

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF LOUISIANA

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**Case Name:** Barisich et al v. BP, PLC et al  
**Case Number:** [2:10-cv-01324-CJB-SS](#)  
**Filer:** George Barisich  
United Commercial Fisherman's Association,  
Inc.

**Document  
Number:** [19](#)

**Docket Text:** [MOTION For Court Supervision Or, Alternatively, To Appoint Special Master by George Barisich, United Commercial Fisherman's Association, Inc.. Motion Hearing set for 6/9/2010 09:30 AM before Judge Carl Barbier. \(Attachments: # \(1\) Memorandum in Support, # \(2\) Exhibit 1-7, # \(3\) Notice of Hearing, # \(4\) Proposed Order\)\(Garner, James\)](#)

**GEORGE BARISICH, individually and on behalf of  
UNITED COMMERCIAL FISHERMAN'S  
ASSOCIATION, INC.**

**Plaintiff**

**Versus**

**BP, P.L.C.; BP  
EXPLORATION &  
PRODUCTION**

**INC.; and BP AMERICA PRODUCTION  
COMPANY**

**Defendants**

**CIVIL ACTION NO. 10-01316**

**SECTION "N"  
Judge Kurt D. Engelhardt**

**DIVISION (2)  
Mag. Judge Joseph C.  
Wilkinson, Jr.**

**MEMORANDUM IN SUPPORT OF MOTION TO APPOINT A SPECIAL MASTER**

Plaintiff George Barisich, individually and on behalf of United Commercial Fisherman's Association, Inc., submits this memorandum in support of his motion to appoint a special master to provide oversight and implementation guidance for the claims processing program initiated by the defendants to provide emergency interim compensation for the damages caused by the ongoing oil spill discharging from BP's<sup>1</sup> Macondo prospect in the Gulf of Mexico.

**I. Background**

This case arises from the explosion of the vessel Deepwater Horizon and the resulting and ongoing oil spill. The Deepwater Horizon was a floating oil rig operated by BP approximately fifty miles southeast of Venice, Louisiana in the Gulf of Mexico. At approximately 10:00 p.m. on April 20, 2010, while the Deepwater Horizon was performing

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<sup>1</sup> The defendants in this matter – BP, p.l.c., BP Exploration & Production Inc., and BP America Production Company – are referred to collectively herein as "BP."

drilling operations for crude oil off the coast of Louisiana at BP's Macondo Prospect, an apparent blow-out of the well occurred, resulting in the fiery explosion of the rig, which subsequently capsized and sank to the ocean floor.

With the failure of the well's casing and the concurrent failure of the blow-out preventor mechanism (the "BOP"), the well began to discharge oil directly into the Gulf of Mexico. The well is discharging at a daily rate estimated between 210,000 to 2.9 million gallons of crude oil.<sup>2</sup> The plume has expanded to thousands of square miles and has already contaminated barrier islands, wetland marshes, and beaches. The Governor of the State of Louisiana has requested a fishery disaster declaration under the Magnuson-Stevens Fishery Conservation and Management Act.<sup>3</sup> The oil that is being released is an extremely hazardous and toxic substance that poses a significant risk to the wetlands and marine life in the Louisiana Coastal Zone. The expanding massive plume of oil continues to migrate to the Louisiana coastline every day, threatening the nation's largest remaining wetland areas and vulnerable habitat of fish, oysters, crabs, shrimp, birds, and other precious wildlife.

Louisiana's commercial fishermen have been directly impacted by the closure of fishing areas by state and federal agencies as a result of the oil discharge. The Louisiana Department of Wildlife and Fisheries has closed a large area of Louisiana's waters to commercial fishing and oyster harvesting. *See* Exhibit 3, Maps of Closure Areas. Likewise, the National Marine Fisheries Service has closed all federal waters off Louisiana to commercial and recreational fishing from the Atchafalaya Bay eastward to the Mississippi state line, and has further "strongly advise[d] fishermen not to fish in areas where oil or oil sheens (very thin layers of floating oil)

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<sup>2</sup> *See, e.g.,* Justin Gillis, "Size of Oil Spill Underestimated, Scientists Say," *New York Times* (May 13, 2010) (Exh. 1 hereto).

