

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

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

Civil Action No. 2:10-cv-01316

v.

Section: N Mag. 2

BP, P.L.C., BP EXPLORATION & PRODUCTION
INC., and BP AMERICA PRODUCTION COMPANY

**PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF
EMERGENCY MOTION FOR SUPPLEMENTAL
TEMPORARY RESTRAINING ORDER**

Introduction

The Master Vessel Charter Agreement (the "MVCA") that defendants, BP, plc, BP Exploration & Production Inc., and BP America Production Company (collectively "BP"), have entered into with volunteers assisting in clean-up efforts off the Louisiana coast are glaringly silent on an important issue – safety oversight for workers' exposure to hazardous chemicals. MVCA attached as Ex. A.

It is not alarmist for Plaintiff to point out that had similar safety oversight been present and in effect at the location of another national tragedy and disaster—the 9/11 attack on New York's Twin Towers—that great physical harm to the first responders could have been alleviated. This Court has the opportunity and responsibility to insure that worker safety should not and cannot be forgotten again, even under the most exigent of circumstances.

In a Nutshell: the Emergency Court Action Necessary to Protect these Cleanup Workers

(1) The Emergency Relief Requested

Plaintiff asks that BP acknowledge that it is responsible for hazardous chemical safety oversight for all persons performing services under an MVCA. Once BP acknowledges this

responsibility, BP should then report to the Court how it carrying out its obligations for safety oversight.

(2) **Why Plaintiff Needs this Immediate Relief from the Court**

The MVCA, pursuant to which commercial fishing vessels and their crews will be deployed to assist BP in the cleanup, fails to contemplate safety oversight responsibility. To be clear, these workers will be exposed in the course of the cleanup to hazardous chemicals. While there are rigorous regulatory schemes in place under OSHA and/or the US Coast Guard regulations for worker exposure to hazardous chemicals, these commercial fishing vessel owners have no ability or experience with complying with such safety oversight schemes. On the other hand, the other party to the MVCA, BP which drafted these agreements, has vastly superior knowledge and experience in this field.¹ Indeed, it is most probable that the vessel owners made subject to the MVCAs or whom are contemplating entering into the MVCAs have no idea that they are faced with exposure to hazardous chemicals and that necessary, but complex regulatory schemes exist for safety oversight of workers threatened with exposure to hazardous chemicals.

BP is the only party that can (and should) assume responsibility for hazardous chemical safety oversight for these commercial fishing vessels and crews. And, yet, the MVCA is entirely silent on this issue. This glaring oversight must be corrected before the safety of these first responders is hideously compromised.

Factual Argument

Despite mustering volunteer workers who do not have pervious experience or training regarding hazardous chemicals, BP fails in the MVCA to assume safety oversight for hazardous chemical exposure. Expecting the volunteer responders, already victims of the ongoing oil spill

¹ Plaintiff will not, however, comment on BP's success at complying with such regulations. Instead, he acknowledges only that BP has superior knowledge of and experience at complying with same.

disaster, also to carry out and be responsible for hazardous chemical safety oversight is unconscionable. BP has put the entire Gulf Coast and its people in jeopardy with the ongoing crude oil release from its Macondo prospect. BP should not be allowed to cause further harm by attempting to foist important safety oversight obligations on the well-intentioned, but non-expert owners and crews of commercial fishing vessels.

Plaintiff has previously argued to the Court that “BP’s demanding that Plaintiff – and others, including many, many members of the United Commercial Fisherman’s Association, Inc. which Plaintiff represents – execute the Agreement BP drafted to cover its own hide before allowing Plaintiff – and those others – to assist in cleaning up an environmental disaster of possibly unprecedented scale that BP caused is akin to demanding that a person running into their own burning home sign a release limiting or giving up their claims against the arsonist that caused the fire.” *See* Memorandum in Support of Plaintiff’s [First] Emergency Motion for Temporary Restraining Order. BP’s failure in the MVCA to assume the necessary hazardous chemical safety oversight is akin to the aforementioned arsonist expecting that the homeowner also be a professional firefighter with special “HazMat” training, experience, and equipment,.

