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July 12, 2011

Via Email

The Honorable Anthony J. Carpinello
JAMS
620 Eighth Avenue, 34th Floor
New York, NY 10018

Re: **FORTRESS VERF I LLC and FORTRESS VALUE RECOVERY vs.
JEEPERS, INC.**
JAMS Ref. No.: 1425006537

Dear Judge Carpinello:

Respondent, Counterclaimant and Third-Party Claimant Financial Trust Company, Inc. and Jeepers, Inc. ("FTC") submit this letter in advance of the call with Your Honor on July 13, 2011 to discuss the order of opening statements.

All parties apparently agree that FTC should put on its evidentiary case first; the Fund has abandoned that role. The only dispute is whether FTC's opponents should be able to open first (the Fund) and last (the Zwirn entities)—and presumably close too. Allowing the Fund and Zwirn to bookend FTC in this fashion makes no sense. The Fund provides no explanation for why it should maintain the right to open and close the case after having abandoned its role as plaintiff in every other facet of the litigation.

The Fund is merely a declaratory judgment plaintiff. FTC is the real plaintiff, bearing the burden of proof on the critical issues, and thus realignment of the parties is fully justified. *See, e.g., Saudi Basic Indus. Corp. v. Mobil*, 2003 WL 25849476, at *2 (Del. Sup.) ("Similarly, the Court is not reluctant to realign the order of proof where a party resorts to a preemptive strike via declaratory judgment for the purpose of securing priority as to forum, when realignment makes clear the true posture of the case. Under the circumstances presented, the Court is compelled to

The Honorable Anthony J. Carpinello
July 12, 2011
Page 2

look beyond the pleadings and allocate the burden of proof to the party that must prove the ultimate issue at trial, ExxonMobil.”) (attached as **Exhibit A**).

As a result, FTC respectfully requests that it be permitted to open and close the case, and FTC will present its evidentiary case first.

Sincerely,

A handwritten signature in black ink that reads "Stephen D. Susman". The signature is written in a cursive style with a large, sweeping initial 'S'.

Stephen D. Susman

cc: Brad S. Karp
Allan Arffa
John Siffert
William O'Brien

EXHIBIT A

Not Reported in A.2d, 2003 WL 25849476 (Del.Super.)
(Cite as: 2003 WL 25849476 (Del.Super.))

H

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT
RULES BEFORE CITING.

**This decision was reviewed by West editorial staff
and not assigned editorial enhancements.**

Superior Court of Delaware,
New Castle County,
SAUDI BASIC INDUSTRIES CORPORATION,
Plaintiff,
v.
MOBIL YANBU PETROCHEMICAL COMPANY,
INC. and Exxon Chemical Arabia, Inc., Defendants.

C.A. No. 00C-07-161-JRJ.
Submitted: Dec. 19, 2002.
Decided: Jan. 24, 2003.

*Upon Defendants' Motion to Realign the Order of
Proof for Trial Presentation-GRANTED.*

Donald E. Reid, Esquire, Morris, Nichols, Arsht &
Tunnell, Wilmington, Delaware, Kenneth R. Adamo,
Esquire, Michael W. Vary, Esquire and Leozino
Agozzino, Esquire, Jones, Day, Reavis & Pogue,
Cleveland, Ohio, Jeffrey W. Lorell, Esquire and Marc
C. Singer, Esquire, Saiber, Schlesinger, Satz & Gold-
stein, LLC, Newark, New Jersey and Cheryl L.
Farine, Esquire, Hudak, Shunk & Farine Co., L.P.A.,
Cuyahoga Falls, Ohio, for Plaintiff.

William J. Wade, Esquire, Richards, Layton & Fin-
ger, Wilmington, Delaware, James W. Quinn, Es-
quire and David Lender, Esquire, Weil, Gotshal &
Manges, LLP, New York, New York, K.C. Johnson,
Esquire, Exxon Mobil Corporation, Houston, Texas,
for Defendants.

OPINION

JURDEN, J.

INTRODUCTION/BACKGROUND

*1 The issue before this Court in the instant mo-
tion is whether or not, in view of the facts of this case
and the recognized rules of law and practice, re-
alignment of the order of proof is appropriate.

In simple terms, the main issue in this case is
whether SABIC breached certain agreements with
Mobil Yanbu Petrochemical Company, Inc. and
Exxon Chemical Arabia, Inc. (collectively, "Exxon-
Mobil") by overcharging YANPET and KEMYA
(The "Joint Ventures") for their use of Unipol® tech-
nology.^{FN1} The Court will not recite the facts underly-
ing this dispute; they are amply set forth in the volu-
minous pleadings, and memoranda filed in support of
this motion and the outstanding summary judgment
motions.