<sup>3</sup> *See* Letter from Gov. Bobby Jindal to Gary Locke, Sec'y of Commerce (April 29, 2010); Letter from Gov. Bobby Jindal to Sec'y Locke (May 14, 2010) (attached as *in globo* Exh. 2).

are present, even if those areas are not currently closed to fishing.” See Exhibit 4, National Marine Fisheries Service, Southeast Fishery Bulletin, May 12, 2010.

As a result of these closures and advisory, Louisiana commercial fishermen, members of the putative class, have been unable to fish and are deprived of their livelihood. Stated simply, many of these fishermen have lost all income and face economic ruin.

In response to this dire situation, BP set up a claims procedure to provide emergency compensation to commercial fishermen, and began distributing monies, which will offset some, but not all, of their existing damages. There are currently a number of different claim centers open throughout Southeastern Louisiana, as well as a 1-888 number dedicated to the process.<sup>4</sup> While the compensation of these fishermen is a laudable goal, BP’s claim scheme called into question whether BP would assert that payments operated as releases of all damages or a liquidation of those damages. Further, BP in some instances refused to issue checks to fishermen who had already retained attorneys. Pursuant to these concerns, on May 12, 2010, Plaintiffs and BP entered into a Joint Stipulation. (Doc. No. 17). The Joint Stipulation provides, in part, that the checks BP has been presenting to fishermen as interim subsistence compensation for damages incurred as a result of the Oil Spill (“Loss of Income Advance”), would operate in no way as a release or waiver of any part of the payees’ claims against BP arising out of the Oil Spill, and that the payments constituted an unconditional tender by BP and may only operate to offset the payee’s claims against BP out of the Oil Spill. *See id.*

BP continues to implement its emergency claims scheme and distribute checks to commercial fishermen to compensate them, in part, for their existing damages. Despite the stipulation reached with BP, these exigent circumstances and other BP actions demand that this claims process be monitored by the Court. Judicial oversight, in the form of appointment of a

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<sup>4</sup> “Fishermen Line Up for BP Payouts,” (May 11, 2010) (<http://www.wdsu.com>) (Exh. 5 hereto).

special master to oversee claims processing, will create efficiency and cohesion, and promote justice by establishing ground rules to ensure that all qualifying claimants are swiftly compensated for a portion of their damages on a uniform basis and without the taking of improper advantage by BP.

The claims scheme implemented by BP is completely under its aegis, and exists without any judicial oversight. This lack of independent oversight infects the scheme with threatened irreparable harm to the fishermen. As has already been brought to this Court's attention and subject to a Consent Order (Doc. No. 6), BP inserted language in the Master Vessel Charter Agreements that could have led to fishermen limiting or waiving altogether any claims against BP. There is currently no system in place in BP's claims scheme to prevent such abuses – whether intentional or not – from again occurring. Despite the potential good intentions of BP in administering the claims processing program, it has erected numerous barriers to the hard-working fishermen of Louisiana receiving necessary subsistence funding to pay their bills and feed their families. For instance, BP is requiring: (1) boat registration information, even though many of the fishermen whose livelihoods have been destroyed may be crew who do not own their own boats; (2) tax records for multiple years; and (3) drivers' licenses showing residence in Plaquemines or St. Bernard parishes, even though many of the affected fishermen commute into those parishes to work each day because of displacement from homes completely devastated by Hurricane Katrina.<sup>5</sup> Then, once a fisherman produces the documentation required by BP, he often experiences delays in getting payments for the damages.<sup>6</sup> Even more troubling – especially

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<sup>5</sup> “Fishermen Line Up for BP Payouts,” (<http://www.wdsu.com>) (May 11, 2010) (Exh. 5 hereto) (describing document requirements for the claims center); Bill Sasser, “Vietnamese, Cambodian fishermen among hardest hit by BP oil spill,” Yahoo News (May 8, 2010) (Exh. 6 hereto) (describing the barriers faced by local fishermen attempting to participate in BP's claims scheme).