The important responsibility for hazardous chemical safety oversight which will necessarily arise under the performance of the MVCAs must fall upon the sole party responsible for this clean-up and for the hiring of non-professional “HazMat” responders, such as the these commercial fishing vessels and their crews. The silence in the MVCA on this key issue will cause further – and irreparable – injury to the citizens of Louisiana and responders from all the Gulf States. And, at worst, it must be considered that this may be yet another dastardly effort by

BP to compromise the safety of these vessel owners and crews when they are at their most vulnerable.²

For these reasons, Plaintiff, individually and on behalf of the United Commercial Fisherman's Association, Inc. as President thereof, respectfully requests that his Motion for Supplemental Temporary Restraining Order be granted to alleviate the risk to him of immediate and irreparable harm before a preliminary injunction hearing may be scheduled to hear all evidence regarding the issues raised in his Motion.

FACTUAL BACKGROUND

The Facts Previously Presented to the Court

Plaintiff incorporates by reference the factual background contained in his Memorandum of Law in Support of Emergency Motion for [First] Temporary Restraining Order.

The Supplemental Facts

The compelling facts supporting the requested relief are detailed in the Verified Complaint for Declaratory and Injunctive Relief. Those facts substantiate that the requirements for injunctive relief are met.

Further, in support of his Emergency Motion and Supplemental Complaint for Declaratory Judgment and Injunctive Relief, Plaintiff submits the following Declarations, which are attached and incorporated by reference as follows:

Ex. B: Declaration of Dr. Vernon E. Rose, Dr.PH, with attachments; and

Ex. C: Declaration of Cmdr. David E. Cole, USCG (ret.), with attachments.

² As this Court is aware, the other thing "spewing" out of BP these days comes from its legal department. One-sided and unconscionable releases and contracts drafted by BP are inundating the fishing communities along the Gulf Coast. That BP would seek to take advantage of the citizens of this region under these exigent circumstances and in such a myriad of ways shocks the conscience.

The Declaration of Dr. Vernon E. Rose, Dr.PH

The purpose of the submitting the Rose declaration to this Court is two-fold. First, Dr. Rose informs the Court of the fact that the crude oil spilling from BP's Macondo prospect unquestionably contains hazardous materials, including, but not limited to substances such as benzene, cyclohexane, ethylbenzene, toluene, and xylene. Ex. B at ¶ 5 and 11(a). “[W]orker exposure to all are regulated as toxic substances by OSHA.” *Id.* Dr. Rose also points out that the MCVA clearly addresses vessel and crew contact with those substances as a consequence of the description of “SERVICES” to be performed as part of the oil-spill clean-up. *Id.* at ¶ 6.

Second, Dr. Rose educates the Court regarding the complex and multi-layered regulatory scheme regarding worker exposure to such hazardous materials. In broad strokes, that scheme provides for the following: (1) a written safety and health program, (2) medical surveillance, (3) hazard identification, (4) use of personal protective equipment, (5) monitoring of airborne hazardous chemicals, (6) risk identification, (7) worker notification, and (8) training of workers. *Id.* at ¶ 9. Based on his review of the situation, Dr. Rose concludes that:

The Master Vessel Charter Agreement does not address the issue of worker health and safety and appears to require the individual boat owners to become experts in hazardous waste management and the recognition and control of their and their crew's exposure to hazardous chemicals. This is an unrealistic expectation. To protect the health and well being of the individuals involved in the services described in 11.B above requires the establishment and implementation of an effective and comprehensive hazardous waste and emergency control plan for the owners and crews performing services under the Master Vessel Charter Agreements, as required under OSHA's Hazardous Waste and Emergency Response regulation. In order to ensure the safety of these workers, BP should file with the court a written safety and health program targeted to this specific class of workers and make periodic additional reports to the court on actions taken under that plan and problems encountered. It would also seem appropriate for BP to fulfill the requirements of the OSHA regulation in all aspects including appropriate training with an emphasis on hazard recognition and exposure control, exposure monitoring and evaluation, as well as the provision of safety and protective equipment and supplies to these workers.