^{FN1.} See *Saudi Basic Indus. Corp. v.*
ExxonMobil Corp., 194 F.Supp.2d 378, 385
(D.N.J.2002). As Judge Walls noted:
"SABIC's complaint seeks declaratory relief
... solely on the issue of whether the royalty
charges were proper under the joint venture
agreements." *Id.*

However, the procedural history leading up to
this motion is critical to its determination. On July
24.2000, the plaintiff, Saudi Basic Industries Corp.
("SABIC") filed a declaratory judgment action
against ExxonMobil in this Court. This filing oc-
curred one business day after the conclusion of me-
diation in a related case, pending in the United States
District Court for the District of New Jersey.
ExxonMobil alleges that SABIC wrongfully used
information gleaned during that mediation, or settle-
ment discussions, in violation of the parties express
agreements, to file this suit "in a blatant attempt to
gain a tactical advantage." ^{FN2} In short, ExxonMobil
accuses SABIC of forum shopping in an effort to
"avoid having the trier of fact in New Jersey hear
about ... [SABIC's] improper overcharges..." ^{FN3}

^{FN2.} Def.'s Mem. Law Supp. Mot. Realign
Order Proof Trial Presentation at 3 [herein-
after Def.'s Mem. Law].

^{FN3.} *Id.* at 3, n. 4.

In response to SABIC's declaratory judgment ac-
tion, ExxonMobil filed counterclaims based on the
alleged overcharges by SABIC including, *inter alia*,

Not Reported in A.2d, 2003 WL 25849476 (Del.Super.)
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claims for breach of contract, breach of fiduciary duty, unjust enrichment and promissory estoppel. In the motion presently before this Court, ExxonMobil asks the Court to “realign” the order of proof for trial presentation because ExxonMobil “bears the burden of proof on the ultimate issue for trial, and because realignment in this instance promotes the conservation of judicial resources and lessens jury confusion.”^{FN4}

FN4, Def.'s Mem. Law at 5.

DISCUSSION

The parties agree that the trial judge has discretion in determining whether or not to depart from the usual order of proof at trial.^{FN5} That discretion is broad.^{FN6} According to Delaware Uniform Rule of Evidence 611(a),

FN5, Hr'g Tr. (Dec. 19, 2002) at 115, 119.

FN6, See *Tice v. State*, 624 A.2d 399, 403 (Del.1993); *Brothers v. McKay*, 544 A.2d 265, 265 (Del.1988); *Gaston v. State* 234 A.2d 324, 325 (Del.1967); *Baltimore & O. R., Co. v. Hawke*, 143 A. 27, 31 (Del.1928).

Control by court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, and (2) avoid needless consumption of time.^{FN7}

FN7, DEL. UNIF. R. EVID. 611(a).

ExxonMobil's concerns about conserving judicial resources and lessening jury confusion are well grounded. Having presided over this complicated dispute for over 15 months, and having become very familiar with the salient facts and issues through numerous, hotly contested discovery disputes and extensive motion practice, the Court firmly believes that realignment of the order of proof in this case would (a) result in a far more effective presentation “for the ascertainment of the truth,” (b) “avoid needless consumption of time,”^{FN8} and (c) reduce the potential for juror confusion. ExxonMobil argues that, “although SABIC is technically the plaintiff by virtue of winning its race to the courthouse, SABIC's

Amended Complaint is merely a compilation of defenses.”^{FN9} ExxonMobil correctly points out that:

FN8, See Del. Unif. R. Evid. 611(a).

FN9, Def.'s Mem. Law at 7.

*2 [r]egardless of what the caption reads, SABIC is in the position of traditional defendant, asserting that it acted correctly. ExxonMobil, on the other hand, is in the position of traditional plaintiff, asserting the affirmative position that SABIC caused it harm by improperly overcharging the joint ventures, and that SABIC is liable for damages for its misconduct.^{FN10}

FN10, *Id.*

In reality, SABIC is a “nominal” plaintiff; there is no question that the ultimate issue to be decided by the jury is whether SABIC overcharged the joint ventures. There is also no question that ExxonMobil bears the burden of proof with respect to this ultimate issue.