<sup>6</sup> Alana Semuels, “Louisiana fishermen bitter over BP job handouts,” L.A. Times (May 13, 2010) (Exh. 7 hereto) (interviewing George Barasich, who notes that each of the 11,191 commercial fishing permits represents a captain

in light of various emergency relief obtained against BP on behalf of Louisiana fishermen – legal counsel have been informed by many fishermen that BP, upon learning that the fisherman has hired a lawyer, states that the fisherman will be put at the “back of the line,” will only be able to make their claim if their counsel appears at a claim center in person, or will not be eligible at all for the emergency damage payments. At the very least, this causes fishermen who have properly sought legal protection to experience delay in receiving much-needed damages payments. And at worst, this reaction by BP – ostensibly out of ethical concerns –punishes fishermen who endeavor not to be at the mercy of BP and its lawyers, and doubtlessly discourages others from seeking legal advice or representation.

There is simply too much danger – some of this risk already realized via haphazard and unfair means – in the claims process being administered without judicial oversight and a Special Master. This is the only way to ensure that the claims scheme initiated by BP can relieve some of the harm without compromising the rights of fishermen. In the short period of time since the oil spill began and litigation commenced, BP has instituted a four-point legal strategy: (1) seek stays of individual pending lawsuits; (2) oppose MDL proceedings; (3) move to have the cases heard in Houston, while Plaintiffs languish in wait for some clarity on which court from the MDL panel will hear the cases; and (4) the attempt to resolve as many claims as possible through its own independent claims scheme. While the law encourages settlements and while it is positive that BP is seeking to compensate those facing economic ruination from damages, the Court has a longstanding duty to protect the general interests of putative class members and the specific interests of fishermen regardless of their status as potential class members. Judicial intervention in this process is necessary and indeed is imperative to prevent irreparable harm and protect the

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and about 2.5 deckhands; and interviewing fisherman David Palmer, who observed that BP “is dallying on handing out checks.”).

rights of these commercial fishermen. Clarity, cohesion, and continuity of the claims scheme must be secured by this Court.

## **II. Analysis**

In light of the foregoing, the plaintiff requests that this Court appoint itself or a Special Master(s) pursuant to Federal Rule of Civil Procedure 53 to aid the Court in the monitoring and oversight of the BP claims scheme. Appointment of a Special Master is warranted in pre- and post-trial matters where the district judge or magistrate is unable to address effectively or timely such matters. *See* Fed. Rule Civ. Proc. 53(a)(1)(C). Rule 53(a) “authorizes a court in which any action is pending to appoint a special master.” *Cruz v. W.B. Hauck*, 515 F.2d 322, 327 (5<sup>th</sup> Cir. 1975). The appointment of a special master pursuant to Rule 53 lies within the discretion of the district court. *Johnson Control Systems, Inc. v. Phoenix Control Systems*, 886 F.2d 1173, 1176 (9<sup>th</sup> Cir. 1989); *see, e.g., St. Martin v. Mobil Exploration & Producing U.S.*, 2001 WL 1153011, \*3 (E.D. La. Sept. 27, 2001). Further, the district court may decide the extent of the master’s duties. *Johnson Control Systems, Inc.* 886 F.2d at 1176. Further, beyond the provisions of Rule 53, it lies in the court’s “inherent power to supply itself with this instrument for the administration of justice when deemed by it essential.” *Ruiz v. Estelle*, 679 F.2d 1115, 1161 n.240 (5<sup>th</sup> Cir. 1982). “It is abundantly clear that granting the courts a flexible mechanism for appointing special masters to address litigation issues is an appropriate way to meet the challenge presented by the growth of complex civil litigation.” Mark A. Fellows & Roger S. Haydock, “Federal Court Special Masters: A Vital Resource in the Era of Complex Litigation,” 31 *Wm. Mitchell L. Rev.* 1269, 1277 (2005).