Rose Decl. at ¶ 7.

The Declaration of Cmdr. David E. Cole, USCG (ret.)

The Declaration of Cmdr. David E. Cole, USCG (ret.) also raises the significant concerns voiced by Dr. Rose about the crews of commercial fishing vessels being tasked by BP under the MVCA for the performance of cleanup services without the necessary safety oversight from trained and experienced parties. Cole Decl. at Ex. 3. Cmdr. Cole recognizes that these fishing vessels “are not constructed or equipped to operate in the presence of oil or other hydrocarbons as either cargoes or where these commodities ate [sic] [eat] freely... as where there is a discharge into the environment.” *Id.* at ¶ 7. Cole further points out that captains and crews of these vessels “are not trained, by virtue of the customs of their industry or the professional competence requirement of the Coast Guard, to recognize or avoid the hazards to their health of the safety of their vessels, of exposure to the commodities which would be found in a spill of crude oil.” *Id.*

Cole concludes:

These uninspected commercial fishing vessels, being used in oil recovery without the benefit of crew training and vessel inspection are exposing their crews to... harmful vapors and the risk of explosion and fire. It is my understanding that the vessel owners and operators are executing contracts whereby they are considered independent contractors. However, prudent vessel operation, marine safety and seamanship would require BP to exercise proper supervision and accept responsibility for the workmanlike procedures which would be expected of the vessel crew members.

Id. at ¶ 14.

Once again, it is incumbent on this Plaintiff and the United Commercial Fisherman’s Association, Inc. to point out to this Court the irreparable consequences of the MVCA. Through this agreement, BP attempts to shift responsibility for key aspects of its own disaster response obligations onto the shoulders of others who cannot and should not have to bear this heavy, but absolutely necessary, burden. Allowing BP to shirk the duty of hazardous material exposure safety oversight for the commercial fishing vessel crews who will play a key role in the clean-up

will itself be another tragedy BP will suffer unto Louisiana and its citizens. It cannot, and should not, be allowed to stand.

Legal Argument

The requirements for injunctive relief are well known and previously brought to this Court's attention by Plaintiff. Plaintiff must show:

- (1) there is substantial likelihood that he will succeed on the merits of his claim;
- (2) without the injunction, he faces an imminent threat of irreparable harm;
- (3) the threatened harm he seeks to avoid through the injunction outweighs any harm that may befall BP if the injunction is granted; and
- (4) granting the injunction will not disserve the public interest.

Paulson Geophysical Servs., Inc. v. Sigmar, 529 F. 3d 303, 309 (5th Cir. 2008). Each of these requirements is met here.

As a general proposition, expecting and requiring the volunteer responders – like Plaintiff and the members of the United Commercial Fisherman's Association, Inc. who he represents –to assume hazardous material safety oversight for their role in the clean-up of BP's oil spill is unconscionable. BP should, but did not, assume this responsibility in the MVCA. Ex. 1, *passim*. Instead BP remained silent. To be very clear, BP fails to (1) alert parties to the MVCA that they, their captains, and/or crews will be exposed to hazardous and flammable chemicals as part of the cleanup services nor (2) informs vessel owners of safety oversight needs for such hazardous and flammable chemical exposure. The silence on this important issue is of grave concern to Plaintiff and the members of the United Commercial Fisherman's Association, Inc. who believe that it is either gross oversight or intentional manipulation by BP.

The complained-of attempt by BP to shift responsibility for hazardous materials safety oversight onto vessel owners under the MVCA under these exigent circumstances is unenforceable. As such, this creates an unconscionable, adhesionary contract under Louisiana law. *See Aguillard v. Auction Management Corp.*, 2004-2804 (La. June 29, 2005), 908 So. 2d 1, 9 (noting that a contract is adhesionary where one party “is in a position stronger than the other’s. The party in the weaker position *is left with no other choice* than to adhere to the terms proposed by the other[.]”) (emphasis added); *LaFleur v. Law Offices of Anthony Buzbee*, 2006-0466 (La. App. 1st Cir. March 23, 2007), 960 So. 2d 105, 112 (observing that adhesionary contracts are “unconscionable” and invalid where of “unduly harsh substance”).