ExxonMobil further argues that “given the facts surrounding SABIC's filing, allowing it to have the benefits of being the plaintiff without the attendant burdens is grossly unfair.”^{FN11} Clearly, SABIC did win the race to the Courthouse,^{FN12} and, in doing so, selected the forum in which it desired to have the overcharge issue decided. It is also clear, based on SABIC's actions, that it did not want the New Jersey District Court to decide the overcharge issue.^{FN13} Given what transpired prior to the filing of this suit, the Court can only conclude that SABIC engaged in preemptive forum shopping when it decided to file a declaratory judgment action in the Delaware Superior Court rather than litigate this issue as a defendant in the New Jersey District Court. That being the case, the Court notes that:

FN11, Def.'s Mem. Law at 10.

FN12, SABIC filed suit here just ten (10) days before ExxonMobil filed suit in New Jersey District Court on the same overcharge issue.

FN13, SABIC argued to the New Jersey

Not Reported in A.2d, 2003 WL 25849476 (Del.Super.)
(Cite as: 2003 WL 25849476 (Del.Super.))

District Court that it should abstain from deciding the overcharge claims because SABIC filed this action before ExxonMobil filed the overcharge claims there.

... the use of the device of declaratory judgment to anticipate and soften the impact of an imminent suit elsewhere concerning long past dealings between the parties for the purpose of gaining an affirmative judgment in a favorable forum requires a closer look at the deference historically accorded a plaintiff's choice of forum.^{FN14}

FN14. *Products and Chemicals, Inc. v. The Lummus Co.*, 252 A.2d 545, 547 (Del.Ch.1968) rev'd on other grounds, 252 A.2d 543 (Del.1969).

While the Court is historically reluctant to deprive a plaintiff of its choice of forum, it is not reluctant to accord less deference to that choice when there is "jockeying for position" by "resort to declaratory judgment for the purpose of defensively establishing priority as to forum."^{FN15} Similarly, the Court is not reluctant to realign the order of proof where a party resorts to a preemptive strike via declaratory judgment for the purpose of securing priority as to forum, when realignment makes clear the true posture of the case.^{FN16} Under the circumstances presented, the Court is compelled to look beyond the pleadings and allocate the burden of proof to the party that must prove the ultimate issue at trial, ExxonMobil.^{FN17}

FN15. *Id.*

FN16. See *BASF Corp. v. Symington*, 50 F.3d 555, 557 (8th Cir.1995) (realigning the parties to reflect actual controversy where plaintiff (BASF) filed declaratory judgment on statute of limitations, but defendant "claims injury by BASF, and is therefore the natural plaintiff"); *St. Paul Mercury Ins. Co. v. Lexington, Ins. Co.*, 888 F.Supp. 1372, 1376 (S.D.Tex.1995) (realigning parties "to better represent the real claims and interests in the case."). See also *Schwendiman Partners, LLC v. Hurt*, 71 F.Supp.2d 983, 988 n. 4 (D.Neb.1999) ("In determining the propriety of a declaratory judgment action in circumstances like those presented in this case,

the court will realign the parties to reflect the actual controversy underlying the action and determine who is the natural plaintiff.") (citation and quotation omitted).

FN17. See *City of Indianapolis v. Chase Nat'l Bank of the City of New York*, 314 U.S. 63, 69, 62 S.Ct. 15, 86 L.Ed. 47 (1941); *Philips v. Liberty Mutual Ins. Co.*, 235 A.2d 835 (Del.1967); *Bluth v. Bellow*, 1987 WL 9369 (Del.Ch.); *Lutz v. Boas*, 171 A.2d 381, 383 (Del.Ch.1961).

In its opposition to realignment, SABIC argues that changing the "ordinary order of proofs would be [grossly] unfair to SABIC."^{FN18} The Court does not agree. The Court's obligation is to exercise "reasonable control" over the presentation of evidence "so as to ... make the presentation effective for the ascertainment of truth...."^{FN19} Under the circumstances presented, there will be no unfairness to SABIC by realigning the order of proof to place the burden of proving the ultimate issue on the party it belongs, thereby making it easier for the jury to understand the presentation of evidence.

FN18. Pl.'s Br. Opp'n Def.'s Mot. Realign Order Proof Trial Presentation at 10.

FN19. DEL. UNIF. R. EVID. 611(a).

CONCLUSION

*3 In the Court's view, proceeding with the order of proof in this manner will promote efficiency, conserve the parties' and the Court's resources, insure the orderly and clear presentation of the evidence, and reduce juror confusion.

For all these reasons, the Defendants' Motion to Realign the Order of Proof for Trial Presentation is **GRANTED**.

Del.Super.,2003.
Saudi Basic Industries Corp. v. Mobil Yanbu Petrochemical Co.
Not Reported in A.2d, 2003 WL 25849476 (Del.Super.)

END OF DOCUMENT

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