Courts often will determine that the role of a Special Master under Rule 53 is especially suited to the administration of a settlement regime or to enforce a particularly logistics-driven

court order. *See, e.g., Navarro-Ayala v. Hernandez-Colon*, 3 F.3d 464, 465 (1st Cir. 1993) (observing that the Special Master had been tasked with monitoring compliance with a stipulation prescribing reforms and setting standards for care and treatment at a hospital); *Citron v. Vaughn*, 2007 WL 4225790, \*2 (D. Conn. Nov. 28, 2007) (“It is well settled that a federal court has the inherent power to appoint an agent to oversee the implementation of its consent decrees.”); *St. Martin*, 2001 WL 1153011 at \*3 (“This Court finds that a Special Master is appropriate in this case as the remedy ordered involves maintaining and repairing canals situated in a fragile ecosystem.”); *Cronin v. Browner*, 90 F. Supp. 2d 364, 377-78 (S.D.N.Y. 2000) (“The special master would be better positioned than this Court to perform the monitoring necessary to ensure compliance, given his time availability and expertise.”); *Powell v. Ward*, 487 F. Supp. 917, 935 (S.D.N.Y. 1980) (“We think that compliance efforts here will be expedited by the appointment of a master to monitor compliance until we are satisfied that the due process protections required by our order have been incorporated into the prison routine.”).

Here, the Court has already entered two orders, one a Consent Order and one a Joint Stipulation, with regard to BP’s payments to fishermen, and the circumstances surrounding those payments. Those orders are intertwined with BP’s claims scheme. Yet, questionable circumstances and results continue to surround the claims processing program administered by BP. There can be little question that the monitoring of this program constitutes the type of “extraordinary circumstances” required to justify additional scrutiny of the claims scheme by this Court or through the appointment of a Special Master. The gravity and breadth of the oil spill, and the potentially protracted destructive effect on the marine life in Louisiana and therefore on the fishermen’s livelihoods, are without precedent. There is a gross imbalance in the sophistication and bargaining power between BP and the fishermen. All circumstances support a

finding that judicial oversight is needed: BP's past actions in administering the claims scheme, BP's disproportionate sophistication, and the one-sided and adhesionary nature of the contracts that BP has employed. In order to address and balance these forces, while maintaining field flexibility and fast resolutions, judicial oversight either by this Court or through a Rule 53 Special Master is the ideal solution.

In both orders already entered by this Court addressing issues arising from BP's payment programs, the Court expressly retained jurisdiction over further related matters. The exercise of that retained jurisdiction is warranted to assume an oversight role itself or to appoint a Special Master to oversee the BP claims processing program. Clear, concise, and comprehensive ground rules for qualification for payment, priority of payment, and payment to represented claimants, and to monitor and resolve any further disputes surrounding payment of claimants as they arise will aid in overall efficiency of the claim scheme and legal challenges to the administration of that scheme. Moreover, the appointment of a Special Master or Masters will also serve to aid BP in the recovery process, in that it will help alleviate any concerns regarding improper contact with commercial fishermen who are represented by counsel.

As this Court is well aware, it holds a special duty to protect seamen, and thereby many of the fishermen whose damages will be partially redressed by the claims scheme. *See Coto v. J. Ray McDermott, S.A.*, 1999-1866 (La. App. 4th Cir. Oct. 25, 2000), 772 So. 2d 828, 830. The situation of the fishermen is desperate, and BP is the designated responsible party for this harm. Though BP is taking some steps purportedly to remedy that harm, it is doing so from a position of tremendous imbalance. Without judicial oversight, BP can unilaterally dictate all terms. The desperation of the claimants may dictate that they have no choice but to accede to BP's terms. Under Rule 53, under this Court's inherent power, and under this Court's special duty as an

admiralty court, the plaintiff requests that the Court exercise discretion to provide balance and oversight through a Special Master.

### **III. Conclusion**

For all of the above reasons, plaintiff George Barisich, individually and on behalf of United Commercial Fisherman's Association, Inc., requests that this Court grant the Motion to Appoint a Special Master and grant all other and further relief to which plaintiff may be entitled.

Respectfully submitted,

*/s/James M. Garner*

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**CERTIFICATE OF SERVICE**

I hereby certify that the above and foregoing pleading has been served on all counsel of record through this Court's electronic filing and notification system, this 15<sup>th</sup> day of May, 2010.

*/s/James M. Garner* \_\_\_\_\_