Applicant is being put at risk of significant loss for no just cause.
27. On the premises, we humbly urge this Honourable Court to hold that the balance of convenience weighs in favour of the Applicant.

Risk of irreparable damage

28. A further requirement for the grant of an order of interlocutory injunction is that an applicant must show that the refusal of the application would cause it to suffer irreparable damage or injury. In *Bello v. A.G. Lagos State* [2007] 2 NWLR (Pt. 1017) 115 at 138, "irreparable damage" was defined as –

"Injury which is substantial and cannot be adequately remedied or atoned for by damages, not injury which cannot be possibly repaired. The fact that a plaintiff may have a right to recover damages is (no) objection to the exercise of jurisdiction by injunction if this right cannot be adequately protected or vindicated by damages".

29. As contended in the Motion to Discharge, the Attorney General of the Federation has made no rules and regulations to guide the actions of the EFCC in the exercise of its

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powers of interim attachment and forfeiture under the EFCC Act (to the extent that these powers are at all constitutional). There is therefore no guidance for example as to: (a) whether the EFCC is required to manage an attached asset such as OPL 245 as a going concern, (b) whether the EFCC 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. Indeed, as averred at paragraph 13(d) of the Supporting Affidavit, the Applicant currently has numerous employees, whose employment is tied to OPL 245. There is no guidance as to what is to happen to these employees during the interregnum forced by the Ex Parte Order. The Ex Parte Order therefore creates a situation in which the Applicant is being unnecessarily put at risk of making significant losses, without any guarantee of being compensated for such losses if it is found that the Ex Parte Order was wrongly made.

30. Finally, we humbly urge Your Lordship to take judicial notice of the fact that the Nigerian economy is currently in an economic recession. The ability of the EFCC or the Federal Government to compensate the Applicant for any losses it may suffer as a result of the Ex Parte Order is no doubt impaired. The Applicant is therefore at risk of making significant losses, including reputational damage which an award of damages cannot adequately compensate for.

31. On the premises, we humbly urge Your Lordship to hold that the Applicant has demonstrated that it will suffer irreparable damage if the Ex Parte Order is not discharged.

RESERVATION OF RIGHTS

32. 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 this Application.

CONCLUSION

33. On the premises of the foregoing arguments, we humbly urge Your Lordship to grant the prayers sought by the Applicant on the Motion for Stay and Injunction dated 31 January 2017.

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[Signature]

DATED THIS 31ST DAY OF JANUARY, 2017

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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

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