To put a finer point on it:

No section of the Louisiana Civil Code directly addresses, in so many words, the doctrine of unconscionability or the related concept of adhesionary contracts. Nonetheless, Louisiana jurisprudence does recognize that certain contractual terms, especially when contained in dense standard forms that are not negotiated, can be too harsh to justly enforce. The theory of such decisions, often, is that an unconscionable contract or term can be thought of as lacking the free consent that the Code requires of all contracts.

Iberia Credit Bureau, Inc. v. Cellular Wireless, LLC, 379 F.3d 159, 167 (5th Cir. 2004).

Here, Plaintiff and the other Louisiana fishermen like him are clearly in a weaker position with regard to negotiation of their rights in relation to BP. Further, BP is vastly more sophisticated in the area of applicable regulatory schemes such as OSHA and US Coast Guard regulations relating to hazardous materials. In comparison, most commercial fishing vessel owners are probably completely unaware that these specific schemes even exist. Because of the threat to their very livelihood caused by BP’s own actions in causing the catastrophic oil discharge that Plaintiff and other fishermen are responding to, and because of the expedited nature of the training of Plaintiff and the execution of associated documents, there was neither

time nor bargaining position to review the provisions at issue here or to negotiate them. Notably, this Court, acting as an admiralty court, must provide special scrutiny to the contract at issue here, and owes special protection to those fishermen such as Plaintiff, who are to be treated as wards under this Court's special protection. *See Coto v. J. Ray McDermott, S.A.*, 1999-1866 (La. App. 4th Cir. Oct. 25, 2000), 772 So. 2d 828, 830.

Irreparable harm is that which "cannot be remedied merely by monetary or other legal damages." *Tillman v. Miller*, 917 F. Supp. 799, 801 (N.D. Ga. 1995), *aff'd* 133 F. 3d 1402 (11th Cir. 1998). In light of the impact of the Agreement's complete silence on hazardous materials safety oversight responsibility, and absent intervention from this Court, Plaintiff most certainly faces imminent and irreparable harm.

By insisting that Plaintiff execute the Agreement before allowing them to assist in clean-up efforts but without informing them of the hazardous material exposure that they will, more likely than not, encounter and the regulatory regime attendant to worker exposure to such materials, BP puts Plaintiff and the members of the United Commercial Fisherman's Association, Inc. in harm's way while attempting to shift safety oversight responsibility solely onto their shoulders. Plaintiff is subject to immediate and irreparable injury if he either (1) chooses not to sign the Agreement and therefore not to participate in the cleanup activities and loses his livelihood as a result, or (2) chooses to participate in the cleanup activities to attempt to protect the source of his livelihood but as a consequence of signing the Agreement is forced to assume hazardous material safety oversight for exposure to BP's own crude oil. That same untenable choice faces every member of the United Commercial Fisherman's Association, Inc. to whom BP has also demanded execute the MVCA.

As indicated above, it is believed that it is BP's aim to obtain executed copies of the MVCA from all volunteers who assist in BP's mandatory clean-up obligations. Some of those volunteers are likely people represented by counsel or putative members of one of the several filed, but not yet certified, classes in actions against BP. Thus, the Agreement could irreparably impact and/or tortiously interfere with attorney-client relationships and be in violation of rules of the Louisiana State Bar.

In sum, if the Motion is denied, Plaintiff – and others like him – faces immediate and irreparable harm. On the other hand, if a TRO is issued, BP will be no worse off, nor will granting a TRO disserve the public interest. To the contrary granting a TRO will *serve* the public interest in promoting worker safety and expediting the cleanup of the environmental disaster now facing the State of Louisiana, the other Gulf States, and their citizens

CONCLUSION

For all of the foregoing reasons, Plaintiff, individually and on behalf of the United Commercial Fisherman's Association, Inc. as President thereof, urges this Court to grant his Emergency Motion for a Supplemental Temporary Restraining Order.

Respectfully submitted,

/s/ James M. Garner

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